
STATUTORY INSTRUMENTS

2001 No. 3592

The Financial Services and Markets Act 2000 (Transitional Provisions) (Partly Completed Procedures) Order 2001

PART IX

APPEALS

CHAPTER I

REFERENCES TO THE FINANCIAL SERVICES TRIBUNAL

Interpretation

102. In this Chapter—

- (a) references to section 97 are references to section 97 of the Financial Services Act (as it has effect by virtue of the 2BCD Regulations and ISD Regulations);
- (b) “the Financial Services Tribunal” means the Financial Services Tribunal established under Chapter IX of Part I of the Financial Services Act.

Request for reference: further consideration by the Authority

103.—(1) This article applies where before commencement—

- (a) a person has required the Authority under section 97(1)(a) to refer a matter to the Financial Services Tribunal;
- (b) the period of 28 days referred in section 97(1) has not expired, and
- (c) the Authority has not served on the person a written notice under section 97(2) or (3).

(2) Where this article applies and the notice to which the request for a reference relates was served under section 29, 34, 59(4) or 60(2) of the Financial Services Act (or is treated for the purposes of section 97(1) as having been so served⁽¹⁾), the Authority may, before the expiry of the period mentioned in section 97(1), notify the person (and any person on whom a copy of the notice had been served) that it has decided—

- (a) to grant the application (where the notice proposed the refusal of an application);
- (b) not to take action in relation to the matter covered by the notice (where the notice proposed the withdrawal or suspension of authorisation or the giving of a direction or publishing of a statement); or
- (c) to withdraw its objection (where the notice was a notice of objection to the acquisition of control).

(1) The reference in section 97 to a notice served under section 29 of the Financial Services Act includes a reference to a notice served under Schedule 4, paragraph 1 to the 2BCD Regulations or to the ISD Regulations (imposing a prohibition under regulation 15) (see Schedule 4 paragraph 2 of the ISD Regulations and the 2BCD Regulations); the reference in section 97 to a notice served under section 59(4) includes a reference to a notice of objection served by the Authority under regulation 42 of the ISD Regulations (see regulation 42(10) of the ISD Regulations).

(3) Where this article applies, the notice to which the request for a reference relates was served under section 70 of the Financial Services Act and the matter was the refusal of an application for the rescission or variation of a prohibition or requirement, the Authority may, before the expiry of the period mentioned in section 97(1), notify the person (and any person on whom a copy of the notice had been served) that it has decided to grant the application.

(4) Where this article applies, the notice to which the request for a reference relates was served under section 70 of the Financial Services Act and the matter was the imposition or variation of a prohibition or requirement which has not yet taken effect, the Authority may, before the expiry of the period mentioned in section 97(1), notify the person (and any person on whom a copy of the notice had been served) that it has decided not to take action in relation to the matter covered by the notice.

(5) Where this article applies and the request for a reference relates to a decision to refuse to give a notice under paragraph 3 or 7(1) of Schedule 6 to the ISD Regulations, the Authority may, before the expiry of the period mentioned in section 97(1), notify the person that it has decided to give (as the case may be)—

- (a) a consent notice under paragraph 19 of Schedule 3; or
- (b) a notice under regulation 11(5)(a) of the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001(2).

(6) Where, before commencement, a substituted notice complying with section 97(5) was served by the Authority pursuant to section 97(4) this article has effect in relation to that notice as if the period mentioned in paragraph (1)(b) was the period of 28 days after the date of service of the original notice or 14 days after the date of service of the substituted notice, whichever ends later.

Effect of notification pursuant to article 103

104.—(1) Where the Authority notifies the person as described in article 103(2), (3) or (4) the Authority must not refer the matter to the Financial Services Tribunal.

(2) Where the Authority notifies the person pursuant to article 103(2)(a) or (3) that it has decided to grant an application, it must grant the application as it has effect after commencement by virtue of article 3 or 4 of this Order.

