

EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES (GIBRALTAR) (AMENDMENT) (EU EXIT)
REGULATIONS 2021

2021 No. 1252

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Her Majesty's Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument extends by 12 months the transitional arrangements under Parts 2 and 3 of the Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2019 (SI 2019/589) ("2019 Regulations"), which enable specified categories of Gibraltar-based firms to provide financial services in the United Kingdom ("UK") and facilitate the access by similar types of UK-based firms to Gibraltar's financial services market.

Explanations

What did any relevant EU law do before exit day?

- 2.2 The Financial Services and Markets Act 2000 (Gibraltar) Order 2001 ("Gibraltar Order") (SI 2001/3084) provides Gibraltar authorised financial services firms with access to the UK market, and facilitates the access of UK authorised firms to the Gibraltar market.
- 2.1 European Union ("EU") law allows authorised financial services firms to access markets across EU member states. Prior to the end of the Transition Period (31 December 2020), for the purposes of EU law, the UK and Gibraltar were, in effect, considered as the same EU member state.
- 2.2 Section 409 of the Financial Services and Markets Act 2000 ("FSMA") enables HM Treasury to make an order to modify Schedule 3 of FSMA so as to enable authorised Gibraltar-based firms to qualify for authorisation under Schedule 3 under specified circumstances. The Gibraltar Order modifies Schedule 3 of FSMA so that rights equivalent to passporting rights under the European Economic Area apply to authorised Gibraltar-based financial services firms operating between the UK and Gibraltar.
- 2.3 HM Treasury introduced the 2019 Regulations, with an original time limit of 31 December 2020, extendable by 12 months at a time, to temporarily enable Gibraltar-based firms to continue operating in the UK while a long-term framework is established, and to prevent a sudden loss of market access.

Why is it being changed?

- 2.4 The Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2020 (SI 2019/1274) ("2020 Regulations") extended the operation of the temporary arrangements to 31 December 2021.
- 2.5 Pursuant to Regulation 12(2) of the 2019 Regulations, this instrument will amend Regulation 12(1) of the 2019 Regulations which, in turn, make technical amendments

to existing primary and secondary legislation, including FSMA (in particular section 409), the Gibraltar Order and the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 (SI 2018/1149) (“Passport Rights Regulations”).

What will it now do?

- 2.6 The amendment will ensure Gibraltar-based authorised financial services firms will be able to continue providing cross-border services and establishing branches in the UK, as they do now, and facilitate the access by similar types of UK-based firms to Gibraltar’s financial services market for a further 12 months.
- 2.7 Regulation 2 substitutes “2021” for “2022” in paragraph (1) of Regulation 12 of the 2019 Regulations, preventing the expiry of Parts 2 and 3.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is to the whole United Kingdom.
- 4.2 The territorial application of this instrument is to the whole United Kingdom.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 This instrument amends regulation 12(1) of the 2019 Regulations, which in turn amends section 409 to FSMA, the Gibraltar Order, and the Passport Rights Regulations, to maintain the current arrangements under the 2019 Regulations.

7. Policy background

What is being done and why?

- 7.1 Gibraltar is a British Overseas Territory with its own institutions of self-government. Gibraltar enjoys legislative autonomy under its own constitution, brought into effect by the Gibraltar Constitution Order 2006. Gibraltar’s Parliament has the power to pass internal legislation, including on financial services, while the UK remains responsible for Gibraltar’s external relations and defence.
- 7.2 The financial services industry plays an important role in Gibraltar’s economy and Gibraltar-based firms have made extensive use of the existing market access arrangements between the UK and Gibraltar.
- 7.3 As the common European Union membership of the UK and Gibraltar has ended, the Government is committed to enabling financial services firms based in Gibraltar to continue to access the UK market. The 2019 Regulations and 2020 Regulations have protected this market access to date.
- 7.4 These temporary arrangements will be superseded by a new, long-term framework.

