

Subsidiary Legislation made under ss.6(1), 33(2), 63(3), 64(3), 83(1), 150(1), 620(1), 621(1) and 627 of, and paragraph 6 of Schedule 10.

Financial Services (Financial Markets and Insolvency: Settlement Finality) Regulations 2020

LN.2020/034

Commencement **15.1.2020**

Amending enactments	Relevant current provisions	Commencement date
LN.2020/425	r. 2(1)	28.12.2020
2021/106	rr. 2(1)-(2), (4)-(5), 3(4)-(5), 4(1)(a), 5, 6(1)-(2), 9(1), (5), 11(1), (4), 12(3)(a)-(b), 13, 16, 17A	1.1.2021
2022/067	rr. 2(1), (4)(b), 17(2), 17A(b)	17.3.2022

2019-26

Financial Services

2020/034

**Financial Services (Financial Markets and Insolvency:
Settlement Finality) Regulations 2020**

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In exercise of the powers conferred upon the Minister under section 6(1), 33(2), 63(3), 64(3), 83(1), 150(1), 620(1), 621(1) and 627 of, and paragraph 6 of Schedule 10 to, the Financial Services Act 2019, as read with section 23(g)(i) of the Interpretation and General Clauses Act, and on the Government by section 23(g)(ii) of that Act and by all other enabling powers, the Minister and the Government have made the following Regulations.

Title and commencement.

1.(1) These Regulations may be cited as the Financial Services (Financial Markets and Insolvency: Settlement Finality) Regulations 2020.

(2) These Regulations come into operation on the day of publication.

Interpretation.

2.(1) In these Regulations and unless the context otherwise requires—

“business day” for a designated system has the meaning given to it in the rules of that system and, for the avoidance of doubt, covers both day and night-time settlements in that system and includes all events happening during a business cycle of that system;

“central bank” means—

- (a) a national central bank (if such a bank is established in Gibraltar) or other monetary authority (if any) in Gibraltar;
- (b) the Bank of England; or
- (c) any central bank (or other monetary authority) of a country or territory outside Gibraltar that is—
 - (aa) a central bank (or other monetary authority) of an EEA state (including the European Central Bank); or
 - (bb) a member of the Bank for International Settlements (including the Bank for International Settlements),

as may be designated by the Minister by notice in the Gazette;

“central counterparty” or “CCP” means a CCP as defined in Article 2(1) of EMIR;

“clearing house” means a body responsible for the calculation of the net positions of institutions, a possible central counterparty and/or a possible settlement agent;

“collateral security” means a realisable asset of any kind including, without limitation, cash or financial instruments provided under a pledge, a repurchase or similar agreement, or otherwise, for the purpose of securing rights and obligations that may arise in connection with a designated system, or provided to a central bank, and includes money provided under a pledge for that purpose;

“commencement of proceedings” has the meaning given by regulation 3;

“competent authority” means the Gibraltar Financial Services Commission;

“Court” means the Supreme Court;

“credit institution” means a credit institution with Part 7 permission to carry on the regulated activity of accepting deposits in paragraph 3 of Schedule 2 to the Act;

“designated system” means a system designated under regulation 5, but does not include an arrangement entered into between interoperable systems;

“indirect participant” means an institution, a central counterparty, a settlement agent, a clearing house or a system operator with a contractual relationship with a participant in a designated system which executes transfer orders that enable the indirect participant to pass transfer orders through the designated system, provided that the indirect participant is known to the system operator;

“insolvency proceedings”–

- (a) if under the law of Gibraltar and in relation to a body corporate, means–
 - (i) proceedings for the appointment of an examiner in respect of the body; or
 - (ii) proceedings for the compulsory winding up of the body; or
 - (iii) a voluntary winding up (either creditors’ or members’) of the body; or
 - (iv) proceedings for the appointment of an administrator in respect of the body;
or
- (b) if under the law of Gibraltar and in relation to a natural person, means–

