

SECOND SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 0000 of 00 XXX, 20XX

LEGAL NOTICE NO. OF 2019.

[These Draft Regulations may be subject to change before made by the Minister.]

EUROPEAN UNION (WITHDRAWAL) ACT 2019

FINANCIAL SERVICES (PASSPORT RIGHTS AND TRANSITIONAL PROVISIONS) (EU EXIT) REGULATIONS 2019

In exercise of the powers conferred on the Minister by sections 11 and 15 of and Schedule 3 to, the European Union (Withdrawal) Act 2019, the Minister has made these Regulations-

Title.

1. These Regulations may be cited as the Financial Services (Passport Rights and Transitional Provisions) (EU Exit) Regulations 2019.

Commencement.

2. These Regulations come into operation on exit day.

Interpretation.

3. In these regulations-

“appropriate UK regulator” means the Financial Conduct Authority or the Prudential Regulation Authority, as the case may be;

“authorisation” means authorisation, a licence, registration or other permission to conduct a regulated activity granted under a relevant enactment and “authorised” is to be construed accordingly;

“EEA firm” means a firm which is established in an EEA state (its “home state”) and is authorised by its home state regulator to conduct a regulated activity in that state;

“the FSC” means the Financial Services Commission established under section 3(1) of the Financial Services Commission Act 2007;

“Gibraltar firm” means a firm which is established in Gibraltar and is authorised by the FSC under a relevant enactment to conduct a regulated activity in Gibraltar;

“home state regulator” means the competent authority (within the meaning of the applicable Single Market Directive) of an EEA firm’s home state;

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

“passport right” means the right to establish a branch or provide services in another jurisdiction derived under a Single Market Directive and, in the case of a Gibraltar firm or UK firm, includes–

- (a) a deemed passport right under article 2 or 4 of the Financial Services and Markets Act 2000 (Gibraltar) Order 2001 of the United Kingdom; or
- (b) a market access right under–
 - (i) paragraph 1 or 2 of Schedule 5 to the Electronic Money Regulations 2011 of the United Kingdom; or
 - (ii) paragraph 1 or 2 of Schedule 7 to the Payment Services Regulations 2017 of the United Kingdom;

“regulated activity” means an activity which–

- (a) in Gibraltar, is regulated by or under a relevant enactment; and
- (b) in another jurisdiction, is regulated under the law of that jurisdiction which gives effect to a Single Market Directive;

“relevant enactment” means an enactment which gives effect in Gibraltar to a Single Market Directive;

“Single Market Directive” means each of the following Directives, as amended from time to time before exit day–

- (a) Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS);
- (b) Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC;
- (c) Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II);
- (d) Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010;

- (e) Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC;
- (f) Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010;
- (g) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU;
- (h) Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC; and
- (i) Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution, and

“UK firm” means a firm which is established in the United Kingdom and is authorised by the appropriate UK regulator to carry on a regulated activity in the United Kingdom.

Passport rights.

4.(1) Subject to sub-regulation (2), the provisions of a relevant enactment which give effect to passport rights under a Single Market Directive cease to apply on and after exit day.

(2) On and after exit day, a Gibraltar firm or UK firm is to be treated as having an entitlement, corresponding to the passport rights deriving from a Single Market Directive that such a firm would have had before exit day, to establish a branch or provide services in the United Kingdom or Gibraltar (as the case may be).

(3) For the purposes of sub-regulations (1) and (2), a relevant enactment is to be read on or after exit day with any necessary modifications and, in particular—

- (a) any reference to the exercise of passport rights between Gibraltar and an EEA state is to be construed as a reference to the exercise of those rights between Gibraltar and the United Kingdom;
- (b) any reference to the FSC cooperating, exchanging information or otherwise engaging with a competent authority in an EEA state is to be construed as a reference to cooperating, exchanging information or otherwise engaging with the appropriate UK regulator;

- (c) any reference (however expressed) to home state, home member state or home EEA state is to be construed as a reference to—
 - (i) in the case of a Gibraltar firm, Gibraltar; and
 - (ii) in the case of a UK firm, the United Kingdom; and
- (d) any reference (however expressed) to host state, host member state or host EEA state is to be construed as a reference to—
 - (i) in the case of a Gibraltar firm, the United Kingdom; and
 - (ii) in the case of a UK firm, Gibraltar;
- (e) any reference to—
 - (i) the competent authority in Gibraltar (whether expressed as a reference to the FSC, the Commission, the Authority or otherwise) is to be construed as a reference to the FSC; and
 - (i) the competent authority in a member state or EEA state is to be construed as a reference to the appropriate UK regulator; and
- (f) any reference to a third country is to be construed to include an EEA state.

