

SECOND SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 4800 GIBRALTAR Thursday 24th December 2020

LEGAL NOTICE NO. 543 OF 2020.

EUROPEAN UNION (WITHDRAWAL) ACT 2019

FINANCIAL SERVICES (PASSPORT RIGHTS AND TRANSITIONAL PROVISIONS) (EU EXIT) REGULATIONS 2020

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-

PART 1 PRELIMINARY

Title.

1. These Regulations may be cited as the Financial Services (Passport Rights and Transitional Provisions) (EU Exit) Regulations 2020.

Commencement.

2. These Regulations come into operation on 1st January 2021.

Interpretation.

3. In these regulations-

“the Act” means the Financial Services Act 2019 and any instrument made under it;

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

“the GFSC” means the Gibraltar Financial Services Commission within the meaning of section 21(1) of the Act;

“Gibraltar firm” means a firm which is established in Gibraltar and has permission to carry on 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;

“permission” means permission, authorisation or other approval to carry on a regulated activity, granted under the Act;

“regulated activity” means an activity which–

- (a) in Gibraltar, is regulated by a provision of the Act giving effect to a Single Market Directive; and
- (b) in another jurisdiction, is regulated under the law of that jurisdiction giving effect to a Single Market Directive;

“restricted temporary approval” means restricted temporary approval under regulation 10;

“Single Market Directive” means each of the following Directives, as amended from time to time before IP completion 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;

“temporary authorisation” means temporary authorisation under regulation 7 or 8;

“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; and

“UK regulator” means the Bank of England, the Financial Conduct Authority, the Payment Systems Regulator or the Prudential Regulation Authority, as the case may be.

PART 2 PASSPORTING

Passporting

Passport rights.

4.(1) Subject to sub-regulation (2), the provisions of the Act which give effect to passport rights cease to apply on and after IP completion day.

(2) On and after IP completion day, a Gibraltar firm or UK firm is to be treated as having an entitlement, corresponding to the passport rights that such a firm would have been entitled to before IP completion 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-regulation (2), on and after IP completion day, the Act is to continue to apply as it applied before IP completion day with any necessary modifications including, in particular, the following—

- (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 GFSC 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;
- (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 GFSC or otherwise) is to be construed as a reference to the GFSC; 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.

Savings

Saving for UK collective investment schemes.

5.(1) Chapter 6 of Part 18 of the Act is to continue to apply in relation to a collective investment scheme which is constituted in the United Kingdom as it applied immediately before IP completion day in relation to a collective investment scheme constituted in another EEA State.

(2) For the purposes of sub-regulation (1), Part 18 of the Act is to be read as if—

(a) in section 322—

(i) in the opening words, for “an EEA State” there were substituted “the United Kingdom”;

(ii) in paragraph (a), for “an UCITS scheme” there were substituted “a UK UCITS (within the meaning of section 237 of the Financial Services and Markets Act 2000 of the United Kingdom)”; and

(iii) in paragraph (b), for “EEA UCITS” there were substituted “UK UCITS”; and

(b) in sections 323 and 324, in each place it occurs, for “EEA UCITS” there were substituted “UK UCITS”.

Saving for UK-related financial services legislation.

6.(1) Where a financial services enactment which, before IP completion day, applied to a relevant matter is amended, repealed or revoked on or after IP completion day in consequence of Gibraltar’s withdrawal from the EU—

(a) the enactment to be read as if the amendment, repeal or revocation had not been made in relation to the relevant matter; and

(b) sub-regulation (3) applies.

(2) A “relevant matter” means—

(a) activities in connection with the UK of a person regulated by the GFSC;

(b) a UK trading venue or financial instruments admitted to trading or traded on a UK trading venue;

(c) activities in Gibraltar of a UK firm;

(d) the charging of interchange fees in relation to transactions between Gibraltar and the UK; or

(e) functions of a UK regulator.