- (i) proceedings under which the person is or may be adjudicated bankrupt; or
 - (ii) if the person has died insolvent, proceedings for the administration in bankruptcy of the person's estate; or
 - (iii) proceedings with the objective of the protection by a court of the person and the person's property from any action or other process; or
- (c) if under the law of a third country, means any collective measure provided for in the law of that third country to wind up or reorganise a person if the measure involves suspending or imposing limitations on relevant transfers or payments;

“institution” means—

- (a) a credit institution;
- (b) an investment firm as defined in Article 2.1A of the MiFIR;
- (c) a public authority or publicly guaranteed undertaking; or
- (d) any undertaking whose head office, registered office or place of residence is outside Gibraltar and whose functions correspond to those of a credit institution or investment firm as referred to in paragraphs (a) and (b) respectively above,

which participates in a system and which is responsible for discharging the financial obligations arising from transfer orders which are effected through the system;

“interoperable systems” means two or more systems whose system operators have entered into an arrangement with one another that involves cross-system execution of transfer orders;

“netting” means the conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders which a participant or participants either issue to or receive from, one or more other participants with the result that only a net claim can be demanded or a net obligation be owed;

“participant” means an institution, a central counterparty, a settlement agent, a clearing house, a system operator or a clearing member of a CCP authorised under Article 17 of EMIR;

“settlement agent”, means a person who provides to institutions and/or to a central counterparty participating in a designated system settlement accounts through which

transfer orders within such a system are settled (whether or not the person extends credit to those participants for settlement purposes);

“settlement account” means an account at a central bank, a settlement agent or a central counterparty used to hold funds or financial instruments and to settle transactions between participants in a designated system;

“system” means a formal arrangement—

- (a) between two or more participants, without counting a settlement agent, a central counterparty, a clearing house or an indirect participant, with common rules and standardised arrangements for the clearing, whether or not through a central counterparty, or execution of transfer orders between the participants; and
- (b) governed by the law of a country or territory chosen by the participants; the participants may, however, only choose the law of a country or territory in which at least one of them has its head office;

“system operator” means the entity or entities legally responsible for the operation of a system;

“third country” means a country or territory other than Gibraltar;

“transfer order” means—

- (a) an instruction by a participant to place an amount of money at the disposal of a recipient by means of a book entry on the accounts of a credit institution, a central bank, a central counterparty or a settlement agent;
- (b) an instruction that results in the assumption or discharge of a payment obligation as defined by the rules of a designated system; or
- (c) an instruction by a participant to transfer the title to, or an interest in, a financial instrument or financial instruments by means of a book entry on a register or by any other means.

(2) *Omitted.*

(3) In these Regulations—

- (a) a reference to the compulsory winding up of a body includes the appointment by the Court of a liquidator under section 160 of the Insolvency Act 2011; and

- (b) a reference to a creditors' voluntary winding up of a body includes the appointment of a liquidator by the members of a company under section 146 of the Insolvency Act 2011.
- (4) For the purposes of these Regulations—
 - (a) a reference to a system being designated in the United Kingdom means designated under the law of the United Kingdom corresponding to these Regulations;
 - (b) a participant is regarded as established in Gibraltar if its head office, registered office or place of residence is in Gibraltar or if it has a branch in Gibraltar.
- (5) For the purposes of paragraph (c) of the definition of “central bank”, the GFSC must publish on its website a list of central banks.

References to commencement of insolvency proceedings.

3.(1) For the purposes of these Regulations references to the commencement of insolvency proceedings shall be construed in accordance with this regulation.

(2) Commencement of insolvency proceedings under the law of Gibraltar in relation to a body corporate means—

- (a) the making by the Court of an order for the appointment of an examiner in respect of the body; or
- (b) the making by the Court of an order for the winding up of the body; or
- (c) the passing by the members of the body of a resolution for the voluntary winding up (whether creditors' or members') of the body.

(3) Commencement of insolvency proceedings under the law of Gibraltar in relation to a natural person means—

- (a) the making of an order of the Court adjudicating the person bankrupt; or
- (b) if the person dies insolvent, the making by the Court of an order for the administration in bankruptcy of the person's estate; or
- (c) the making by the Court of an order providing for the protection of the person and the person's property under an arrangement controlled by the Court.

