



HM Treasury

Market access arrangements for financial services between the UK and Gibraltar

Summary of Responses

November 2020

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Chapter 1

Introduction

Background to the consultation

- 1.1 In March 2020 HM Treasury published a consultation paper inviting views on the main features of the Gibraltar Authorisation Regime (“GAR”), a new permanent legislative framework enabling UK market access for specified Gibraltar-based financial services firms if they intend to carry on GAR-approved activities in the UK.
- 1.2 The GAR will deliver on the Government’s commitment to enable Gibraltar-based financial services firms to continue accessing the UK market for GAR-approved activities now that the UK and Gibraltar’s common membership of the EU has come to an end. The Government has already introduced temporary arrangements to protect this market access, which will be in place until the permanent arrangements of the GAR are implemented.
- 1.3 Looking to the future, the GAR will reflect the unique and historical relationship between the two jurisdictions and the arrangements that were in place while we were members of the European Union. The GAR delivers on a Ministerial commitment to provide long-term access between the UK and Gibraltar for financial services firms to the UK market while at the same time promoting the objectives of financial stability, the safety and soundness of firms, protecting market integrity and ensuring high levels of consumer protection. The GAR will be based on closely aligned standards of financial regulation, authorisation, supervision and enforcement. The GAR will further be underpinned by bespoke arrangements for cooperation among the UK and Gibraltar governments and the national regulators, which will include, among other things, arrangements for information-sharing and coordination of their regulatory and supervisory duties to support the delivery of a well-functioning GAR regime.
- 1.4 As market access is a sovereign matter, it will be the responsibility of the Government of Gibraltar to legislate in their own domestic legislation for the reciprocal market access for UK firms. The consultation paper published in March invited views on priority interests for UK-based firms operating in Gibraltar. This document provides further information on the requirements applicable in UK legislation to UK-based firms looking to operate in Gibraltar.
- 1.5 The Government consulted on the proposed GAR regime from 11 March 2020 to 11 May 2020. The consultation received 5 responses from UK and Gibraltar-based stakeholders, primarily from the insurance sector, which are listed at Annex A. The Government also discussed the proposals with the Government of Gibraltar.

- 1.6 This document summarises the main responses received to the consultation and sets out the Government’s proposals for the GAR after considering those views. The Government has brought forward legislation implementing the GAR as part of the Financial Services Bill 2020.
- 1.7 The Government is grateful to all the organisations and individuals who took the time to respond to this consultation.

Overview of respondents’ view

- 1.8 Consultation respondents had a wide range of views on the proposed new regime, with some focusing on the high-level principles of market access set out by the proposal, and others focusing on more technical aspects of policy.
- 1.9 On balance, respondents welcomed the Government’s proposals and noted that the new regime would deliver certainty to Gibraltar-based firms looking to continue to operate in the UK. All respondents recognised the need for alignment of law and practice between the UK and Gibraltar to underpin reciprocal access to each other’s markets. A proportion of respondents expressed concern about the potential for dual regulation on firms, encouraging the Government to set out further detail to understand the implications of the new regime and the new cooperation arrangements between the UK (Financial Conduct Authority “FCA” and Prudential Regulation Authority “PRA”) and Gibraltar (Gibraltar Financial Services Commission “GFSC”) regulators.
- 1.10 The following chapters detail the responses received to the questions asked in each chapter of the consultation and set out the Government’s responses to the views presented.

