

**SECOND SUPPLEMENT TO THE GIBRALTAR  
GAZETTE**

**No. 3315 of 28 November, 2002**

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LEGAL NOTICE NO. 92 OF 2002

**FINANCIAL SERVICES ORDINANCE**

**THE FINANCIAL MARKETS AND INSOLVENCY (SETTLEMENT  
FINALITY) REGULATIONS 2002**

In exercise of the powers conferred on him by section 53 of the Financial Services Ordinance, and all other enabling powers, and for the purpose of transposing Directive 98/26/EC of the European Parliament and of the Council of 19th May 1998 on settlement finality in payment and securities settlement systems, the Minister has made the following regulations—

**PART I**

**GENERAL**

**Title.**

1. These Regulations may be cited as the Financial Markets and Insolvency (Settlement Finality) Regulations 2002 .

**Interpretation.**

2.(1) In these Regulations—

"central bank" means a central bank of an EEA State or the European Central Bank;

"central counterparty" means a body corporate or unincorporated association interposed between the institutions in a designated system and which acts as the exclusive counterparty of those institutions with regard to transfer orders;

"charge" means any form of security, including a mortgage;

"clearing house" means a body corporate or unincorporated association which is responsible for the calculation of the net positions of institutions and any central counterparty or settlement agent in a designated system;

"collateral security" means any realisable assets provided under a charge or a repurchase or similar agreement, or otherwise (including money provided under a charge)-

- (a) for the purpose of securing rights and obligations potentially arising in connection with a designated system ("collateral security in connection with participation in a designated system"); or
- (b) to a central bank for the purpose of securing rights and obligations in connection with its operations in carrying out its functions as a central bank ("collateral security in connection with the functions of a central bank");

"collateral security charge" means, where collateral security consists of realisable assets (including money) provided under a charge, that charge;

"credit institution" means a credit institution as defined in the first indent of Article 1 of Council Directive 77/780/EEC including the bodies set out in the list in Article 2(2);

"creditors' voluntary winding-up resolution" means a resolution for voluntary winding up where the winding up is a creditors' winding up;

"default arrangements" means the arrangements put in place by a designated system to limit systemic and other types of risk which arise in the event of a participant appearing to be unable, or likely to become unable, to meet its obligations in respect of a transfer order, or any other arrangements for-

- (a) netting,
- (b) the closing out of open positions, or
- (c) the application or transfer of collateral security;

"defaulter" means a person in respect of whom action has been taken by a designated system under its default arrangements;

"designated system" means a system which is declared by a designation order for the time being in force to be a designated system for the purposes of these Regulations;

"designating authority" means the Minister with responsibility for Trade and Industry;

"designation order" has the meaning given by regulation 4;

"EEA State" means a State which is a Contracting Party to the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 as adjusted by the Protocol signed at Brussels on 17th March 1993;

"guidance", in relation to a designated system, means guidance issued or any recommendation made by it which is intended to have continuing effect and is issued in writing or other legible form to all or any class of its participants or users or persons seeking to participate in the system or to use its facilities and which would, if it were a rule, come within the definition of a rule;

"indirect participant" means a credit institution for which payment transfer orders are capable of being effected through a designated system pursuant to its contractual relationship with an institution;

"institution" means—

- (a) a credit institution;
- (b) an investment firm as defined in point 2 of Article 1 of Council Directive 93/22/EEC excluding the bodies set out in the list in Article 2(2)(a) to (k);
- (c) a public authority or publicly guaranteed undertaking;
- (d) any undertaking whose head office is outside the European Community and whose functions correspond to those of a credit institution or investment firm as defined in (a) and (b) above; or
- (e) any undertaking whose head office is outside the European Community and whose functions correspond to (e) any

undertaking which is treated by the designating authority as an institution in accordance with regulation 8(1),