Transitional arrangements for EEA firms

Temporary permission.

5.(1) An EEA firm which, before exit day—

- (a) was carrying on a regulated activity in Gibraltar by virtue of a passport right; and
- (b) notifies the FSC that the firm—
 - (i) wishes to continue to carry on the regulated activity in Gibraltar after that date, and
 - (ii) intends to apply for authorisation to carry on the regulated activity,

is permitted to carry on the regulated activity in Gibraltar on a temporary basis on and after exit day.

(2) A notice under sub-regulation (1)(b) must be—

- (a) given in the form and manner that the FSC may direct; and
- (b) accompanied by any information that the FSC may reasonably require.

(3) Where the FSC gives notice to an EEA firm with a temporary permission under sub-regulation (1), requiring the firm to submit an application for authorisation by a date specified in the notice and the firm—

- (a) submits a completed application by that date, the EEA firm's temporary permission has effect until the FSC has determined the application; or
- (b) fails to submit a completed application by that date—
 - (i) the firm is to be regarded as having given notice that it no longer proposes to carry on the regulated activity in Gibraltar; and
 - (ii) regulation 6(3) applies to the firm's temporary permission from the date specified in the notice as if the firm had given notice under regulation 6(1) on that date.

(4) A temporary permission under sub-regulation (1) does not authorise an EEA firm to carry on a regulated activity in the United Kingdom.

Temporary permission for persons ceasing activities

6.(1) This regulation applies to an EEA firm which, before exit day—

- (a) was carrying on a regulated activity in Gibraltar by virtue of a passport right; and
- (b) notifies the FSC that, with effect from exit day, the firm does not propose to carry on any new business in Gibraltar in respect of the regulated activity.

(2) A notice under sub-regulation (1)(b) must be—

- (a) given in the form and manner that the FSC may direct; and
- (b) accompanied by any information that the FSC may reasonably require.

(3) An EEA firm to which sub-regulation (1) applies is permitted to carry on the regulated activity in Gibraltar on a temporary basis on and after exit day, but that temporary permission—

- (a) only permits the firm to carry on the regulated activity for purposes related to the orderly cessation of its business in Gibraltar in respect of the regulated activity;
- (b) does not permit the firm to conduct any new business in Gibraltar in respect of the regulated activity; and
- (c) ceases to have effect at the end of the period of six months beginning on exit day.

(4) A temporary permission under this regulation does not authorise an EEA firm to carry on a regulated activity in the United Kingdom.

EEA firms which fail to give notice.

7.(1) An EEA firm which—

- (a) before exit day was carrying on a regulated activity in Gibraltar by virtue of a passport right; and
- (b) by exit day has not given the FSC notice under regulation 5(1)(b) or 6(1)(b),

must cease carrying on that regulated activity in Gibraltar on and after exit day.

(2) The FSC may, in its discretion, accept a notice under regulation 5(1)(b) or 6(1)(b) which is given by an EEA firm not more than three months after exit day and sub-regulation (1) does not apply in any case where the FSC exercises that discretion.

Transitional arrangement for pre-existing contracts

Restricted temporary permission: pre-existing contractual obligations.

8.(1) This regulation applies to an EEA firm which—

- (a) before exit day was carrying on a regulated activity in Gibraltar by virtue of a passport right;
- (b) on or after exit day, is not authorised to carry on the regulated activity in Gibraltar; and
- (c) is a party to a contract entered into before exit day (a “pre-existing contract”) and, on or after exit day—
 - (i) it is necessary for the EEA firm to carry on the regulated activity in Gibraltar in order to perform its obligations under the pre-existing contract; and
 - (ii) the firm continues to be authorised by its home state regulator to carry on the same regulated activity under the law of the firm’s home state.

(2) An EEA firm which meets the conditions in sub-regulation (1) is to be treated as having a restricted permission to carry on the regulated activity in Gibraltar on a temporary basis on and after exit day (a “restricted temporary permission”).