Chapter 2

Gibraltar Authorisation Regime

Consultation proposal and summary of responses

- 2.1 As set out in the consultation paper launched in March 2020, the GAR will allow specified Gibraltar-based financial services firms to access the UK market as “authorised persons” under the Financial Services and Market Act 2000 (“FSMA”), without having to apply for authorisation from the UK regulators they intend to carry on GAR-approved activities in the UK. For the purposes of this consultation response, references to Gibraltar-based firms also apply to individuals.
- 2.2 HM Treasury will be able to specify by statutory instrument the UK regulated activities for which market access is granted and the relevant modes of supply. HM Treasury will have to be satisfied that the requirements in respect of their objectives, alignment and cooperation have been met before access is granted for an activity.
- 2.3 It is expected that the approved activities under the GAR will generally reflect the composition of Gibraltar-based firms currently conducting business in the UK.
- 2.4 Access of Gibraltar-based firms to the UK market will be conditional on Gibraltar aligning its relevant law and practice with that of the UK, on that access complying with certain objectives, such as financial stability and consumer protection, as well as on the UK and Gibraltar governments and regulators closely cooperating as part of this regime. Relevant law and practice includes, for example, any future changes to the UK’s financial regulation, law and supervisory practice and any related areas of relevance, such as data protection law and insolvency law as well as the basis of supervision and enforcement in Gibraltar and the way in which it is undertaken by Gibraltar authorities.
- 2.5 Having left the EU, the alignment condition will be fundamental to the broader scope of market access available under the GAR by promoting consistent and effective regulation of firms. This will ultimately enable the GAR to provide market access for specified activities in wholesale and retail financial sectors.
- 2.6 HM Treasury will be responsible for working with the Government of Gibraltar to ensure that alignment is achieved and maintained in the areas where Gibraltar is interested in having access to the UK market, thus enabling firms to exercise this route if available. Gibraltarian firms will continue to remain subject to the laws of Gibraltar and will be supervised by the GFSC. They may be subject to further UK requirements, as is the case

now and will need to comply with additional disclosure requirements identifying themselves to UK consumers as authorised by the GFSC.

- 2.7 The regime will also be underpinned by new cooperation arrangements between HM Treasury and the Government of Gibraltar as well as the UK and Gibraltar regulators. The engagement between the UK regulators and the GFSC is considered in further detail in the next chapter.
- 2.8 In addition, HM Treasury will operate a regular review process to ensure that the conditions of alignment of Gibraltar law and practice with UK legislation, cooperation, and the objectives continue to be fulfilled in time. If one of these conditions were not to be maintained, HM Treasury would engage with the Government of Gibraltar in a process to try to resolve any outstanding issues and would ultimately have the ability to withdraw approval for an activity or activities within the regime.
- 2.9 All UK and Gibraltar-based respondents to the consultation acknowledged the need for alignment and cooperation between governments and agreed that Gibraltar-based firms operating in the UK should be subject to the high regulatory and supervisory standards that apply in the UK market. In the view of some respondents, the proposed regime would achieve the appropriate balance between driving competition and consumer choice, whilst ensuring firms are subject to sound regulation. One respondent sought to clarify whether the alignment condition would include considerations of Gibraltar's supervisory practices and any material outcomes to firms.
- 2.10 There were also calls to extend the regime beyond the Overseas Territory of Gibraltar.

Government response

- 2.11 The proposals consulted on have been included in the Financial Services Bill 2020. The Government will implement the GAR's structure as consulted on, and is now able to provide further information on the operation of the framework.
- 2.12 The access of Gibraltar-based firms to the UK market will be based on three conditions that HM Treasury will need to periodically reassess: compliance with certain objectives such as financial stability and consumer protection; alignment of law and practice in the UK and Gibraltar; and cooperation between Gibraltar entities and UK entities.
- 2.13 The new framework will respect Gibraltar's regulatory autonomy and enable the Government of Gibraltar to choose the activities for which it wants to access the UK market and therefore remain aligned with the UK's law and practice.
- 2.14 With a view of ensuring a high level of consumer protection, HM Treasury has added a new actor to the cooperation regime of the GAR proposed in the consultation document, the manager of the Financial Services Compensation Scheme (FSCS). The manager of the FSCS will also participate in the agreements setting out the cooperation tools and requirements with the UK and Gibraltar governments and the national regulators.

