

FINANCIAL SERVICES AND MARKETS ACT 2000

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part Vi: Official Listing

155. EC law requires each member State to nominate or create a competent authority to maintain an official list of securities, to regulate the admission of securities to the Official List, and to monitor issuers' adherence to the listing rules (as explained below) thereafter. In the United Kingdom these functions are exercised by the Authority following the coming into force of the [Official Listing of Securities \(Change of Competent Authority\) Regulations 2000 \(SI 2000/968\)](#), the competent authority function was exercised by the London Stock Exchange. The provisions of this Part implement these requirements of EC directives. These provisions replace those in Part IV of the FS Act 1986.
156. There is no requirement for issuers of securities, for example companies issuing new shares, to apply for admission to the official list. However, admission to the official list signals that certain standards regarding the financial status and history of the company have been met; that adequate information about a security has been made available to investors at the time of application; and that information about the performance and plans of the issuer will continue to be made available on a continuing basis so long as the company has securities listed on the official list.
157. In carrying out its functions, the competent authority makes rules which govern the admission of securities to listing, the continuing obligations of issuers, the enforcement of those obligations and the suspension and cancellation of listing. These rules are collectively known as "listing rules", which have been published by the competent authority in the "yellow book". The competent authority also has a role in scrutinizing prospectuses and circulars where there is no application for admission to the official list.

Section 72: The competent authority

158. This section confers the functions of competent authority on the Authority. *Subsection (2)* and Schedule 7 make provision for the way in which other provisions of the Act apply to the Authority when exercising functions as the competent authority. However, subsection (3) and Schedule 8 provide a power for the Treasury to transfer some or all of the functions of the competent authority for the United Kingdom to another body.

Section 73: General duty of the competent authority

159. This section sets out the general duties of the competent authority. *Subsection (1)* sets out a number of principles to which the competent authority must have regard in discharging its general functions (as defined in *subsection (2)*).
160. *Subsection (1)* is similar to section 2(3). The requirements of *subsection (1)* are intended to act as constraints on the way the competent authority carries out its functions under

Part VI. Unlike section 2(3), this section does not have a principle relating to the responsibilities of senior management. This is because the competent authority is not responsible for the conduct of business or the prudential regulation of listed companies.

Section 74: The official list

161. This section places a duty on the competent authority to continue to maintain the official list. Section 99 allows the competent authority to charge fees for this purpose. Before this Act comes into force, the official list will be made up of securities that have been admitted by the competent authority under the statutory provisions of Part IV of the FS Act 1986 and securities and other financial instruments which were admitted by the competent authority under contract with issuers (for example gilts and covered warrants). Under the Act there will be a single statutory regime for the official listing of all these securities and other instruments.
162. The legislation therefore gives the Treasury a power in *subsection (3)* to provide that certain categories of financial instrument cannot be admitted to the Official List. This is a reserve power to ensure that the Treasury could stop the admission to the list of financial instruments which they consider, for example, pose undue risks to investors. *Subsection (4)* confers powers on the Authority to make listing rules.

Section 75: Applications for listing

163. This section provides that only applications for listing which are by, or with the consent of, the issuer and meet the requirements imposed by the competent authority may be granted. The competent authority can refuse an application for listing where it considers that granting it would be detrimental to the interests of investors.
164. *Subsection (3)* provides that no application for listing can be entertained by the competent authority in respect of securities issued by a body of a prescribed kind. The Treasury intend to use this power to prescribe that securities issued by a private company or by an old public company (within the meaning of section 1 of the Companies Consolidation (Consequential Provisions) Act 1985) cannot be admitted to listing. This will replicate provisions in the FS Act 1986.

Section 77: Discontinuance and suspension of listing

165. Occasionally circumstances arise which mean that normal dealings in listed securities cannot take place. For example, a company may fail to comply with reporting requirements in the listing rules, so that investors and potential investors do not have sufficient information on which to make informed decisions about the company's securities in order to deal in the securities. Alternatively, a company may be in financial difficulties which it has not clarified or quantified. This section gives the competent authority the power to suspend or discontinue the listing of a company's securities in such circumstances. During a suspension, trading in the securities cannot take place on a recognised investment exchange. An issuer may refer a decision to discontinue or suspend listing to the Tribunal.