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

"netting" means the conversion into one net claim or obligation of different claims or obligations between participants resulting from the issue and receipt of transfer orders between them, whether on a bilateral or multilateral basis and whether through the interposition of a clearing house, central counterparty or settlement agent or otherwise;

"participant" means—

- (a) an institution,
- (b) a body corporate or unincorporated association which carries out any combination of the functions of a central counterparty, a settlement agent or a clearing house, with respect to a system, or
- (c) an indirect participant which is treated as a participant, or is a member of a class of indirect participants which are treated as participants, in accordance with regulation 9;

"relevant office-holder" means—

- (a) the official receiver,
- (b) any person acting in relation to a company as its liquidator, provisional liquidator, or administrator;
- (c) any person acting in relation to an individual as his trustee in bankruptcy or interim receiver of his property or as permanent or interim trustee in the sequestration of his estate;
- (d) any person acting as administrator of an insolvent estate of a deceased person;

and in sub-paragraph (b), "company" means any company, society, association, partnership or other body which may be

wound up under the Companies Ordinance or the Bankruptcy Ordinance;

"rules", in relation to a designated system, means rules or conditions governing the system with respect to the matters dealt with in these Regulations;

"securities" means (except for the purposes of the definition of "charge") any instruments referred to in section B of the Annex to Council Directive 93/22/EEC;

"settlement account" means an account at a central bank, a settlement agent or a central counterparty used to hold funds or securities (or both) and to settle transactions between participants in a designated system;

"settlement agent" means a body corporate or unincorporated association providing settlement accounts to the institutions and any central counterparty in a designated system for the settlement of transfer orders within the system and, as the case may be, for extending credit to such institutions and any such central counterparty for settlement purposes;

"the Settlement Finality Directive" means Directive 98/26/EC of the European Parliament and of the Council of 19th May 1998 on settlement finality in payment and securities settlement systems;

"transfer order" means—

- (a) an instruction by a participant to place at the disposal of a recipient an amount of money by means of a book entry on the accounts of a credit institution, a central bank or a settlement agent, or an instruction which results in the assumption or discharge of a payment obligation as defined by the rules of a designated system ("a payment transfer order"); or
- (b) an instruction by a participant to transfer the title to, or interest in, securities by means of a book entry on a register, or otherwise ("a securities transfer order");

"winding up" means—

- (a) winding up by the court, or

(b) creditors' voluntary winding up.

(2) Subject to sub-regulation (1), expressions used in these Regulations which are also used in the Settlement Finality Directive have the same meaning in these Regulations as they have in the Settlement Finality Directive.

(3) References in these Regulations to things done, or required to be done, by or in relation to a designated system shall, in the case of a designated system which is neither a body corporate nor an unincorporated association, be treated as references to things done, or required to be done, by or in relation to the operator of that system.

**PART II**

**DESIGNATED SYSTEMS**

**Application for designation.**

3.(1) Any body corporate or unincorporated association may apply to the designating authority for an order declaring it, or any system of which it is the operator, to be a designated system for the purposes of these Regulations.

(2) Any such application—

(a) shall be made in such manner as the designating authority may direct; and

(b) shall be accompanied by such information as the designating authority may reasonably require for the purpose of determining the application.

(3) At any time after receiving an application and before determining it, the designating authority may require the applicant to furnish additional information.

(4) The directions and requirements given or imposed under sub-regulations (2) and (3) may differ as between different applications.

(5) Any information to be furnished to the designating authority under this regulation shall be in such form or verified in such manner as it may specify.

(6) Every application shall be accompanied by copies of the rules of the system to which the application relates and any guidance relating to that system.

**Grant and refusal of designation.**

4.(1) Where—

(a) an application has been duly made under regulation 3;

(b) the applicant has paid any fee charged by virtue of regulation 5(1); and

- (c) the designating authority is satisfied that the requirements of the Schedule are satisfied with respect to the system to which the application relates;

the designating authority may make an order (a "designation order") declaring the system to be a designated system for the purposes of these Regulations.