(4) Commencement of insolvency proceedings, namely whether under the law of Gibraltar or a third country and whether in relation to a body corporate or a natural person, means the opening of insolvency proceedings against the body or person.

Application.

4.(1) These Regulations apply to—

- (a) a designated system, regardless of the currency or currencies in which such a system operates;
- (b) a participant in a system referred to in paragraph (a); and
- (c) collateral security provided in connection with participation in such a system, or operations of a central bank in the context of its function as a central bank.

(2) Nothing in these Regulations prevents a participant from acting as, or carrying out the functions of, a central counterparty, a settlement agent or a clearing house.

(3) Nothing in these Regulations prevents a system operator from acting as a settlement agent, central counterparty or clearing house.

Designation of designated systems.

5. The GFSC may designate a system as a designated system if it is satisfied that the rules of the system comply with regulation 8.

The GFSC may decide that a person should be treated as participant in designated system.

6.(1) An indirect participant must be treated by the GFSC to be a participant in a designated system only if so doing is justified on the grounds of systemic risk.

(2) Where an indirect participant is treated by the GFSC to be a participant in a designated system pursuant to sub-regulation (1), this must not limit the responsibility of the participant through which the indirect participant passes transfer orders to the designated system.

(3) According to the rules of a system, a participant may act as central counterparty, settlement agent, clearing house or carry out part or all of these tasks.

Transfer order and netting to be binding despite insolvency proceedings.

7.(1) A transfer order that has entered a designated system is legally enforceable and binding on participants and third parties even if insolvency proceedings against a participant are commenced provided that the transfer order entered the system before the commencement of the proceedings.

(2) Netting is legally enforceable and binding on participants and third parties even if insolvency proceedings against a participant are commenced provided that the transfer order to which the netting relates entered the system before the commencement of the proceedings.

(3) Sub-regulations (1) and (2) have effect even in the case of insolvency proceedings against a participant in an interoperable system or against the system operator of an interoperable system which is not a participant.

(4) If–

- (a) a transfer order entered a designated system after the commencement of insolvency proceedings against a participant in the system; and
- (b) the order is executed on the business day on which those insolvency proceedings commenced,

the order is legally enforceable and binding on third parties only if the system operator can prove that, at the time that the transfer order became irrevocable, it did not know, and had no reason to know, that those proceedings had commenced.

(5) No law, regulation, rule or practice on the setting aside of contracts and transactions entered into before the commencement of insolvency proceedings against a participant in a designated system has the effect of unwinding a netting.

Requirements for rules of designated systems and interoperable systems.

8.(1) The rules of a designated system must–

- (a) specify the moment at which a transfer order is to be considered to have been entered into the system;
- (b) specify the moment after which a transfer order may not be revoked by a participant or any third party; and
- (c) prohibit the revocation by a participant or any third party of a transfer order from the moment specified in accordance with sub-regulation (1)(b).

(2) In the case of interoperable systems, the rules of each system must specify the moment of entry into that system in such a way as to ensure, as far as possible, that the rules of all the interoperable systems are coordinated in this regard. Unless expressly provided for by the rules of all the interoperable systems concerned, each system's rules on the moment of entry are not affected by the rules of any other system with which it is interoperable.

(3) In the case of interoperable systems, the rules of each system must specify the moment of irrevocability from that system in such a way as to ensure, so far as possible, that the rules of all the interoperable systems are coordinated in this regard. Unless expressly provided for by the rules of all the interoperable systems concerned, each system's rules on the moment of irrevocability must not be affected by the rules of any other system with which it is interoperable.

Certain matters to be notified to the GFSC.

9.(1) *Omitted.*

(2) Where a participant in a designated system is a body corporate, the Court must notify the GFSC immediately after making an order for—

- (a) the appointment of any liquidator or administrator in respect of the participant; or
- (b) the compulsory winding-up of the participant.

