



# Financial Services Act 1986

## 1986 CHAPTER 60

### PART I

#### REGULATION OF INVESTMENT BUSINESS

#### CHAPTER XIV

#### PREVENTION OF RESTRICTIVE PRACTICES

##### *Examination of rules and practices*

#### **119 Recognised self-regulating organisations, investment exchanges and clearing houses**

- (1) The Secretary of State shall not make a recognition order in respect of a self-regulating organisation, investment exchange or clearing house unless he is satisfied that—
  - (a) the rules and any guidance of which copies are furnished with the application for the order; and
  - (b) in the case of an investment exchange, any arrangements of which particulars are furnished with the application,do not have, and are not intended or likely to have, to any significant extent the effect of restricting, distorting or preventing competition or, if they have or are intended or likely to have that effect to any significant extent, that the effect is not greater than is necessary for the protection of investors.
- (2) The powers conferred by subsection (3) below shall be exercisable by the Secretary of State if at any time it appears to him that—
  - (a) any rules made or guidance issued by a recognised self regulating organisation, investment exchange or clearing house or any clearing arrangements made by a recognised clearing house;
  - (b) any practices of any such organisation, exchange or clearing house; or

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- (c) any practices of persons who are members of, or otherwise subject to the rules made by, any such organisation, exchange or clearing house, have, or are intended or likely to have, to a significant extent the effect of restricting, distorting or preventing competition and that that effect is greater than is necessary for the protection of investors.
- (3) The powers exercisable under this subsection are—
- (a) to revoke the recognition order of the organisation, exchange or clearing house;
  - (b) to direct it to take specified steps for the purpose of securing that the rules, guidance, arrangements or practices in question do not have the effect mentioned in subsection (2) above;
  - (c) to make alterations in the rules for that purpose ;
- and subsections (2) to (5), (7) and (9) of section 11 above shall have effect in relation to the revocation of a recognition order under this subsection as they have effect in relation to the revocation of such an order under subsection (1) of that section.
- (4) Subsection (3)(c) above does not apply to an overseas investment exchange or overseas clearing house.
- (5) The practices referred to in paragraph (b) of subsection (2) above are practices of the organisation, exchange or clearing house in its capacity as such, being, in the case of a clearing house, practices in respect of its clearing arrangements; and the practices referred to in paragraph (c) of that subsection are practices in relation to business in respect of which the persons in question are subject to the rules of the organisation, exchange or clearing house and which are required or contemplated by its rules or guidance or otherwise attributable to its conduct in its capacity as such.

## **120 Modification of s. 119 where recognition function is transferred**

- (1) This section applies instead of section 119 above where the function of making or revoking a recognition order in respect of a self-regulating organisation, investment exchange or clearing house is exercisable by a designated agency.
- (2) The designated agency—
- (a) shall send to the Secretary of State a copy of the rules and of any guidance or arrangements of which copies or particulars are furnished with any application made to the agency for a recognition order together with any other information supplied with or in connection with the application; and
  - (b) shall not make the recognition order without the leave of the Secretary of State ;
- and he shall not give leave in any case in which he would (apart from the delegation order) have been precluded by section 119(1) above from making the recognition order.
- (3) A designated agency shall send the Secretary of State a copy of any notice received by it under section 14(6) or 41(5) or (6) above.
- (4) If at any time it appears to the Secretary of State in the case of a recognised self-regulating organisation, recognised investment exchange or recognised clearing house that there are circumstances such that (apart from the delegation order) he would have been able to exercise any of the powers conferred by subsection (3) of section 119 above he may, notwithstanding the delegation order, himself exercise the power

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conferred by paragraph (a) of that subsection or direct the designated agency to exercise the power conferred by paragraph (b) or (c) of that subsection in such manner as he may specify.

## **121 Designated agencies**

- (1) The Secretary of State shall not make a delegation order transferring any function to a designated agency unless he is satisfied that any rules, regulations and guidance of which copies are furnished to him under section 114(9) or (10) above do not have, and are not intended or likely to have, to any significant extent the effect of restricting, distorting or preventing competition or, if they have or are intended or likely to have that effect to any significant extent, that the effect is not greater than is necessary for the protection of investors.
- (2) The powers conferred by subsection (3) below shall be exercisable by the Secretary of State if at any time it appears to him that—
  - (a) any rules or regulations made by a designated agency in the exercise of functions transferred to it by a delegation order or any guidance issued by a designated agency;
  - (b) any practices of a designated agency; or
  - (c) any practices of persons who are subject to rules or regulations made by it in the exercise of those functions,have, or are intended or are likely to have, to any significant extent the effect of restricting, distorting or preventing competition and that that effect is greater than is necessary for the protection of investors.
- (3) The powers exercisable under this subsection are—
  - (a) to make an order in respect of the agency under section 115(2) above as if the circumstances were such as are there mentioned; or
  - (b) to direct the agency to take specified steps for the purpose of securing that the rules, regulations, guidance or practices in question do not have the effect mentioned in subsection (2) above.
- (4) The practices referred to in paragraph (b) of subsection (2) above are practices of the designated agency in its capacity as such; and the practices referred to in paragraph (c) of that subsection are practices in relation to business in respect of which the persons in question are subject to any such rules or regulations as are mentioned in paragraph (a) of that subsection and which are required or contemplated by those rules or regulations or by any such guidance as is there mentioned or are otherwise attributable to the conduct of the agency in its capacity as such.