- 2.15 Respondents queried whether HM Treasury will be responsible for scrutinising individual notifications for market access into the UK. The Government can clarify that responsibility for processing a notification for market access will lie, as it does now, with the Gibraltar regulator and the UK regulators.
- 2.16 As a result of interest from respondents, HM Treasury can confirm that, in the assessment of the alignment condition, it will consider both textual alignment of law and alignment of supervisory and enforcement practices as part of the periodical reviews that will occur under the GAR. HM Treasury can also confirm that its assessment of fulfilment of the cooperation condition will include both the formal agreements in place between UK and Gibraltar entities and the implementation of those agreements. Furthermore, HM Treasury is committed to ensuring that the right mechanisms are put in place to ensure appropriate protections for UK consumers of Gibraltar firms. When undertaking these reviews, HM Treasury will have regard to the advice and expertise of the UK regulators.
- 2.17 The Bill proposes a duty on HM Treasury to report to Parliament every two years on the operation of the GAR. HM Treasury will report, in particular, on whether and how the new regime is delivering on the fulfilment of the conditions of alignment, achievement of the objectives, and cooperation in relation to the activities authorised under the GAR.
- 2.18 If HM Treasury proposes to make adjustments to market access, this will be done through secondary legislation, which Parliament will debate under the affirmative resolution procedure and will be accompanied by explanatory memoranda setting out the evidence for and basis on which changes are proposed.
- 2.19 As set out in the consultation paper in March, HM Treasury does not intend to apply these proposed market access arrangements to other jurisdictions. The GAR reflects the unique historic relationship between the UK and Gibraltar and is based on the shared institutional framework in place during our membership of the European Union. The proposals acknowledge the changes to the legal basis for our bilateral economic relationship which were brought about by both the UK and Gibraltar leaving the EU. These unique circumstances do not exist for other jurisdictions.

Chapter 3

Implementation and administration of the Gibraltar regime

Accessing the UK market

Consultation proposal and summary of responses

- 3.1 The consultation paper set out the Government's proposals to require that Gibraltar-based firms, both already operating in the UK and intending to continue to do so, and new entrants to the market, undergo a notification process.
- 3.2 Under the proposals in the consultation paper, Gibraltar-based firms would notify the GFSC of their intention to carry on a regulated activity in the UK which is approved by HM Treasury's regulations for the purposes of the GAR. Firms would not be able to carry on an approved activity in the UK unless they have a corresponding authorisation in Gibraltar and the GFSC gives its consent. Any restrictions on permissions that the GFSC applies to Gibraltar-based firms would equally apply to the activities they intend to carry on in the UK.
- 3.3 The GFSC will in turn send the UK regulators a notification containing relevant information, including its consent to the firm's access to the UK financial services market. The Government sought views in the consultation paper on the length of the period the UK regulators would have to consider a notification before a firm obtains a permission. Respondents largely recognised the need for a notification process and sought further details to reassure themselves that existing firms would not face a cliff-edge whilst waiting for authorisation.
- 3.4 The Government also sought views on any priority interests or other matters in relation to the market access arrangements for UK firms accessing the Gibraltar market. No specific proposals were received.
- 3.5 One respondent queried the emphasis on Gibraltar-based firms being required to obtain permission to carry on a corresponding activity in Gibraltar in order to seek access for a particular regulated activity in the UK.

Government response

Notification procedure

- 3.6 The Government intends to implement the proposals set out in the consultation paper in relation to the notification procedure and can offer more detailed information on the steps involved in this process. As part of the procedure, the GFSC will send a notification to the UK regulators

providing relevant information and signalling its consent. Subsequently the UK regulators will be able to consider the notification for a maximum period defined in the proposed legislation, though in practice consideration may take less time. Once the UK regulator confirms or the period for consideration of the notification has expired, the firms will obtain permission to operate in the UK.