- 7.5 The Financial Services Act 2021 (“FS Act”) establishes the Gibraltar Authorisation Regime (“GAR”), the long-term legal and institutional framework that will enable market access in financial services between the jurisdictions. Access of Gibraltar-based firms to the UK’s wholesale and retail markets will be conditional on Gibraltar aligning sufficiently its relevant laws, and regulatory and supervisory practices, with those of the UK. Access will be contingent too on fulfilment of 8 broad objectives, such as protection of financial stability and consumers, and on the applicable UK and Gibraltar authorities demonstrating ongoing and close cooperation. The FS Act makes provision to facilitate the access of UK firms into Gibraltar, which is primarily a question of Gibraltar law.
- 7.6 Under the GAR, the Government will operate periodic reviews to ensure compatibility is sustained with the conditions of alignment and of cooperation, and the broad objectives. HM Treasury will engage the Government of Gibraltar bilaterally to resolve any emerging issues. HM Treasury will be under a duty to lay before Parliament every two years a report on the operation of the GAR. In particular, this must explain whether the underlying conditions continue to be satisfied.
- 7.7 Secondary legislation is required to implement the GAR and is being prepared by HM Treasury. Once the GAR enters into force, the temporary arrangements – the Gibraltar Order and other savings provisions – will be repealed.
- 7.8 In parallel, the Government of Gibraltar passed its Financial Services Act 2019 and is currently working with HM Treasury to implement the GAR.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument is not being made under the European Union (Withdrawal) Act but relates to the withdrawal of the UK from the EU insofar as it will update the 2019 Regulations, made under the European Union (Withdrawal) Act, which preserve, as amended, pre-withdrawal arrangements in relation to Gibraltar.
- 8.2 This instrument will extend the period during which the 2019 Regulations will have effect by amending regulation 12(1) of the 2019 Regulations. Regulation 12(2) of the 2019 Regulations enables extensions of 12 months on each occasion.

9. Consolidation

- 9.1 There are currently no plans to consolidate the relevant legislation.

10. Consultation outcome

- 10.1 HM Treasury has not undertaken a consultation on this instrument. HM Treasury engaged with the Government of Gibraltar and both sides agree to an extension of the temporary arrangements by an additional 12 months.
- 10.2 Between March and May 2020, a public consultation was undertaken to seek stakeholder views on the future permanent market access arrangements between the UK and Gibraltar. Overall, this revealed support for arrangements that avoid disruption to business and consumers:
<https://www.gov.uk/government/consultations/market-access-arrangements-for-financial-services-between-the-uk-and-gibraltar-a-consultation>. Stakeholders that were engaged in this process include the Government of Gibraltar, the Financial Conduct Authority, the Prudential Regulatory Authority, and the Bank of England.

11. Guidance

11.1 No further guidance is being published alongside this instrument.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because, in line with Better Regulation guidance, HM Treasury considers that the net impact on businesses will be less than £5 million a year. Due to this limited impact, a de-minimis Impact Assessment has been carried out, a copy of which is published alongside this Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise the effects of this instrument in relation to small business. This instrument is designed to maintain existing passporting rights for Gibraltar-based financial services firms to continue access into the UK market, and facilitate the access by similar types of UK-based firms to Gibraltar's financial services market. It involves no changes in policy. Therefore, there should be no, or no significant, impact on small businesses in Gibraltar that provide services in the UK or on UK-based firms that provide services in Gibraltar.

14. Monitoring & review

14.1 Regulation 12 in Part 5 of the 2019 Regulations provides a power for HM Treasury to extend its sunset clause beyond 31 December 2020, the original time limit. HM Treasury is able to make a Statutory Instrument that extends the effect of the 2019 Regulations by one year at a time. The last extension, to 31 December 2021, was brought about by the 2020 Regulations. The Statutory Instrument would be subject to annulment by a resolution of either House of Parliament.

14.2 Regulation 12(3) in Part 5 states that HM Treasury's decision to extend the Regulations must also be supported by a Ministerial statement, published and laid before Parliament, that details progress towards the long-term, permanent legal and institutional framework. See Annex A for this statement of progress.

15. Contact

15.1 Christina Pavlis at HM Treasury, email: christina.pavlis@hmtreasury.gov.uk, can be contacted with any queries regarding the instrument.

15.2 John O'Regan, Deputy Director for International Policy & Partnerships at HM Treasury, can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Economic Secretary to the Treasury, John Glen MP, can confirm that this Explanatory Memorandum meets the required standard.

Annex A

HM Treasury

Progress statement on the development of new permanent market access arrangements for financial services between the UK and Gibraltar.

This statement accompanies the Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2021 (“2021 Regulations”), pursuant to Regulation 12(3) of the Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2019 (“2019 Regulations”).

Background to the 2021 Regulations

As the common European Union (“EU”) membership of the United Kingdom (“UK”) and Gibraltar has ended, the Government is committed to the creation of a new legal and institutional framework for financial services market access between the jurisdictions.

The Gibraltar Authorisation Regime (“GAR”) became established through section 22 and Schedules 6, 7 and 8¹ of the Financial Services Act 2021 (“the Act”).² Work is underway to operationalise the GAR via a framework of Statutory Instruments. In the meantime, temporary arrangements must remain in place to avoid Gibraltar suffering abrupt loss of access to the UK market and to prevent UK consumer detriment. It should be noted that UK access to the Gibraltar market under the GAR is a question of Gibraltar law.