(3) An EEA firm that is entitled to a restricted temporary permission must—

- (a) notify the FSC without delay that the firm is carrying on a regulated activity under a restricted temporary permission; and
- (b) provide the FSC with any information that it may reasonably require and at intervals it may specify on the regulated activity carried on by the firm under the restricted temporary permission.

(4) A restricted temporary permission has effect only in respect of the regulated activity in question in so far as is necessary—

- (a) for the performance of a pre-existing contract, including the performance of an obligation under the contract which is contingent or conditional;
- (b) for the purposes of reducing the financial risk of—
 - (i) a party to a pre-existing contract, or
 - (ii) a third-party affected by the performance of a pre-existing contract;
- (c) in order to transfer the property, rights or liabilities under a pre-existing contract to a person authorised to carry on a regulated activity; or
- (d) in order to comply with a requirement imposed by or under an enactment.

(5) A restricted temporary permission has effect for not more than—

- (a) fifteen years, for the purpose of performing a pre-existing contract of insurance; or
- (b) five years, for the purpose of performing any other pre-existing contract.

(6) An EEA firm to which sub-regulation (7) applies must notify the FSC if—

- (a) the EEA firm's authorisation by its home state regulator is, or is to be, varied or cancelled;
- (b) the EEA firm becomes the subject of—
 - (i) a regulatory or criminal investigation; or
 - (ii) regulatory or criminal proceedings; or
- (c) the EEA firm is one in relation to which an insolvency event occurs.

(7) In sub-regulation (6) an “insolvency event” means an insolvency event specified in section 2 of the Insolvency Act 2011 or an equivalent insolvency event under the law of the EEA firm's home state.

(8) A notice under sub-regulation (3) or (6) must be—

- (a) given in the form and manner that the FSC may direct; and
- (b) accompanied by any information that the FSC may reasonably require.

Requirements imposed by home state regulator

Effect of existing requirements.

9.(1) Where an EEA firm has a temporary permission under regulation 5 or 6 or a restricted temporary permission under regulation 8 and the firm's permission to conduct the same regulated activity in its home State was, before exit day, subject to a requirement imposed by its home state regulator which continues to have effect on and after exit day, the firm's temporary permission or restricted temporary permission is to have effect subject to the same requirement as if it was imposed by the FSC.

(2) Sub-regulation (1) only applies to the extent that a similar requirement could have been imposed by the FSC on a person authorised under the relevant enactment which regulates the same regulated activity.

(3) In this regulation "requirement" means a condition, restriction or other requirement.

FSC's powers

FSC's powers.

10.(1) The FSC's powers under a relevant enactment are exercisable (with any necessary modification) in respect of—

- (a) an EEA firm which has—
 - (i) a temporary permission under regulation 5 or 6; or
 - (ii) a restricted temporary permission under regulation 8; and
- (b) the regulated activity which the EEA firm is authorised to carry on by virtue of that permission,

as those powers may be exercised in respect of a person who is authorised under the relevant enactment and the regulated activity which the person is authorised to carry on by virtue of that enactment.

(2) Without limiting sub-regulation (1) the FSC may, in exercising its powers under a relevant enactment—

- (a) vary or cancel a temporary permission or restricted temporary permission; or
- (b) impose a requirement, restriction or prohibition on a person who has a temporary permission or restricted temporary permission.

Dated

A J ISOLA
Minister with responsibility for financial services

EXPLANATORY MEMORANDUM

These regulations are made under the European Union (Withdrawal) Act 2018 and address deficiencies in retained EU law arising from Gibraltar's withdrawal from the European Union.

The regulations retain reciprocal "passport" rights for Gibraltar firms and UK firms in respect of financial services which are regulated under the Single Market Directives. The regulations also introduce transitional arrangements for EEA firms (which will cease to have passport rights on exit day), enabling them to carry on regulated activities in Gibraltar under a temporary permission whilst they seek authorisation or cease activities. In addition, the regulations provide for a restricted form of temporary permission, enabling EEA firms to conduct regulated activities in Gibraltar where doing so is necessary to perform ongoing contracts to which they were a party before exit day.

**Printed by the Gibraltar Chronicle Printing Limited
Unit 3, New Harbours
Government Printers for Gibraltar,
Copies may be purchased at 6, Convent Place, Price. £0.40**

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