- 3.7 The UK regulators will only be able to reject a notification under the following technical grounds:
- if the notification does not satisfy one or more of the requirements of information required by law, such as providing the name/address of the Gibraltar-based firm or the senior managers responsible for the carrying on of the activity for which access is being sought
 - if the Gibraltar-based firm does not have permission from the Gibraltar regulator to carry on the corresponding activity in Gibraltar
 - if the activity for which access is being sought ceases to be an approved activity
 - if a senior manager of the firm is prohibited from performing a function by a prohibition order in relation to a regulated activity
 - if the Gibraltar-based firm, or a related firm, has lost a relevant access right because, for example, it has had its permission to operate in the UK cancelled, and that firm poses a serious threat to the interests of consumers or the soundness, stability and resilience of the UK financial system
- 3.8 It is the Government's intention to ensure that existing firms operating in the UK can smoothly transition from the previous regime into the GAR. The proposed Financial Services Bill 2020 includes powers for HM Treasury to make transitional provisions to mitigate the risk of a cliff-edge. Subject to the conditions of alignment and cooperation being met, HM Treasury will exercise this power to ensure that all legal arrangements are in place in order to ensure that firms currently accessing the UK market and carrying on GAR-approved activities can continue to do so.
- 3.9 Gibraltar-based firms currently accessing the UK market under the existing arrangements and who intend to carry on GAR-approved activities will be required to send a notification to the GFSC to confirm their intention to continue operating in the UK market and no additional consent from the GFSC will be required.
- 3.10 These requirements will enable the UK regulators to update the public register of firms operating in the UK with up to date information. This is a necessary step to promote transparency in the market and ensure that consumers are protected.
- 3.11 The contents that a notification must contain are set out in the Financial Services Bill 2020. A notification seeking a variation of GAR permissions will also be subject to the consideration period by the UK regulators.

Approved and corresponding activities

- 3.12 Given the observations raised by some respondents on the linkage between Gibraltar corresponding activities and the UK's regulated activities it may be helpful to set out the terminology in more detail.
- 3.13 The GAR will be based on the concept of 'approved activities,' whereby Gibraltar-based firms can only carry on regulated activities approved by HM Treasury. A regulated activity in the UK is an activity specified in the UK's Financial Services and Markets Act 2000 (Regulated Activities) Order 2001. A person may only carry on a regulated activity in the UK if it is an exempt person or is an authorised person, as set in Section 19 of FSMA. Under the GAR, HM Treasury will be able by regulations to approve a regulated activity, thus opening up UK market access to Gibraltar-based firms that satisfy the relevant requirements.
- 3.14 When approving a regulated activity, HM Treasury will also have to specify the corresponding activity for which the firms will need to have authorisation from the GFSC. The Government believes it is prudent to restrict the carrying on of regulated activities to corresponding activities so that HM Treasury can satisfy itself that the firm is being monitored by its home regulator for the same activity. A firm that obtains a permission to carry on an approved activity in the UK will be an 'authorised person' under FSMA.
- 3.15 The GAR, including the regulations made by HM Treasury to approve regulated activities and specify corresponding activities, will replace the existing regime under the Financial Services and Markets Act 2000 (Gibraltar) Order (SI 2001/3084) ("the Gibraltar Order"). The Gibraltar Order specifies the categories of Gibraltar-based firms (e.g. insurers) that are treated as EEA firms with passporting rights into the UK.
- 3.16 However, there are a small number of regimes in UK law that regulate the treatment of Gibraltar-based persons operating in the UK markets for financial services which sit out of the scope of the Gibraltar Order. These include, for example, the Electronic Money Regulations 2011. The Government will seek powers as part of the Financial Services Bill 2020 to make necessary tailored arrangements for these regimes to preserve existing economic cross-border activity of both Gibraltar-based firms in the UK market and UK-based firms in Gibraltar market. The exercise of these powers will be subject to a requirement similar to the one set out for the rest of the GAR that the preservation of the economic activities which sit outside of the scope of the Regulated Activities Order is compatible with certain objectives, such as financial stability and consumer protection.
- 3.17 Where possible, the Government will bring these activities under the main mechanisms of the GAR, including the conditions of alignment and cooperation, and the requirement of the two-yearly reporting to Parliament.

Market access arrangements for UK firms

- 3.18 The Government is also introducing legislation to Parliament as part of the Financial Services Bill 2020 in respect of UK firms wishing to operate in Gibraltar and is able to set out further details on the pre-requirements UK-

based firms must meet in order to exercise their rights to operate in Gibraltar.

- 3.19 As market access is a sovereign matter, it will be up to the Government of Gibraltar to legislate for market access arrangements for UK-based firms, and it will ultimately decide which regulated activities UK-based firms will be able to carry on in Gibraltar. The Financial Services Bill 2020 will facilitate access for UK-based firms to the Gibraltar market by establishing an outbound notification procedure.
- 3.20 As part of this procedure the UK-based firm must give the appropriate UK regulator notice of its intentions and the UK regulator will notify its consent to the Gibraltar regulator.
- 3.21 The appropriate UK regulator may refuse to notify its consent to the Gibraltar regulator if the notice provided by the UK-based firm does not meet relevant information requirements, or if it appears to the UK regulators that it is desirable to refuse in order to advance one or more of their statutory objectives. UK-based firms will have the right to refer a decision taken by the UK regulators in respect of this permission to the Upper Tribunal.