(3) A financial services enactment to which sub-regulation (1) applies is to be read with any modifications necessary to ensure that the enactment continues to apply to the relevant matter after IP completion day as it applied to it before IP completion day.

(4) Nothing in this regulation saves any obligation of the GFSC after IP completion day—

(a) to act in accordance with, or to take any account of—

- (i) guidelines, guidance, opinions, recommendations or decisions issued by a European Supervisory Authority whether before or after IP completion day; or
- (ii) technical standards adopted by the European Commission after IP completion day; or

(b) to provide information to, or co-operate with—

- (i) a European Supervisory Authority or any other EU institution, agency or body (an “EU entity”); or
- (ii) a competent authority of an EEA State.

(5) Where the effect of this regulation would be to make a right or obligation of any person dependent on a decision from an EU entity in circumstances where that right or obligation would after IP completion day, apart from this regulation, be dependent on a decision of the GFSC, any reference to the EU entity in relation to that decision is to be treated as a reference to the GFSC.

(6) In sub-regulation (5), “decision” includes any form of permission, authorisation, designation, recognition or registration required for the exercise of the right or the imposition of the obligation.

(7) In this regulation—

a “financial services enactment” means—

- (a) the Act; or
- (b) any instrument concerning or related to financial services which is direct EU legislation;

“interchange fee” has the meaning given in Article 2(10) of Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions; and

“UK trading venue” has the meaning given in paragraph 1 of Schedule 2 to the Act.

PART 3
TRANSITIONAL ARRANGEMENTS FOR EEA FIRMS

Temporary authorisation

Temporary authorisation for firms seeking permission.

7.(1) An EEA firm which, before IP completion day–

- (a) was or would have been entitled to carry on a regulated activity in Gibraltar by virtue of a passport right; and
- (b) notifies the GFSC that the firm–
 - (i) wishes to carry on the regulated activity in Gibraltar after that date, and
 - (ii) intends to apply for permission to carry on the regulated activity,

is authorised to carry on the regulated activity in Gibraltar on a temporary basis on and after IP completion day.

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

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

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

- (a) submits a completed application by that date, the EEA firm’s temporary authorisation has effect until the GFSC 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 8(3) applies to the firm’s temporary authorisation from the date specified in the notice as if the firm had given notice under regulation 8(1) on that date.

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

Temporary authorisation for firms ceasing activities.

8.(1) This regulation applies to an EEA firm which, before IP completion day–

- (a) was carrying on a regulated activity in Gibraltar by virtue of a passport right; and
- (b) notifies the GFSC that, with effect from IP completion 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 GFSC may direct; and
- (b) accompanied by any information that the GFSC may reasonably require.

(3) An EEA firm to which sub-regulation (1) applies is authorised to carry on the regulated activity in Gibraltar on a temporary basis on and after IP completion day, but that temporary authorisation–

- (a) only authorises 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 authorise the firm to conduct any new business in Gibraltar in respect of the regulated activity; and
- (c) ceases to have effect on 31st December 2021.

(4) Temporary authorisation under sub-regulation (3) does not authorise an EEA firm to carry on a regulated activity in the United Kingdom.

EEA firms which fail to give notice.

9.(1) An EEA firm which–

- (a) before IP completion day was entitled to carry on a regulated activity in Gibraltar by virtue of a passport right; and
- (b) by IP completion day has not given the GFSC notice under regulation 7(1)(b) or 8(1)(b),

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

(2) The GFSC may, in its discretion, accept a notice under regulation 7(1)(b) or 8(1)(b) which is given by an EEA firm not more than three months after IP completion day and sub-regulation (1) does not apply in any case where the GFSC exercises that discretion.

Transitional arrangement for pre-existing contracts

Restricted temporary approval: pre-existing contractual obligations.