(3) Where a participant in a designated system is not a body corporate, the Court must notify the GFSC immediately after making an order—

- (a) adjudicating the participant bankrupt;
- (b) if the participant has died insolvent, for the administration in bankruptcy of the participant's estate; or
- (c) for an arrangement under the control of the Court that involves the protection, by court order, of the participant's person and property from any action or other process.

(4) Where a participant in a designated system is a body corporate, if the participant becomes subject to a creditors' or members' voluntary winding-up, the participant must notify the GFSC immediately after the members have passed a resolution for that winding up.

Gibraltar law relating to insolvency or insolvency proceedings not to affect certain rights and obligations.

10.(1) Insolvency proceedings must not have retroactive effect on the rights and obligations of a participant arising from, or in connection with, its participation in a system before the commencement of such proceedings.

(2) Sub-regulation (1) also applies as regards the rights and obligations of a participant in an interoperable system, or of a system operator of an interoperable system which is not a participant.

Certain questions to be determined in accordance with foreign law.

11.(1) Subject to regulation 10, if insolvency proceedings are commenced against a participant, or a person who has been a participant, in a system designated for the purposes of these Regulations or designated in the United Kingdom, any question that—

- (a) relates to the rights and obligations arising from, or in connection with, that participation; and
- (b) falls to be determined by a court in Gibraltar,

is to be decided in accordance with the law governing that system.

(2) If an equivalent overseas order is subject to the insolvency law of Gibraltar, these Regulations apply to and in relation to that order in the same way as they apply to and in relation to a transfer order.

(3) If an equivalent overseas security is subject to the insolvency law of Gibraltar, these Regulations apply to and in relation to that security in the same way as they apply to and in relation to a collateral security connected with a designated system.

(4) In this regulation—

“equivalent overseas order” means an order having the like effect as a transfer order which is effected through a system designated in the United Kingdom and which is governed by the law of the United Kingdom; and

“equivalent overseas security” means any realisable assets provided under a charge or a repurchase or similar agreement, or otherwise (including credit claims and money provided under a charge) for the purpose of securing rights and obligations potentially arising in connection with such a system.

Insolvency proceedings not to affect certain rights.

12.(1) Notwithstanding the provisions of any other enactment, the rights of—

- (a) a system operator or a participant to collateral security provided to them in connection with a system or any interoperable system; and
- (b) a central bank to collateral security provided to it,

to realise those rights are not affected by insolvency proceedings against—

- (i) the participant (whether in the system concerned or in an interoperable system);
- (ii) the system operator of an interoperable system which is not a participant;
- (iii) the counterparty to a central bank; or
- (iv) any third party which provided the collateral security.

(2) Collateral security referred to in sub-regulation (1) may be realised for the satisfaction of rights referred to in that sub-regulation.

(3) If—

- (a) financial instruments are provided as collateral security to any one or more of a participant, or a system operator, in each case in a system designated for the purposes of these Regulations or designated in the United Kingdom, or a central bank (including any nominee, agent or third party acting on behalf of the participant, the system operator or the central bank), and
- (b) the right of the participant, system operator or central bank with respect to the financial instruments is legally recorded in a register, account or centralised deposit system located,

the rights of that person as a holder of collateral security in relation to those financial instruments are governed by the domestic law of the country or territory or, where appropriate, the law of the part of the country or territory, where the register, account, or centralised deposit system is maintained.

(4) Without prejudice to the generality of sub-regulations (1) and (3) and for the avoidance of doubt, a claim of a participant, system operator or a central bank to collateral security

referred to in this regulation has, and must be taken always to have had, priority over any claim of any other person to that collateral security including, without limitation, in an insolvency proceeding, unless, in respect of any such claim of another person, the terms on which the collateral security was provided expressly provide that that claim is to have priority to the claim of the participant, system operator or the central bank, as the case may be.

(5) In this regulation—

“central bank” includes a nominee, agent or third party acting on behalf of a central bank;

“participant” includes a nominee, agent or third party acting on behalf of a participant;

“system operator” includes a nominee, agent or third party acting on behalf of a system operator.

Provision of information by designated systems.

13.(1) The system operator of a designated system governed by the law of Gibraltar must, when that system is designated as a designated system, provide to the GFSC in writing a list of the participants (including any possible or actual indirect participants) in the designated system and shall give written notice to the GFSC of any amendment to the list immediately.