Supplementary protections under the GAR

Consultation proposals and summary of responses

- 3.22 In the consultation paper the Government set out the existing arrangements which apply to Gibraltar-based firms at present in respect of the Financial Ombudsman Service (FOS) and FSCS, and sought views in relation to the future participation of Gibraltar-based firms in the UK's FSCS.
- 3.23 The Government also proposed to bring all Gibraltar firms into the compulsory jurisdiction of the FOS once the GAR has commenced, including by transferring Gibraltar-based firms under the voluntary jurisdiction.
- 3.24 Respondents accepted the extension of current FSCS arrangements into the GAR in respect of insurers and the existing exclusion from the home finance and debt management sub-schemes. This was, to an extent, reflective of the fact that most respondents operate in the insurance sector in the UK and Gibraltar. One respondent suggested that the existing Gibraltarian compensation schemes could be absorbed into the FSCS. Another UK-based respondent expressed dissatisfaction in relation to the increases to the FSCS levy due to the past performance of Gibraltar-based firms.
- 3.25 No respondents objected to the principle that UK-based consumers of Gibraltar-based firms should be adequately protected, although some respondents requested that the FSCS levy applicable to Gibraltar-based firms in the GAR should be proportionate to the business carried out by Gibraltar-based firms.
- 3.26 In relation to FOS, some respondents supported the proposal if there was no alternative home ombudsman to take on those responsibilities. By contrast, one respondent opposed the extension of the FOS's compulsory jurisdiction

arguing for Gibraltar-based firms to remain in the voluntary jurisdiction which primarily covers retail financial products.

Government response

- 3.27 The Government believes that it is of utmost importance that we provide the right levels of protections for UK customers and policyholders of Gibraltarian products through the FOS and FSCS or their Gibraltarian equivalents, and that the level of protection afforded is clearly communicated to UK customers. Following consultation, it is the Government's intention that under the GAR, most UK consumers purchasing their products from Gibraltarian providers should receive a similar level of compensation as those purchasing their products from UK-based firms, whether through the FSCS or through the equivalent Gibraltarian schemes.
- 3.28 As part of the Financial Services Bill 2020, HM Treasury will request a power from Parliament to introduce new secondary legislation that will deliver on the consumer protection aims set out in this response. Similarly, the FSCS levy is a matter for the UK Regulators to decide depending on the circumstances of the market and the failures that occur. Annually, the PRA and FCA publish a joint consultation providing for the FSCS' management expenses.
- 3.29 The proposals set out in the consultation paper in respect of FOS coverage will be implemented to offer adequate protection to UK consumers. It should be clarified that this means that only inbound Gibraltar-based firms operating in UK will be brought under the FOS's compulsory jurisdiction, not all Gibraltar-based firms. At present there is no complaints-handling body for financial services firms in Gibraltar, so it is imperative that UK consumers can seek redress from the UK's FOS. Firms already under the voluntary jurisdiction will transfer to the compulsory jurisdiction of the FOS with no loss of eligibility for their consumers in respect of actions occurring before they entered the compulsory jurisdiction.

Changes to market access

Consultation proposals and summary of responses

- 3.30 This section sets out the process that HM Treasury will follow to issue a determination on whether alignment and cooperation have been maintained, and accordingly retain the status quo or adjust the legal position to reflect the findings. These arrangements have been discussed further in an earlier section.
- 3.31 The Government also noted that Gibraltar-based firms in the GAR will remain subject to the laws and rules of Gibraltar and will be supervised by the GFSC and sought views on the powers of UK regulators in relation to the Gibraltar-based firms accessing the UK market under the GAR.
- 3.32 Respondents expressed concerns about dual regulation on firms and requested further details on how future balance of views between the GFSC and the UK regulators would be handled. Respondents sought further information on the nature of the powers that the Government envisaged

and expressed reservations towards introducing the ability for the UK regulators to take direct action against individual firms.