*Consultation with Director General of Fair Trading*

## **122 Reports by Director General of Fair Trading**

- (1) The Secretary of State shall before deciding—
  - (a) whether to refuse to make, or to refuse leave for the making of, a recognition order in pursuance of section 119(1) or 120(2) above; or
  - (b) whether he is precluded by section 121(1) above from making a delegation order,

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send to the Director General of Fair Trading (in this Chapter referred to as " the Director ") a copy of the rules and regulations and of any guidance or arrangements which the Secretary of State is required to consider in making that decision together with such other information as the Secretary of State considers will assist the Director in discharging his functions under subsection (2) below.

- (2) The Director shall report to the Secretary of State whether. In his opinion, the rules, regulations, guidance or arrangements of which copies are sent to him under subsection (1) above have, or are intended or likely to have, to any significant extent the effect of restricting, distorting, or preventing competition and, if so, what that effect is likely to be ; and in making any such decision as is mentioned in that subsection the Secretary of State shall have regard to the Director's report.
- (3) The Secretary of State shall send the Director copies of any notice received by him under section 14(6), 41(5) or (6) or 120(3) above or under paragraph 4 of Schedule 9 to this Act together with such other information as the Secretary of State considers will assist the Director in discharging his functions under subsections (4) and (5) below.
- (4) The Director shall keep under review—
  - (a) the rules, guidance, arrangements and regulations mentioned in section 119(2) and 121(2) above; and
  - (b) the matters specified in the notices of which copies are sent to him under subsection (3) above ;

and if at any time he is of the opinion that any such rules, guidance, arrangements, regulations or matters, or any such rules, guidance, arrangements or regulations taken together with any such matters, have, or are intended or likely to have, to any significant extent the effect mentioned in subsection (2) above, he shall make a report to the Secretary of State stating his opinion and what that effect is or is likely to be.
- (5) The Director may report to the Secretary of State his opinion that any such matter as is mentioned in subsection (4)(b) above does not in his opinion have, and is not intended or likely to have, to any significant extent the effect mentioned in subsection (2) above.
- (6) The Director may from time to time consider whether any such practices as are mentioned in section 119(2) or 121(2) above have, or are intended or likely to have, to any significant extent the effect mentioned in subsection (2) above and, if so, what that effect is or is likely to be; and if he is of that opinion he shall make a report to the Secretary of State stating his opinion and what the effect is or is likely to be.
- (7) The Secretary of State shall not exercise his powers under section 119(3), 120(4) or 121(3) above except after receiving and considering a report from the Director under subsection (4) or (6) above.
- (8) The Director may, if he thinks fit, publish any report made by him under this section but shall exclude from a published report, so far as practicable, any matter which relates to the affairs of a particular person (other than the self-regulating organisation, investment exchange, clearing house or designated agency concerned) the publication of which would or might in his opinion seriously and prejudicially affect the interests of that person.

## **123 Investigations by Director General of Fair Trading**

- (1) For the purpose of investigating any matter with a view to its consideration under section 122 above the Director may by a notice in writing—

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- (a) require any person to produce, at a time and place specified in the notice, to the Director or to any person appointed by him for the purpose, any documents which are specified or described in the notice and which are documents in his custody or under his control and relating to any matter relevant to the investigation ; or
  - (b) require any person carrying on any business to furnish to the Director such information as may be specified or described in the notice, and specify the time within which, and the manner and form in which, any such information is to be furnished.
- (2) A person shall not under this section be required to produce any document or disclose any information which he would be entitled to refuse to produce or disclose on grounds of legal professional privilege in proceedings in the High Court or on grounds of confidentiality as between client and professional legal adviser in proceedings in the Court of Session.
- (3) Subsections (5) to (8) of section 85 of the Fair Trading Act 1973 (enforcement provisions) shall apply in relation to a notice under this section as they apply in relation to a notice under subsection (1) of that section.