(2) In determining whether to make a designation order, the designating authority shall have regard to systemic risks.

(3) A designation order shall state the date on which it takes effect.

(4) Where the designating authority refuses an application for a designation order it shall give the applicant a written notice to that effect stating the reasons for the refusal.

**Fees.**

5.(1) The designating authority may charge a fee to an applicant for a designation order.

(2) The designating authority may charge a designated system a periodical fee.

(3) Fees chargeable by the designating authority under this regulation shall not exceed an amount which reasonably represents the amount of costs incurred or likely to be incurred—

- (a) in the case of a fee charged to an applicant for a designation order, in determining whether the designation order should be made; and
- (b) in the case of a periodical fee, in satisfying itself that the designated system continues to meet the requirements of the Schedule and is complying with any obligations to which it is subject by virtue of these Regulations.

**Revocation of designation.**

6. A designation order may be revoked by a further order made by the designating authority if at any time it appears to the designating authority—



- (a) that any requirement of the Schedule is not satisfied in the case of the system to which the designation order relates; or
- (b) that the system has failed to comply with any obligation to which it is subject by virtue of these Regulations.

**Undertakings treated as institutions.**

7.(1) A designating authority may treat as an institution any undertaking which participates in a designated system and which is responsible for discharging financial obligations arising from transfer orders effected through that system, provided that—

- (a) the designating authority considers such treatment to be required on grounds of systemic risk, and
- (b) the designated system is one in which at least three institutions (other than any undertaking treated as an institution by virtue of this paragraph) participate and through which securities transfer orders are effected.

(2) Where a designating authority decides to treat an undertaking as an institution in accordance with sub-regulation (1), it shall give written notice of that decision to the designated system in which the undertaking is to be treated as a participant.

**Indirect participants treated as participants.**

8.(1) A designating authority may treat—

- (a) an indirect participant as a participant in a designated system, or
- (b) a class of indirect participants as participants in a designated system,

where it considers this to be required on grounds of systemic risk, and shall give written notice of any decision to that effect to the designated system.

**Provision of information by designated systems.**

9.(1) A designated system shall, on being declared to be a designated system, provide to the designating authority in writing a list of its

participants and shall give written notice to the designating authority of any amendment to the list within seven days of such amendment.

(2) The designating authority may, in writing, require a designated system to furnish to it such other 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 designating authority may specify.

(3) When a designated system amends, revokes or adds to its rules or its guidance, it shall within fourteen days give written notice to the designating authority of the amendment, revocation or addition.

(4) A designated system shall give the designating authority at least fourteen days' written notice of any proposal to amend, revoke or add to its default arrangements.

**Exemption from liability in damages.**

10.(1) Neither the designating authority nor any person who is, or is acting as, a member, officer or member of staff of the designating authority shall be liable in damages for anything done or omitted in the discharge, or purported discharge, of the designating authority's functions under these Regulations.

(2) Sub-regulation (1) does not apply if the act or omission is shown to have been in bad faith.

**Publication of information and advice.**

11. A designating authority may publish information or give advice, or arrange for the publication of information or the giving of advice, in such form and manner as it considers appropriate with respect to any matter dealt with in these Regulations.

**PART III**

**TRANSFER ORDERS EFFECTED THROUGH A DESIGNATED  
SYSTEM AND COLLATERAL SECURITY**

**Modifications of the law of insolvency.**

12.(1) The general law of insolvency has effect in relation to—

- (a) transfer orders effected through a designated system and action taken under the rules of a designated system with respect to such orders; and
- (b) collateral security,

subject to the provisions of this Part.

- (2) Those provisions apply in relation to—
  - (a) insolvency proceedings in respect of a participant in a designated system; and
  - (b) insolvency proceedings in respect of a provider of collateral security in connection with the functions of a central bank, in so far as the proceedings affect the rights of the central bank to the collateral security;

but not in relation to any other insolvency proceedings, notwithstanding that rights or liabilities arising from transfer orders or collateral security fall to be dealt with in the proceedings.

