

EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES (GIBRALTAR) (AMENDMENT) (EU EXIT)
REGULATIONS 2022

2022 No. 1157

1. Introduction

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

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 amend section 409 to the Financial Services and Markets Act (2000) (“FSMA”), the Financial Services and Markets Act 2000 (Gibraltar) Order 2001 (“Gibraltar Order”) (SI 2001/3084), and the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 (SI 2018/1149) (“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. According to Government of Gibraltar data from 2022, 95% of Gibraltar’s financial services business is with the UK. Additionally, around 29% of motor insurance policies in the UK are provided by Gibraltar-based insurers.
- 7.3 Gibraltar authorised financial services firms are able to access the UK market under the Gibraltar Order, which also facilitates the access of UK authorised firms to the Gibraltar market.
- 7.4 The Government is committed to enabling financial services firms based in Gibraltar to continue to access the UK market. When the common European Union membership of the UK and Gibraltar was ended, the existing arrangements were preserved under Parts 2 and 3 of the 2019 Regulations. These are transitional arrangements.
- 7.5 These temporary arrangements will be superseded by a new, long-term framework.
- 7.6 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 Gibraltarian 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.
- 7.7 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.
- 7.8 Secondary legislation is required to implement the GAR and is being prepared by HM Treasury. From the outset, it was anticipated that the Gibraltar Order would need to be extended beyond 2022, as the process of implementing the GAR would need to be a multi-year project. Once the GAR enters into force, the temporary arrangements – the Gibraltar Order and other savings provisions – will be repealed.
- 7.9 In parallel, the Government of Gibraltar passed its Financial Services Act 2019 and is currently working with HM Treasury to implement the GAR.

Explanations

What did any law do before the changes to be made by this instrument?

- 7.10 European Union (“EU”) law allows authorised financial services firms to access markets across EU member states. Prior to exit from the EU, for the purposes of EU law, the UK and Gibraltar were, in effect, considered as the same EU member state.
- 7.11 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.

- 7.12 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?

- 7.13 The temporary arrangements can only be extended by 12 months at a time. The Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2020 (SI 2020/1274) (“2020 Regulations”) extended the operation of the temporary arrangements to 31 December 2021. The Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2021 (SI 2021/1252) (“2021 Regulations”) then extended the operation of temporary arrangements further to 31 December 2022.
- 7.14 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 Passport Rights Regulations.

What will it now do?

- 7.15 The amendment will ensure Gibraltar 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. The amendment will prevent an abrupt loss of access when the 2021 Regulations expire on 31 December 2022.
- 7.16 Regulation 2 substitutes “2023” for “2022” in paragraph (1) of Regulation 12 of the 2019 Regulations, preventing the expiry of Parts 2 and 3 on 31 December 2022.

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. 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](https://www.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 2022, was brought about by the 2021 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 Katherine Pride at HM Treasury, email: katherine.pride@hmtreasury.gov.uk can be contacted with any queries regarding the instrument.

- 15.2 John O'Regan, Deputy Director for International Policy and Partnerships at HM Treasury, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Andrew Griffith MP, the Economic Secretary to the Treasury, 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 2022 (“2022 Regulations”), pursuant to Regulation 12(3) of the Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2019 (“2019 Regulations”).

1. The Financial Services Act 2021 (“the FS Act”), which received Royal Assent on 29 April, established the Gibraltar Authorisation Regime (“GAR”) by amending the Financial Services and Markets Act (“FSMA”). Government engagement for the creation of the primary legislation included public consultation between March and May 2020¹. To implement the GAR, HM Treasury is consulting the Financial Conduct Authority (“FCA”), Prudential Regulation Authority (“PRA”), Financial Ombudsman Service (“FOS”), UK Financial Services Compensation Scheme (“FSCS”), Government of Gibraltar (“HMGoG”), and Gibraltar Financial Services Commission (“GFSC”).
2. Regulation 12(3) of the 2019 Regulations² 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.
3. 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 European Union (“EU”). These unique circumstances are not applied between the UK and any other jurisdiction.
4. HM Treasury is developing the secondary legislation required to implement the GAR.
5. 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.
6. HM Treasury, in consultation with the UK regulators and Gibraltarian authorities, are close to completing analysis (points (1) and (2) in paragraph 5, above) for the principal sectors of insurance and insurance intermediation. In accordance with the primary legislation, Gibraltar law and regulation corresponding to UK regulated activities have been identified and analysed for variations in the legal regime.

¹ <https://www.gov.uk/government/consultations/market-access-arrangements-for-financial-services-between-the-uk-and-gibraltar-a-consultation#history>

² Further definition and explanation of the 2019 Regulations is included in the Explanatory Memorandum to the Financial Services (Gibraltar) (Amendment) (EU Exit) 2022, page 1.

7. Under the FS Act, approval in relation to points (1) and (2) (paragraph 5, above) will be subject to HM Treasury being satisfied that, among other things, there is sufficient alignment between UK and Gibraltar law and regulatory and supervisory practices. Treasury have had discussions with both UK regulators to inform the content and design of assessments for insurance and insurance intermediation, with further technical input expected and required. In parallel, work is underway to determine the division of general rule-making powers between UK and Gibraltar regulators (point (3) in paragraph 5, above), which will dictate some of the assessment requirements.
8. The insurance sector alone constitutes a significant percentage of Gibraltar-based financial services activities under the Gibraltar Order, and eligible for the GAR. It is understood that around 29% of motor insurance contracts in the UK are written by Gibraltar-based firms. As such, insurance and insurance intermediation have been prioritised.
9. For other activities captured in the Gibraltar Order (investment services, for example), HM Treasury has identified the relevant regulated activities under UK law and corresponding regulated activities in Gibraltar and begun the analysis needed prior to progress to assessment for alignment.
10. The GAR is expected to provide Gibraltar-based firms with access to both wholesale and retail UK markets. It is therefore crucial that preparation of the secondary legislation is particularly robust. In addition to the condition of alignment being satisfied, so too must broad objectives set out in the FS Act³ to ensure that access to the UK market by Gibraltar firms is compatible with, amongst other things, the good functioning of the UK market, UK financial stability and the protection of UK consumers. Overall, this is a broader and deeper process than is undertaken in relation to other market access arrangements, reflecting the breadth and depth of market access available.
11. The Act also requires fulfilment of the condition of cooperation⁴, 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. This will include a government-to-government MoU between HM Treasury and HMGoG.
12. 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 HM Treasury and/ or, in the case of the regulator MoUs, by the UK regulators. Criteria and processes for all reviews will be finalised before the GAR is in force.
13. Alongside work to implement the GAR, HM Treasury are addressing temporary arrangements put in place under the EU Withdrawal Act to preserve Gibraltar’s access to the UK financial services market for activities not covered by the Gibraltar Order. On 17 October, HM Treasury laid the Financial Services (Miscellaneous Amendments) Regulations 2022 to ensure that, post-EU exit, HM Treasury and the FCA can apply their powers under certain Regulations to bring treatment of Gibraltar firms in line with UK authorised firms, where operating in the UK.

³ Broad objectives are set out in paragraph 7 of Schedule 2A, Financial Services and Markets Act (FSMA).

⁴ The condition of cooperation is laid out in paragraph 9 of Schedule 2A, FSMA.