*Consequential exemptions from competition law*

**124 The Fair Trading Act 1973**

- (1) For the purpose of determining whether a monopoly situation within the meaning of the Fair Trading Act 1973 exists by reason of the circumstances mentioned in section 7(1)(c) of that Act, no account shall be taken of—
- (a) the rules made or guidance issued by a recognised self regulating organisation, recognised investment exchange or recognised clearing house or any conduct constituting such a practice as is mentioned in section 119(2) above;
  - (b) any clearing arrangements or any conduct required or contemplated by any such arrangements; or
  - (c) the rules or regulations made or guidance issued by a designated agency in the exercise of functions transferred to it by a delegation order or any conduct constituting such a practice as is mentioned in section 121(2) above.
- (2) Where a recognition order is revoked there shall be disregarded for the purpose mentioned in subsection (1) above any such conduct as is mentioned in that subsection which occurred while the order was in force.
- (3) Where on a monopoly reference under section 50 or 51 of the said Act of 1973 falling within section 49 of that Act the Monopolies and Mergers Commission find that a monopoly situation within the meaning of that Act exists and—
- (a) that the person (or, if more than one, any of the persons) in whose favour it exists is subject to the rules of a recognised self-regulating organisation, recognised investment exchange or recognised clearing house or to the rules or regulations made by a designated agency in the exercise of functions transferred to it by a delegation order; or
  - (b) that any such person's conduct in carrying on any business to which those rules or regulations relate is the subject of guidance issued by such an organisation, exchange, clearing house or agency; or
  - (c) that any such person is a party to any clearing arrangements ; or

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(d) that the person (or, if more than one, any of the persons) in whose favour the monopoly situation exists is such an organisation, exchange or clearing house as is mentioned in paragraph (a) above or a designated agency, the Commission, in making their report on that reference, shall exclude from their consideration the question whether the rules, regulations, guidance or clearing arrangements or any acts or omissions of such an organisation, exchange, clearing house or agency as is mentioned in paragraph (d) above in its capacity as such operate, or may be expected to operate, against the public interest; and section 54(3) of that Act shall have effect subject to the provisions of this subsection.

## **125 The Restrictive Trade Practices Act 1976**

- (1) The Restrictive Trade Practices Act 1976 shall not apply to any agreement for the constitution of a recognised self-regulating organisation, recognised investment exchange or recognised clearing house, including any term deemed to be contained in it by virtue of section 8(2) or 16(3) of that Act.
- (2) The said Act of 1976 shall not apply to any agreement the parties to which consist of or include—
  - (a) any such organisation, exchange or clearing house as is mentioned in subsection (1) above ; or
  - (b) a person who is subject to the rules of any such organisation, exchange or clearing house or to the rules or regulations made by a designated agency in the exercise of functions transferred to it by a delegation order, by reason of any term the inclusion of which in the agreement is required or contemplated by the rules, regulations or guidance of that organisation, exchange, clearing house or agency.
- (3) The said Act of 1976 shall not apply to any clearing arrangements or to any agreement between a recognised investment exchange and a recognised clearing house by reason of any term the inclusion of which in the agreement is required or contemplated by any clearing arrangements.
- (4) Where the recognition order in respect of a self-regulating organisation, investment exchange or clearing house is revoked the foregoing provisions shall have effect as if the organisation, exchange or clearing house had continued to be recognised until the end of the period of six months beginning with the day on which the revocation takes effect.
- (5) Where an agreement ceases by virtue of this section to be subject to registration—
  - (a) the Director shall remove from the register maintained by him under the said Act of 1976 any particulars which are entered or filed in that register in respect of the agreement; and
  - (b) any proceedings in respect of the agreement which are pending before the Restrictive Practices Court shall be discontinued.
- (6) Where an agreement which has been exempt from registration by virtue of this section ceases to be exempt in consequence of the revocation of a recognition order, the time within which particulars of the agreement are to be furnished in accordance with section 24 of and Schedule 2 to the said Act of 1976 shall be the period of one month beginning with the day on which the agreement ceased to be exempt from registration.

- (7) Where in the case of an agreement registered under the said Act of 1976 a term ceases to fall within subsection (2) or (3) above in consequence of the revocation of a recognition order and particulars of that term have not previously been furnished to the Director under section 24 of that Act, those particulars shall be furnished to him within the period of one month beginning with the day on which the term ceased to fall within that subsection.
- (8) The Restrictive Trade Practices (Stock Exchange) Act 1984 shall cease to have effect.

## **126 The Competition Act 1980**

- (1) No course of conduct constituting any such practice as is mentioned in section 119(2) or 121(2) above shall constitute an anti-competitive practice for the purposes of the Competition Act 1980.
- (2) Where a recognition order or delegation order is revoked, there shall not be treated as an anti-competitive practice for the purposes of that Act any such course of conduct as is mentioned in subsection (1) above which occurred while the order was in force.

