THIRD SUPPLEMENT TO THE GIBRALTAR GAZETTE
No. 3,755 of 11th January, 2010

B. 03/10

BILL

FOR

AN ACT to amend the Financial Services (Insurance Companies) Act in order to transpose into the law of Gibraltar Articles 1, 2 and 4 of Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector.

ENACTED by the Legislature of Gibraltar.

Title and commencement.

1. This Act may be cited as the Financial Services (Insurance Companies) (Amendment) Act 2010 and shall be deemed to have come into operation on 4 January 2010.

Amendment of the Financial Services (Insurance Companies) Act.

2.(1) The Financial Services (Insurance Companies) Act is amended in accordance with the provisions of this section.

(2) The following is inserted after section 2–

"Meaning of "qualifying holding": supplementary provisions.

2A.(1) For the purposes of section 2(16), in the context of subsections (3) and (4) and of the other levels of holding referred to in subsection (4), the voting rights referred to in

Articles 9 and 10 of Directive 2004/109/EC[1], as well as the conditions regarding aggregation thereof laid down in Article 12(4) and (5) of that Directive, shall be taken into account by the Commission.

(2) The Commission shall not take into account voting rights or shares which investment firms or credit institutions may hold as a result of providing the underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis included under point 6 of Section A of Schedule 1 to the Financial Services (Markets in Financial Instruments) Act 2006 provided that those rights are, on the one hand, not exercised or otherwise used to intervene in the management of the issuer and, on the other, disposed of within one year of acquisition.

(3) The Commission shall not grant an undertaking authorisation to take up the business of insurance before it has been informed of the identities of the shareholders or members, direct or indirect, whether natural or legal persons, who have qualifying holdings in that undertaking and of the amounts of those holdings.

(4) The following provisions apply–

(a) any natural or legal person or such persons acting in concert (hereinafter referred to as the proposed acquirer), who have taken a decision either to acquire, directly or indirectly, a qualifying holding in a Gibraltar insurer or to further increase, directly or indirectly, such a qualifying holding in a Gibraltar insurer as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20%, 30% or 50% or so that the Gibraltar insurer would become its subsidiary (hereinafter referred to as the proposed acquisition), shall first notify in writing the Commission of their intention

[1] Directive 2004/19/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (OJ L 390, 31.12.2004, p. 38).

and the Gibraltar insurer in which they are seeking to acquire or increase a qualifying holding, indicating the size of the intended holding and other relevant information, as referred to in section 39C(4). The Commission need not apply the 30% threshold where, in accordance with Article 9(3)(a) of Directive 2004/109/EC, it applies a threshold of one-third;

(b) the Commission shall require any natural or legal person who has taken a decision to dispose, directly or indirectly, of a qualifying holding in a Gibraltar insurer first to notify in writing the Commission, indicating the size of his intended holding. Such a person shall likewise notify the Commission if he has taken a decision to reduce his qualifying holding so that the proportion of the voting rights or of the capital held would fall below 20%, 30% or 50% or so that the Gibraltar insurer would cease to be his subsidiary. The Commission need not apply the 30% threshold where, in accordance with Article 9(3)(a) of Directive 2004/109/EC, it applies a threshold of one-third;

(c) on becoming aware of them, insurance undertakings shall inform the Commission–

(i) of any acquisitions or disposals of holdings in their capital that cause holdings to exceed or fall below any of the thresholds referred to in paragraphs (a) and (b);

(ii) at least once a year, of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings as shown, for example, by the information received at annual general meetings of shareholders or members or as a result of compliance with the regulations relating to companies listed on stock exchanges;

(d) where the influence exercised by the persons referred to in paragraph (a) is likely to operate against the

prudent and sound management of an insurance undertaking, the Commission shall take appropriate measures to put an end to that situation. Such measures may consist, for example, in injunctions, sanctions against directors and managers, or suspension of the exercise of the voting rights attaching to the shares held by the shareholders or members in question;

(e) paragraph (d) shall apply to natural or legal persons failing to comply with the obligation to provide prior information imposed in paragraph (a). If a holding is acquired despite the opposition of the Commission, the Commission shall, regardless of any other sanctions to be adopted, seek an order from a judge of the Supreme Court either for the exercise of the corresponding voting rights to be suspended, or for the nullity of votes cast or for the possibility of their annulment;

(f) the Commission shall refuse authorisation if, taking into account the need to ensure the sound and prudent management of an insurance undertaking, it is not satisfied as to the qualifications of the shareholders or members.".

(3) The following section is inserted prior to section 40–

"Application of section 40 to 46.

39A. Sections 40 to 46 apply subject to the provisions of section 2A(4) (a) and (b) and sections 39A to 39D.".

(4) The following is inserted after section 39A–

"Commission Assessment Periods.

39B.(1) The Commission–

(a) shall, promptly and in any event within two working days following receipt of the

notification required under section 2A(4)(a) as well as following the possible subsequent receipt of the information referred to in subsection (2) below, acknowledge receipt thereof in writing to the proposed acquirer;

(b) shall have a maximum of 60 working days as from the date of the written acknowledgement of receipt of the notification and all documents required by the Commission to be attached to the notification on the basis of the list referred to in section 39C(4) (hereinafter referred to as the assessment period), to carry out the assessment provided for in section 39C(1) (hereinafter referred to as the assessment);

(c) shall inform the proposed acquirer of the date of the expiry of the assessment period at the time of acknowledging receipt.