10.(1) This regulation applies to an EEA firm which–

- (a) before IP completion day was carrying on a regulated activity in Gibraltar by virtue of a passport right;
- (b) on or after IP completion day, does not have permission or temporary authorisation to carry on the regulated activity in Gibraltar; and
- (c) is a party to a contract entered into before IP completion day (a “pre-existing contract”) and, on or after IP completion 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 approval to carry on the regulated activity in Gibraltar on a restricted and temporary basis on and after IP completion day (“restricted temporary approval”).

(3) An EEA firm that is entitled to restricted temporary approval must–

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

(4) Restricted temporary approval has effect in respect of the regulated activity in question only 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) Restricted temporary approval 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 (2) applies must notify the GFSC 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 3 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 GFSC may direct; and
 - (b) accompanied by any information that the GFSC may reasonably require.

PART 4

TRANSITIONAL ARRANGEMENTS FOR EEA FUNDS

Interpretation of Part 4.

11.(1) In this Part–

“AIFM Regulations” means the Financial Services (Alternative Investment Fund Managers) Regulations 2020;

“EEA AIFM” means an AIFM which is authorised by its home state regulator in accordance with Article 6.1 of the AIFM Directive (as it applies in the European Union);

“EuSEF” means a European social entrepreneurship fund registered under Article 15a of the EuSEF Regulation (as it applies in the European Union);

“EuVECA” means a European venture capital fund registered under Article 14a of the EuVECA Regulation (as it applies in the European Union);

“relevant fund” means an AIF, a EuSEF or a EuVECA; and

“relevant period” means the period beginning on IP completion day and ending on 31st December 2023.

(2) Other expressions used in this Part which are defined in the Act or the AIFM Regulations have the meaning given in that Act or those regulations.

Temporary permission for relevant funds etc.

Temporary marketing permission.

12.(1) If this regulation applies–

- (a) a relevant fund may be marketed in Gibraltar during the relevant period on the same terms and subject to the same conditions as the relevant fund was, or could have been, marketed in Gibraltar before IP completion day; and
- (b) an EEA AIFM may continue to market a Gibraltar AIF in Gibraltar during the relevant period on the same terms and subject to the same conditions as it was able to do before IP completion day.

(2) This regulation applies in relation to AIFs where–

- (a) an EEA AIFM satisfied the conditions entitling it to market an EEA AIF in Gibraltar before IP completion day under the AIFM Regulations;
- (b) the entitlement to market that AIF has not been suspended or revoked before IP completion day;
- (c) the AIFM of the AIF has notified the GFSC that it wishes the relevant fund to have temporary permission to be marketed in Gibraltar after IP completion day under sub-regulation (1); and
- (d) the AIFM is an authorised person, or is authorised or registered as an AIFM in a Member State.

(3) This regulation applies in relation to EuSEFs where–

- (a) the EuSEF is–

- (i) registered under Article 15a of the EUSEF Regulation (as it applies in the European Union); or
 - (ii) managed by a small AIFM or a EuSEF Manager;
 - (b) the GFSC has received a notification under Article 17 of the EuSEF Regulation that Gibraltar has been added to the list of Member States in which the manager intends to market the EuSEF;
 - (c) the AIFM or EuSEF Manager marketing the relevant fund–
 - (i) has not been subject to any sanctions under Article 19 of the EUSEF Regulation; and
 - (ii) has notified the GFSC that it wishes the relevant fund to have temporary permission to be marketed in Gibraltar after IP completion day under sub-regulation (1).
- (4) This regulation applies in relation to EuVECAs where–
- (a) the EuVECA is–
 - (i) registered under Article 14a of the EuVECA Regulation (as it applies in the European Union); or
 - (ii) managed by a small AIFM or a EuVECA Manager;
 - (b) the GFSC has received a notification under Article 16 of the EuVECA Regulation that Gibraltar has been added to the list of Member States in which the manager intends to market the EuVECA;
 - (c) the AIFM or EuVECA Manager of the EuVECA–
 - (i) has not been subject to any sanctions under Article 18 of the EuVECA Regulation; and
 - (ii) has notified the GFSC that it wishes the relevant fund to have temporary permission to be marketed in Gibraltar after IP completion day under sub-regulation (1).
- (5) This regulation applies in relation to EEA AIFMs marketing Gibraltar AIFs where the EEA AIFM–
- (a) satisfied the conditions entitling it to market the Gibraltar AIF in Gibraltar before IP completion day under the AIFM Regulations;
 - (b) is authorised or registered as an AIFM in a Member State;

(c) has notified the GFSC that it wishes to have temporary permission to market the Gibraltar AIF in Gibraltar after IP completion day under sub-regulation (1).