### *Recognised professional bodies*

## **127 Modification of Restrictive Trade Practices Act 1976 in relation to recognised professional bodies**

- (1) This section applies to—
- (a) any agreement for the constitution of a recognised professional body, including any term deemed to be contained in it by virtue of section 16(3) of the Restrictive Trade Practices Act 1976 ; and
  - (b) any other agreement—
    - (i) the parties to which consist of or include such a body, a person certified by such a body or a member of such a body; and
    - (ii) to which that Act applies by virtue of any term the inclusion of which in the agreement is required or contemplated by rules or guidance of that body relating to the carrying on of investment business by persons certified by it.
- (2) If it appears to the Secretary of State that the restrictions in an agreement to which this section applies—
- (a) do not have, and are not intended or likely to have, to any significant extent the effect of restricting, distorting or preventing competition ; or
  - (b) if all or any of them have, or are intended or likely to have, that effect to any significant extent, that the effect is not greater than is necessary for the protection of investors,
- he may give a direction to the Director requiring him not to make an application to the Restrictive Practices Court under Part I of the said Act of 1976 in respect of the agreement.
- (3) If it appears to the Secretary of State that one or more (but not all) of the restrictions in an agreement to which this section applies—
- (a) do not have, and are not intended or likely to have, to any significant extent the effect mentioned in subsection (2) above; or

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- (b) if they have, or are intended or likely to have, that effect to any significant extent that the effect is not greater than is necessary for the protection of investors,

he may make a declaration to that effect and give notice of it to the Director and the Restrictive Practices Court.

- (4) The Restrictive Practices Court shall not in any proceedings begun by an application made after notice has been given to it of a declaration under this section make any finding or exercise any power under Part I of the said Act of 1976 in relation to a restriction in respect of which the declaration has effect.
- (5) The Director shall not make any application to the Restrictive Practices Court under Part I of the said Act of 1976 in respect of any agreement to which this section applies unless—
- (a) he has notified the Secretary of State of his intention to do so; and
  - (b) the Secretary of State has either notified him that he does not intend to give a direction or make a declaration under this section or has given him notice of a declaration in respect of it;

and where the Director proposes to make any such application he shall furnish the Secretary of State with particulars of the agreement and the restrictions by virtue of which the said Act of 1976 applies to it and such other information as he considers will assist the Secretary of State in deciding whether to exercise his powers under this section or as the Secretary of State may request.

- (6) The Secretary of State may—
- (a) revoke a direction or declaration under this section;
  - (b) vary any such declaration; or
  - (c) give a direction or make a declaration notwithstanding a previous notification to the Director that he did not intend to give a direction or make a declaration, if he is satisfied that there has been a material change of circumstances such that the grounds for the direction or declaration have ceased to exist, that there are grounds for a different declaration or that there are grounds for giving a direction or making a declaration, as the case may be.
- (7) The Secretary of State shall give notice to the Director of the revocation of a direction and to the Director and the Restrictive Practices Court of the revocation or variation of a declaration ; and no such variation shall have effect so as to restrict the powers of the Court in any proceedings begun by an application already made by the Director.
- (8) A direction or declaration under this section shall cease to have effect if the agreement in question ceases to be one to which this section applies.
- (9) This section applies to information provisions as it applies to restrictions.

### *Supplemental*

## **128 Supplementary provisions**

- (1) Before the Secretary of State exercises a power under section 119(3) (b) or (c) above, his power to refuse leave under section 120(2) above or his power to give a direction under section 120(4) above in respect of a self-regulating organisation, investment



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- exchange or clearing house, or his power under section 121(3)(b) above in respect of a designated agency, he shall—
- (a) give written notice of his intention to do so to the organisation, exchange, clearing house or agency and take such steps (whether by publication or otherwise) as he thinks appropriate for bringing the notice to the attention of any other person who in his opinion is likely to be affected by the exercise of the power ; and
  - (b) have regard to any representation made within such time as he considers reasonable by the organisation, exchange, clearing house or agency or by any such other person.
- (2) A notice under subsection (1) above shall give particulars of the manner in which the Secretary of State proposes to exercise the power in question and state the reasons for which he proposes to act; and the statement of reasons may include matters contained in any report received by him under section 122 above.
  - (3) Any direction given under this Chapter shall, on the application of the person by whom it was given, be enforceable by mandamus or, in Scotland, by an order for specific performance under section 91 of the Court of Session Act 1868.
  - (4) The fact that any rules or regulations made by a recognised self-regulating organisation, investment exchange or clearing house or by a designated agency have been altered by or pursuant to a direction given by the Secretary of State under this Chapter shall not preclude their subsequent alteration or revocation by that organisation, exchange, clearing house or agency.
  - (5) In determining under this Chapter whether any guidance has, or is likely to have, any particular effect the Secretary of State and the Director may assume that the persons to whom it is addressed will act in conformity with it.