(2) The following provisions apply–

(a) the Commission may, during the assessment period, if necessary, and no later than on the 50th working day of the assessment period, request any further information that is necessary to complete the assessment. Such request shall be made in writing and shall specify the additional information needed;

(b) for the period between the date of request for information by the Commission and the receipt of a response thereto by the proposed acquirer, the assessment period shall be interrupted. The interruption shall not exceed 20 working days. Any further requests by the Commission for completion or clarification of the information shall be at its discretion but may not result in an interruption of the assessment period.

(3) The Commission may extend the interruption referred to in subsection (2) up to 30 working days if the proposed acquirer is–

(a) situated or regulated outside the EEA; or

(b) a natural or legal person not subject to prudential supervision.

(4) Where the Commission, upon completion of the assessment, decides to oppose the proposed acquisition, it shall, within two working days, and not exceeding the assessment period, serve on the proposed acquirer a written notice of objection which shall include the reasons for that decision. Subject to the laws of Gibraltar, an appropriate statement of the reasons for the decision may be made accessible to the public at the request of the proposed acquirer. This shall not prevent the Minister from allowing the Commission to make such disclosure in the absence of a request by the proposed acquirer.

(5) Where the Commission does not oppose the proposed acquisition within the assessment period in writing, it shall be deemed to be approved.

(6) The Commission may fix a maximum period for concluding the proposed acquisition and extend it where appropriate.

Appraisals of applications.

39C.(1) In assessing the notification provided for in section 2A(4)(a) and the information referred to in section 39B(2), the Commission shall, in order to ensure the sound and prudent management of the Gibraltar insurer in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on the Gibraltar insurer, appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition against all of the following criteria–

(a) the reputation of the proposed acquirer;

(b) the reputation and experience of any person who will direct the business of the Gibraltar insurer as a result of the proposed acquisition;

(c) the financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the Gibraltar insurer in which the acquisition is proposed;

(d) whether the Gibraltar insurer will be able to comply and continue to comply with the prudential requirements based on this Act and, where applicable, other financial services legislation, in particular, whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the competent authorities and determine the allocation of responsibilities among the competent authorities;

(e) whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

(2) The Commission may oppose the proposed acquisition only if there are reasonable grounds for doing so on the basis of the criteria set out in subsection (1) or if the information provided by the proposed acquirer is incomplete.

(3) The Commision shall neither impose any prior conditions in respect of the level of holding that must be acquired nor examine the proposed acquisition in terms of the economic needs of the market.

(4) The Commission shall make publicly available a list specifying the information that is necessary to carry out the assessment and that must be provided to the Commission at the time of notification referred to in section 2A(4)(a). The information required shall be proportionate and adapted to the nature of the proposed acquirer and the proposed acquisition. The Commission shall not require information that is not relevant for a prudential assessment.

(5) Where two or more proposals to acquire or increase qualifying holdings in the same insurance undertaking have been notified to the Commission, the latter shall treat the proposed acquirers in a non-discriminatory manner.

Consultation.

39D. (1) The Commission shall work in full consultation with any appropriate home State regulator when carrying out the assessment if the proposed acquirer is one of the following–

(a) a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm or management company within the meaning of the Financial Services (Collective Investment Schemes) Act 2005 (hereinafter referred to as the "UCITS management company") authorised in a Member State or in a sector other than that in which the acquisition is proposed;

(b) the parent undertaking of a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm or UCITS management company authorised in a Member State or in a sector other than that in which the acquisition is proposed; or

(c) a natural or legal person controlling a credit institution, assurance undertaking, insurance

undertaking, reinsurance undertaking, investment firm or UCITS management company authorised in a Member State or in a sector other than that in which the acquisition is proposed.

(2) The Commission shall, without undue delay, provide any appropriate home State regulator with any information which is essential or relevant for the assessment. In this regard, the Commission shall communicate to any appropriate home State regulator upon request all relevant information and shall communicate on its own initiative all essential information. A decision by the Commission assessing the notification shall indicate any views or reservations expressed by the home State regulator of the proposed acquirer.".

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EXPLANATORY MEMORANDUM

This Bill amends the Financial Services (Insurance Companies) Act in order to transpose Articles 1, 2 and 4 of Directive 2007/44/EC.

The current system of prudential supervision in the EU is based on the principle of responsibility for the competent authorities of the home Member States. There is also an underlying requirement for the competent authorities of home and host Member States to collaborate closely in order to supervise the activities of institutions operating in Member States other than that in which their head offices are located.

In cases of acquisition, the existing legal framework has been designed to regulate cases where an acquirer wishes either to acquire a holding or increase a holding in a financial institution or investment firm. The competent national authorities - in our case the Financial Services Commission- are able to oppose an acquisition if, in view of the need to ensure sound and prudent management of the institutions, the authority is not satisfied as to the suitability of the acquirer. The current legal framework though does not provide specific criteria for assessing the suitability of the acquirer and has thus afforded considerable latitude to the relevant authorities in accepting, discouraging or rejecting a proposed acquisition. Furthermore, the current legislation does not set out in detail the procedure by which acquisitions are assessed.

To address these concerns, this Bill, in accordance with the requirements set out in Directive 2007/44/EC, modifies the existing regulatory framework with regard to the procedure as well as the criteria to be examined by the competent authorities when assessing the suitability of a proposed acquirer. The new approach curtails, significantly, authorities' discretion to make a prudential assessment. In addition deadlines have been reduced and any "stopping of the clock" by the authorities is limited to one occasion and subject to clear conditions, and are expected to apply a set of prudential criteria for supervisory assessments. For example: the reputation of the proposed acquirer; the reputation and experience of any person that may run the resulting institution or company; the financial soundness of the proposed acquirer; on-going compliance with relevant Directives; and the level of risk as regards money laundering and terrorist financing.

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