Government response

- 3.33 The Government recognises that the UK and Gibraltar regulators have a significant level of expertise in relation to the firms that they supervise and is committed to avoiding burdensome regulation on firms.
- 3.34 The Government will be legislating for necessary intervention powers for the UK regulators, building on the changes introduced in the temporary market access arrangements for Gibraltar in order to ensure the necessary levels of protection for financial stability and consumer protection reasons. The UK regulators will only be able to use those powers on their own initiative if certain limited conditions are met, demonstrating the need for swift action.
- 3.35 The intervention powers will be available in the four following cases:
- where it is desirable to advance the objectives of the UK regulators; the GFSC is aware, or ought reasonably to be aware, of the reasons why the UK regulators consider that to be the case, and the GFSC has had time to take measures or indicate what measures (if any) it is likely to adopt in order to deal with the situation
 - where it is desirable to advance the objectives of the regulators and a delay could be materially detrimental to UK consumers and/or financial system
 - where a Gibraltar-based firm is contravening or has contravened a requirement imposed on the firm under the GAR in respect of its activities in the UK, or a rule made by the regulator, and the contravention is not minor
 - where it is desirable to advance the PRA's objectives and a Gibraltarian firm poses a risk to the soundness, stability and resilience of the UK financial system.
- 3.36 In addition to this, the Government's proposed legislation requires cooperation between the UK regulators, the manager of the FSCS, and the GFSC. These entities will need to agree memoranda of understanding and other cooperation arrangements to set out the procedure and approach to resolving supervisory concerns under the GAR.
- 3.37 The Government will also work with the UK regulators, the Government of Gibraltar and the Gibraltarian regulator to define the split of rule-making responsibilities between the regulators in the two jurisdictions, taking into account the arrangements that existed before the end of the Transition Period.

Wind-down and contractual continuity arrangements

Consultation proposals and summary of responses

- 3.38 In the consultation paper, the Government proposed introducing wind-down arrangements in case of withdrawal of market access for one or more activities under the GAR. These arrangements were devised to ensure that Gibraltar-based firms can continue to undertake an activity in the UK for a

temporary period of time. Gibraltar-based firms would not need to apply to be covered by this mechanism and they would be able to use this time to apply for authorisation from the UK regulators to operate in the UK market or exit the market in an orderly fashion.

- 3.39 Respondents sought further details in relation to the technical details of the wind-down arrangements.

Government response

- 3.40 Under the GAR, HM Treasury may withdraw market access for one or more specific activities. Separately, the UK regulators may cancel a particular firm's permission to carry on an approved activity in the UK in the aforementioned narrowly defined circumstances. A right to refer disputed matters to the Upper Tribunal will be available for Gibraltar-based firms that have their access rights cancelled by the UK regulators. The Gibraltar regulator could also cancel a firm's permission to carry on a corresponding activity in Gibraltar.
- 3.41 The option of withdrawal of market access is a tool of last resort. In practice the Government believes it is more likely that UK authorities and Gibraltar authorities will engage to resolve any emerging issues bilaterally.
- 3.42 Were HM Treasury to withdraw market access for one or more specific activities, the Financial Services Bill 2020 is intended to confer powers on HM Treasury to specify the duration of the temporary wind-down arrangements. The Government believes that a 'one-size-fits-all' approach would not be appropriate in this situation. The timescales will depend on a number of considerations, including the particular sector, the number and size of the firms affected. The Government wishes to retain the flexibility to specify the duration of the winding-down arrangements to ensure that each firm has sufficient time to take alternative steps during this time.
- 3.43 In the event of a withdrawal of Gibraltar Authorisation for a specified regulated activity or activities, this will not prevent the Government of Gibraltar and the GFSC from seeking Gibraltar Authorisation for the same activity or activities in the future.

Annex A

Consultation Respondents

Association of British Insurers (ABI)

A UK-based insurer

A Gibraltar-based insurer

Gibraltar Insurance Association (GIA)

Guernsey Investment and Funds Association (GIFA)

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