(3) Where the Authority notifies the person pursuant to article 103(5) it must (as the case may be)—

- (a) give the consent notice and otherwise comply with the relevant procedure set out in paragraph 19 of Schedule 3; or
- (b) comply with regulation 11(5) of the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001.

Transitional reference to Financial Services Tribunal

105.—(1) Where the Authority does not notify the person as described in article 103(2), (3), (4) or (5), the Authority must refer the matter to the Financial Services Tribunal.

(2) Notwithstanding the repeal of the Financial Services Act, sections 96, 97(6), 99, 100 and 101 of Schedule 6 to that Act continue to have effect in relation to transitional references with the modifications set out in article 108.

(3) A “transitional reference” is—

- (a) a reference—
 - (i) which was made by the Authority before commencement to the Financial Services Tribunal pursuant to section 97(1);

- (ii) which was not withdrawn before commencement; and
 - (iii) on which the tribunal has not reported before commencement; or
- (b) a reference made by the Authority to the Financial Services Tribunal under paragraph (1).

Task of the Financial Services Tribunal on transitional reference

106.—(1) On a transitional reference made at the request of a person falling within section 97(1)(a), the Financial Services Tribunal must—

- (a) investigate the case and report on it to the Authority,
- (b) state in that report its recommendations as to what would be the appropriate action (if any) for the Authority to take in the exercise of the powers conferred on the Authority by or under the Act and give the reasons for those recommendations.

(2) The Authority must exercise its powers in the manner most appropriate to give effect to the Financial Services Tribunal’s recommendations.

(3) The Financial Services Tribunal must send a copy of its report to the person at whose request the case was referred to it.

Appropriate decisions on determination of transitional reference

107.—(1) Where the transitional reference made at the request of a person falling within section 97(1)(a) concerned a notice served under section 29, 34, or 70 of the Financial Services Act, the Authority may not exercise its powers under section 205 or 206 of the Act in giving effect to the recommendations of the Financial Services Tribunal.

(2) Where the transitional reference made at the request of a person falling within section 97(1)(a) concerned a notice served under section 59(4) or 60 of the Financial Services Act, the Authority may not exercise its powers under Part IV or Part XIII of the Act in giving effect to the recommendations of the Financial Services Tribunal.

Modification of section 100 of Financial Services Act in relation to transitional reference

108.—(1) Section 100 of the Financial Services Act has effect in relation to a transitional reference as if the following were substituted for subsection (2)—

“(2) The Authority may at any such time withdraw any reference made at the request of a person on whom a notice was served under any of the provisions mentioned in subsection (1)(a) of section 97 above if it decides—

- (a) to grant the application (where the notice proposed the refusal of an application);
- (b) not to take action in relation to the matter covered by the notice (where the notice proposed the withdrawal or suspension of authorisation or the giving of a direction or publishing of a statement);
- (c) to withdraw its objection (where the notice was a notice of objection to an acquisition of control);
- (d) to give a consent notice (where the Authority had refused consent under paragraph 3 or 7 of Schedule 6 to the ISD Regulations);
- (e) to consent to a change of details (where the Authority had refused consent pursuant to regulation 11(6) of the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001),

and notifies the person who requested the reference of that decision.

(2A) But a reference may not be withdrawn under subsection (2) unless the decision to withdraw it is made and the notice is given before any prohibition, requirement or variation has taken effect.”

(2) Section 100 of the Financial Services Act has effect in relation to a transitional reference as if the following were substituted for subsection (5)—

“(5) Where a person on whom a notice was served under section 29, 34 or 60 above withdraws a case from the Tribunal, the Financial Services and Markets Act 2000 (Transitional Provisions) (Partly Completed Procedures) Order 2001 applies to him as if the period for such a reference had expired before commencement (within the meaning of that Order) without such a reference being required and the Authority had given notice (as the case may be)—

- (a) under section 29(5)(a);
- (b) under section 34(5)(a);
- (c) under section 60(5) that the statement is to be published;
- (d) under paragraph 1(5)(a) of Schedule 4 to the Banking Coordination (Second Council Directive) Regulations 1992; or
- (e) under paragraph 1(5)(a) of Schedule 4 to the Investment Services Regulations 1995.”