**Proceedings of designated system take precedence over insolvency proceedings.**

13.(1) None of the following shall be regarded as to any extent invalid at law on the ground of inconsistency with the law relating to the distribution of the assets of a person on bankruptcy, winding up, sequestration or in the administration of an insolvent estate—

- (a) a transfer order;
- (b) the default arrangements of a designated system;
- (c) the rules of a designated system as to the settlement of transfer orders not dealt with under its default arrangements;
- (d) a contract for the purpose of realising collateral security in connection with participation in a designated system otherwise than pursuant to its default arrangements; or
- (e) a contract for the purpose of realising collateral security in connection with the functions of a central bank.

(2) The powers of a relevant office-holder in his capacity as such, and the powers of the court under the Companies Ordinance or the Bankruptcy Ordinance, shall not be exercised in such a way as to prevent or interfere with—

- (a) the settlement in accordance with the rules of a designated system of a transfer order not dealt with under its default arrangements;
- (b) any action taken under its default arrangements;
- (c) any action taken to realise collateral security in connection with participation in a designated system otherwise than pursuant to its default arrangements; or
- (d) any action taken to realise collateral security in connection with the functions of a central bank.

This does not prevent the court from afterwards making any such order or decree as is mentioned in regulation 15(1) or (2).

(3) Nothing in the following provisions of this Part shall be construed as affecting the generality of the above provisions.

(4) A debt or other liability arising out of a transfer order which is the subject of action taken under default arrangements may not be proved in a winding up or bankruptcy until the completion of the action taken under default arrangements.

(5) A debt or other liability which by virtue of subregulation (4) may not be proved or claimed shall not be taken into account for the purposes of any set-off until the completion of the action taken under default arrangements.

### **General**

#### **Transfer order entered into designated system following insolvency.**

14.(1) This Part does not apply in relation to any transfer order given by a participant which is entered into a designated system after—

- (a) a court has made an order of a type referred to in regulation 15 in respect of that participant, or
- (b) that participant has passed a creditors' voluntary winding-up resolution,

unless the conditions mentioned in sub-regulation (2) are satisfied.

- (2) The conditions referred to in sub-regulation (1) are that–
  - (a) the transfer order is carried out on the same day that the event specified in sub-regulation (1)(a) or (b) occurs, and
  - (b) the settlement agent, the central counterparty or the clearing house can show that it did not have notice of that event at the time of settlement of the transfer order.

(3) For the purposes of sub-regulation (2)(b), the relevant settlement agent, central counterparty or clearing house shall be taken to have notice of an event specified in sub-regulation (1)(a) or (b) if it deliberately failed to make enquiries as to that matter in circumstances in which a reasonable and honest person would have done so.

**Notification of insolvency order or passing of resolution for creditors' voluntary winding up.**

15.(1) Upon the making of an order for bankruptcy, sequestration, administration or winding up in respect of a participant in a designated system, the court shall forthwith notify both the system and the designating authority that such an order has been made.

- (2) Following receipt of–
  - (a) such notification from the court, or
  - (b) notification from a participant of the passing of a creditors' voluntary winding-up resolution pursuant to paragraph 5(4) of the Schedule,

the designating authority shall forthwith inform the Financial and Development Secretary of the notification.

**Applicable law relating to securities held as collateral security.**

16. Where—

- (a) securities (including rights in securities) are provided as collateral security to a participant or a central bank (including any nominee, agent or third party acting on behalf of the participant or the central bank), and
- (b) a register, account or centralised deposit system located in an EEA State legally records the entitlement of that person to the collateral security,

the rights of that person as a holder of collateral security in relation to those securities shall be governed by the law of the EEA State or, where appropriate, the law of the part of the EEA State, where the register, account, or centralised deposit system is located.