(6) A notification under sub-regulation (2)(c), (3)(c)(ii), (4)(c)(ii) and (5)(c) must be—

(a) made in the form and manner, and during the period, that the GFSC may direct; and

(b) accompanied by any information that the GFSC may reasonable require,

and the GFSC may give different directions to different persons or categories of person and vary or revoke a previous direction.

Deemed authorisation

13.(1) During the relevant period, an EEA AIFM is to be treated as if it is an authorised person for the purposes of the Act if—

(a) immediately before IP completion day the EEA AIFM—

(i) was marketing an EEA AIF or Gibraltar AIF in Gibraltar in reliance on its rights under Article 32 of the AIFM Directive; and

(ii) was authorised to carry on a regulated activity in Gibraltar by virtue of section 54(1)(b) of the Act; and

(b) after IP completion day, it is permitted to market that EEA AIF under regulation 12.

PART 5 REGULATORY PROVISIONS

Requirements imposed by home State regulator

Effect of existing requirements.

14.(1) Where—

(a) an EEA firm has temporary authorisation or restricted temporary approval; or

(b) an EEA AIFM has deemed authorisation under regulation 13,

and the firm's or AIFM's authorisation to conduct the same regulated activity in its home State is subject to a requirement imposed by its home State regulator, the firm's temporary authorisation or restricted temporary approval or AIFM's deemed authorisation is to have effect subject to the same requirement as if it were imposed by the GFSC.

(2) Sub-regulation (1) only applies to the extent that the GFSC could impose a similar requirement on a person with permission to carry on the same regulated activity.

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

Exercise of GFSC’s powers

GFSC’s powers.

15.(1) The GFSC’s powers under the Act are exercisable (with any necessary modification) in respect of—

- (a) an EEA firm which has temporary authorisation or restricted temporary approval, or the regulated activity which the EEA firm carries on by virtue of that authorisation or approval;
- (b) an AIF, EuSEF or EuVECA marketed under regulation 12;
- (c) an EEA AIFM which has deemed authorisation under regulation 13 or the regulated activity which the AIFM carries on by virtue of that deemed authorisation,

as those powers may be exercised in respect of a person who has permission and the regulated activity which the person is entitled to carry on by virtue of that permission.

(2) Without limiting sub-regulation (1) the GFSC may, in exercising its powers under the Act, vary, cancel or impose a requirement, restriction or prohibition on—

- (a) an EEA firm’s temporary authorisation or restricted temporary approval;
- (b) a temporary marketing permission for an AIF, EuSEF or EuVECA; or
- (c) an EEA AIFM’s deemed authorisation,

and, for the purposes of paragraph (b), references in the Act to an AIF are to be read as including a EuSEF or EuVECA.

Dated: 24th December 2020.

A J ISOLA,
Minister with responsibility for financial services.

EXPLANATORY MEMORANDUM

These regulations are made under the European Union (Withdrawal) Act 2019 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 IP completion day), enabling them to carry on regulated activities in Gibraltar under a temporary authorisation while they seek permission or cease activities. In addition, the regulations provide for restricted temporary approval, enabling EEA firms to conduct regulated activities in Gibraltar on a restricted basis where doing so is necessary to perform ongoing contracts to which they were a party before IP completion day. The regulations also provide for the temporary approval of the marketing of AIFs, EuSEFs and EuVEECAs, and deemed authorisation for EEA AIFMs.

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