Test to be applied by the Financial Services Tribunal

109.—(1) Where in any transitional reference the issues arising for consideration included the issue whether a person authorised under the Financial Services Act was a fit and proper person to carry on investment business (within the meaning of that Act), the Financial Services Tribunal must consider instead whether that person is failing or is likely to fail to satisfy the threshold conditions (within the meaning of section 41 of the Act).

(2) Where in any transitional reference the issues arising for consideration included the issue whether a person was a fit and proper person to be employed in connection with investment business (within the meaning of the Financial Services Act) or investment business of a particular kind, the Financial Services Tribunal must consider instead whether that person is a fit and proper person to perform the functions in relation to a regulated activity corresponding to that investment business which he was performing before commencement.

(3) Where in any transitional reference the issues arising for consideration included the issue whether a person was a fit and proper person to be a controller of any description to which regulation 41 of the ISD Regulations applies, the Financial Services Tribunal must consider instead—

- (a) in a case where, after commencement, the person would require the approval of the Authority under section 59, the question whether that person is a fit and proper person to perform the functions in relation to a regulated activity corresponding to the investment business which he was performing before commencement;
- (b) in a case where, after commencement, the person would have control over a UK authorised person (within the meaning of Part XII of the Act), the question whether the person meets the approval requirements within the meaning of section 186.

Decisions taken by the Authority giving effect to Financial Services Tribunal recommendations

110.—(1) Where the Authority gives effect to a recommendation of the Financial Services Tribunal by exercising its power under section 45, sections 53, 54 and 55 do not apply to the exercise of that power.

(2) Where the Authority gives effect to a recommendation of the Financial Services Tribunal by exercising its power under section 52(6) or (7), section 52(9) does not apply to the exercise of that power.

(3) Where the Authority gives effect to a recommendation of the Financial Services Tribunal by exercising its power under section 56, sections 57 and 58 do not apply to the exercise of that power.

(4) Where the Authority gives effect to a recommendation of the Financial Services Tribunal by exercising its power under section 186(1), 185(1) or 187, section 183(3), 185(3) or 188 (as the case may be) does not apply to the exercise of that power.

(5) Where the Authority gives effect to a recommendation of the Financial Services Tribunal by exercising its power under section 196 or 200(1), section 197 and section 200(2) to (5) do not apply to the exercise of that power.

(6) Where the Authority gives effect to a recommendation of the Financial Services Tribunal by exercising its power under section 205 or 206, sections 207, 208 and 210(7) do not apply to the exercise of that power.

(7) Where the Authority gives effect to a recommendation of the Financial Services Tribunal by exercising any of the powers mentioned in paragraphs (1) to (6), it shall exercise that power by giving to the parties to the transitional reference a written notice and sections 390(3), (4) and (7) and 391(4) apply to that notice as they apply to a final notice.

Modification of Financial Services Tribunal Rules

111. The Financial Services Tribunal (Conduct of Investigations) Rules 1988(3) have effect after commencement (notwithstanding the repeal of the Financial Services Act) in relation to a transitional reference with the following modifications—

(a) references in the rules to a matter referred to the Tribunal under section 97 must be read as references to transitional references within the meaning of article 105(3);

(b) for rule 17 substitute the following—

“In a transitional reference made at the request of a person falling within section 97(1)(a) of the Act, the Tribunal shall inform the relevant authority and the applicant of the recommendation it is minded to give as to the appropriate action (if any) for the relevant authority to take and shall afford the applicant and the relevant authority fourteen days in which to make written or oral representations to it before making its report.”.