(2) The system operator of a designated system governed by the law of a third country must, when that system is designated as a designated system—

(a) provide to the GFSC in writing a list of any participants in the designated system that are established in Gibraltar (including any indirect participants that are established in Gibraltar); and

(b) give written notice to the GFSC of any amendment to that list immediately.

(3) The GFSC may, in writing, require the system operator of a designated system to furnish to it such further information relating to that designated system as it reasonably requires for the exercise of its functions under these Regulations, within such time, in such form, at such intervals and verified in such manner as the GFSC may specify.

(4) When the system operator of a designated system amends, revokes or adds to its rules or its guidance, it shall within 14 days, give written notice to the GFSC of the amendment, revocation or addition.

(5) The system operator of a designated system governed by the law of Gibraltar shall give the GFSC at least three months' written notice of any proposal to amend, revoke or add to its default arrangements.

(6) The GFSC may, if it considers it appropriate, agree a shorter period of notice in connection with sub-regulation (5).

(7) When the system operator of a designated system governed by the law of a third country amends, revokes or adds to its default arrangements, it must within 7 days give written notice to the GFSC of the amendment, revocation or addition.

(8) Nothing in this regulation shall require the system operator of a designated system governed by the law of Gibraltar to give any notice or furnish any information to the GFSC where the notice or information has already been given or furnished to the GFSC pursuant to any requirement imposed by or under any other enactment.

(9) In addition to the requirement to notify set out in sub-regulation (1), the GFSC may impose supervision or authorisation requirements on designated systems governed by the law of Gibraltar.

Institutions to provide information to certain persons about designated systems.

14. An institution must, on being requested to do so by a person who claims to have a legitimate interest in the designated systems in which the institution is a participant, provide the person with information about the main rules governing the functioning of that system.

Commencement of insolvency proceedings against participant not to prevent certain funds, etc., from being used to fulfil obligations.

15.(1) The commencement of insolvency proceedings against a participant or a system operator of an interoperable system must not prevent funds or financial instruments available on the settlement account of that participant from being used to fulfil that participant's obligations in the system or in an interoperable system on the business day of the opening of the insolvency proceedings.

(2) In the case referred to in sub-regulation (1), the participant's credit facility connected to the system may be used against available, existing collateral security to fulfil the participant's obligations in the system or in an interoperable system.

16. *Omitted.*

Maximum amounts of administrative penalty.

17.(1) Any administrative penalty imposed under section 152 of the Financial Services Act 2019 for a contravention of a regulatory requirement by a person to whom these Regulations apply must be of an amount which does not exceed the higher of the following—

- (a) where the amount of the benefit derived as a result of the contravention can be determined, two times the amount of that benefit;
- (b) in the case of a legal person—
 - (i) £250,000; or
 - (ii) 5% of the total annual turnover according to the last available annual accounts approved by its management body;
- (c) in the case of an individual, £125,000.

(2) Where a legal person is a parent undertaking or a subsidiary of a parent undertaking which has to prepare consolidated financial accounts in accordance with Part 7 of the Companies Act 2014, the relevant total turnover for the purpose of sub-regulation (1)(b) is the total annual turnover, or the corresponding type of income in accordance with the relevant accounting legislative acts, according to the last available consolidated annual accounts approved by the management body of the ultimate parent undertaking.

Applicable law for orders made and collateral provided before IP completion day.

17A. After IP completion day the provisions of these Regulations as they were in force immediately before IP completion day continue to apply to—

- (a) transfer orders entered into a designated system and collateral security provided, prior to IP completion day;
- (b) equivalent overseas orders entered, prior to IP completion day, into a system designated for the purposes of the Directive 98/26/EC (as it had effect immediately before IP completion day) in an EEA state or designated in the United Kingdom; and
- (c) equivalent overseas security provided prior to IP completion day.

Revocation of 2011 Regulations.

18. The Financial Markets and Insolvency (Settlement Finality) Regulations 2011 are revoked.

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