Prior to 31 December 2020, market access between the UK and Gibraltar had been governed through the Financial Services and Markets Act 2000 (Gibraltar) Order 2001 (“Gibraltar Order”).

The 2019 Regulations (SI 2019/589) amended arrangements in the Gibraltar Order and access has continued under the Gibraltar Order, now the main component of the temporary regime. The 2019 Regulations were extended by the Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2020 (SI 2020/1274) until 31 December 2021 and can continue to be extended by 12 months at a time.

The 2021 Regulations will amend Regulation 12(1) of the 2019 Regulations to extend Parts 2 and 3 to 31 December 2022 – the Gibraltar Order, and section 409 to the Financial Services and Markets Act 2000 (“FSMA”). In turn, this will prolong, as saved for Gibraltar, the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 (SI 2018/1149).

As the GAR comes into force, the Gibraltar Order and other savings provisions shall be repealed.

Progress made on the GAR

Regulation 12(3) requires that HM Treasury publish and lay a statement before Parliament describing the progress made in preparing the new permanent legislative arrangements between the UK and Gibraltar. The Act received Royal Assent on 29 April 2021. The Act

¹ The GAR will replace the Gibraltar Order. Section 23 of the Act delegates power to create regimes modelled on the GAR for areas of financial services not covered by the Gibraltar Order.

² <https://www.legislation.gov.uk/ukpga/2021/22/contents/enacted>

establishes the GAR by amending FSMA. Government engagement for the creation of the primary legislation included public consultation between March and May 2020.³

To implement the GAR, HM Treasury is working with the Financial Conduct Authority, the Prudential Regulation Authority, the Financial Ombudsman Service, the UK Financial Services Compensation Scheme (“FSCS”), the Government of Gibraltar, and the Gibraltar Financial Services Commission.

A number of legal and non-legal mechanisms must be delivered to satisfy the delegated powers conferred on HM Treasury by the Act. These will reflect the unique and historical relationship between the two jurisdictions and the arrangements in place during our common membership of the EU. These unique circumstances are not applied between the UK and any other jurisdiction.

HM Treasury is developing the secondary legislation required to implement the GAR. Subject to Parliamentary approval, the secondary legislation will define, in particular: (1) the scope of Gibraltar’s access to the UK market by setting out the regulated financial services activities under UK law that could be carried on, in the UK, by relevant Gibraltar-based persons under the GAR; (2) the corresponding activities under Gibraltar law that Gibraltar-based persons seeking GAR access must be authorised by the GFSC to carry on; (3) the scope and division of regulators’ powers; and (4) requirements relating to participation in the FSCS.

In relation to points 1) and 2) in the above paragraph, approval will be subject to assessments, carried out by HM Treasury, determining that there are high standards of financial services regulation and sufficient alignment between relevant UK and Gibraltar law, as well as regulatory and supervisory practices. In addition to the condition of alignment being satisfied, so too must the objectives set out in the Act to ensure that access to the UK market by Gibraltar firms is compatible with, amongst other things, the good functioning of the UK market, financial stability and the protection of consumers.⁴

The Act requires fulfilment also of the condition of cooperation, which applies to all involved UK and Gibraltar authorities. Memoranda of Understanding (“MoUs”) will set out cooperation requirements and are being developed alongside the statutory framework. It is expected that at least one MoU between UK and Gibraltar regulators and an all-party MoU will be concluded prior to GAR commencement. In accordance with the Act, MoUs will be laid before Parliament by HM Treasury and published.

Ongoing market access for approved activities will be subject to biennial alignment reviews; sooner if HM Treasury were to consider this appropriate. All cooperation memoranda will be subject to biennial review; again, sooner if deemed necessary by either the UK regulators and/or HM Treasury. Criteria and processes for all reviews should be finalised before the GAR is in force.

³ <https://www.gov.uk/government/consultations/market-access-arrangements-for-financial-services-between-the-uk-and-gibraltar-a-consultation#history>

⁴ Schedule 2A, paragraph 7, FSMA (inserted by Schedule 6 of the Act). The 8 objectives are: a) to protect and enhance the soundness, stability and resilience of UK financial system; (b) to protect and enhance public confidence in the UK financial system; (c) to prevent the use of the UK financial system for a purpose connected with financial crime; (d) to ensure that the relevant markets in the UK function well; (e) to protect consumers; (f) to protect the operation of the compensation scheme; (g) to protect public funds; (h) to maintain and improve relations between the UK and other countries and territories with significant financial markets or significant markets for financial services.