**Applicable law where insolvency proceedings are brought.**

17. Where insolvency proceedings are brought in any jurisdiction against a person who participates, or has participated, in a system designated for the purposes of the Settlement Finality Directive, any question relating to the rights and obligations arising from, or in connection with, that participation and arising from, or in connection with, that participation and falling to be determined by a court in Gibraltar shall (subject to regulation 16) be determined in accordance with the law governing that system.

**Systems designated in other EEA States and the United Kingdom.**

18.(1) Where an equivalent overseas order or equivalent overseas security is subject to the law of Gibraltar, this Part shall apply—

- (a) in relation to the equivalent overseas order as it applies in relation to a transfer order; and
- (b) in relation to the equivalent overseas security as it applies in relation to collateral security in connection with a designated system.

(2) In paragraph (1)—

- (a) "equivalent overseas order" means an order having the like effect as a transfer order which is effected through a system

designated for the purposes of the Settlement Finality Directive in the United Kingdom or another EEA State; and

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

## **SCHEDULE**

Regulation 4(1)

### **REQUIREMENTS FOR DESIGNATION OF SYSTEM**

#### **Establishment, participation and governing law.**

1.(1) The head office of at least one of the participants in the system must be in Gibraltar and the law of Gibraltar must be the governing law of the system.

(2) There must be not less than three institutions participating in the system, unless otherwise determined by the designating authority in any case where—

- (a) there are two institutions participating in a system; and
- (b) the designating authority considers that designation is required on the grounds of systemic risk.

(3) The system must be a system through which transfer orders are effected.

(4) Where orders relating to financial instruments other than securities are effected through the system—

- (a) the system must primarily be a system through which securities transfer orders are effected; and
- (b) the designating authority must consider that designation is required on grounds of systemic risk.

#### **Arrangements and resources.**

2. The system must have adequate arrangements and resources for the effective monitoring and enforcement of compliance with its rules or, as respects monitoring, arrangements providing for that function to be performed on its behalf (and without affecting its responsibility) by another body or person who is able and willing to perform it.

**Financial resources.**

3. The system must have financial resources sufficient for the proper performance of its functions as a system.

**Co-operation with other authorities.**

4. The system must be able and willing to co-operate, by the sharing of information and otherwise, with—

- (a) the Financial Services Commission,
- (b) the Minister with responsibility for Trade and Industry,
- (c) any relevant office-holder, and
- (d) any authority, body or person having responsibility for any matter arising out of, or connected with, the default of a participant.



**Specific provision in the rules.**

5.(1) The rules of the system must—

- (a) specify the point at which a transfer order takes effect as having been entered into the system,
- (b) specify the point after which a transfer order may not be revoked by a participant or any other party, and
- (c) prohibit the revocation by a participant or any other party of a transfer order from the point specified in accordance with paragraph (b).

(2) The rules of the system must require each institution which participates in the system to provide upon payment of a reasonable charge the information mentioned in sub-paragraph (3) to any person who requests it, save where the request is frivolous or vexatious. The rules must require the information to be provided within fourteen days of the request being made.

(3) The information referred to in sub-paragraph (2) is as follows—

- (a) details of the systems which are designated for the purposes of the Settlement Finality Directive in which the institution participates, and
- (b) information about the main rules governing the functioning of those systems.

(4) The rules of the system must require each participant upon the passing of a creditors' voluntary winding up resolution, to notify forthwith both the system and the designating authority that such a resolution has been passed.

**Default arrangements.**

6. The system must have default arrangements which are appropriate for that system in all the circumstances.

Dated the 28th day of November, 2002.

K AZOPARDI,  
Minister for Trade and Industry.

**EXPLANATORY NOTE**

The Regulations implement Directive 98/26/EC of the European Parliament and of the Council on settlement finality in payment and securities settlement systems. The Directive seeks to reduce the risks associated with participation in payment and securities settlement systems by minimising the disruption caused by insolvency proceedings brought against a participant in such a system.