Section 78: Discontinuance and suspension: procedure

166. This section sets out the procedures to be followed by the competent authority when it suspends or discontinues the listing of any securities under section 77. The procedure is broadly similar to that which applies in the case of other supervisory decisions listed in section 395(13), and which is described in the context of section 53 above.
167. During the procedure for making representations and referring the matter to the Tribunal, it is possible for a suspension or discontinuance to be reversed. If a suspension is cancelled the securities simply remain listed. If a discontinuance is cancelled at this stage, either because the competent authority accedes to representations which are made under *subsection (3)(c)* or because it follows directions of the Tribunal to that effect,

subsection (9) provides that the securities are regarded as being readmitted to the list as soon as the discontinuance is cancelled and without any fresh admission needing to be granted.

168. *Subsections (10) to (12)* set out a separate procedure which applies, after a suspension has taken effect and after the procedures for making representations and for referring the matter to the Tribunal have been exhausted, if there is a subsequent application for the suspension to be cancelled. In this case the standard warning and decision notice procedure applies as for other applications. However, at this stage in the process, a discontinuance is regarded as final and so there is no procedure for applying for it to be reversed. Instead a fresh application would need to be made for listing under section 75.

Section 79: Listing particulars and other documents

169. Under EC law, where there is an application for the listing of securities which are to be offered to the public in the United Kingdom for the first time, a prospectus must be approved by the competent authority and published. This is provided for by section 84. Where a prospectus is not required, for example because the securities have already been offered to the public or because there is an exemption (as set out in Schedule 11) the competent authority can provide that securities can only be admitted to the official list after publication of listing particulars and other documents approved by the competent authority. Listing particulars are documents which contain information on the nature and circumstances of the applicant and on the securities to be listed. The content is determined by listing rules. The existence of the power will allow investors to make informed decisions about that security.
170. *Subsection (3)* allows the Treasury to prescribe the persons responsible for listing particulars. The Treasury intend to exercise this power to prescribe those persons covered by section 152 of the FS Act 1986. However, the power will allow there to be some flexibility to reflect the admission of any possible types of financial instrument to the official list. This is necessary given the comprehensive nature of the statutory regime under section 74.

Section 80: General duty of disclosure in listing particulars

171. This section places a duty on those responsible for producing listing particulars to ensure that those particulars contain, at the very least, adequate information to enable investors and their professional advisers to make informed decisions about the issuer and securities in question. The competent authority can authorise the omission of certain information in certain circumstances, as set out in section 82.

Section 81: Supplementary listing particulars

172. This section provides that where there is any significant change following the submission of listing particulars to the competent authority but before dealings in the securities have started, supplementary listing particulars must be approved and published.

Section 82: Exemptions from disclosure

173. This section allows the competent authority to authorise the omission of information required by listing rules to be included in listing particulars in certain circumstances. These circumstances are set out in *subsection (1)*; namely, that the disclosure of the information would be contrary to the public interest, would be seriously detrimental to the issuer (for example the disclosure of commercial secrets), or would be unnecessary given the kind of people who could be expected to buy or sell those securities (for example, if the securities were only dealt in by professionals).

174. *Subsection (2)* provides that information cannot be omitted where it would be seriously detrimental to the issuer if that information is essential in order for a person to make an informed assessment. (“Essential information” is defined in *subsection (6)*.)

Section 83: Registration of listing particulars

175. This section requires listing rules to provide that listing particulars must be lodged with the registrar of companies on or before the date on which they are published. The same requirement applies to prospectuses because of section 86. Breach of this requirement is an offence under *subsection (3)*, punishable by a fine..

Section 84: Prospectuses

176. This section provides that a prospectus must be published before securities are offered to the public in the United Kingdom for the first time before admission to the official list. Section 103(6) and Schedule 11 define the circumstances in which a person is to be treated as having offered securities to the public in the United Kingdom. For example, an offer is not regarded as being made, and the requirement to publish a prospectus therefore does not arise, where the offer is made to no more than 50 persons.

Section 85: Publication of prospectuses

177. This section makes it a criminal offence for a person to offer new securities to the public in the United Kingdom before a prospectus has been published. This offence only applies where listing rules require the publication of a prospectus before particular new securities are admitted to the official list.

Section 87: Approval of prospectus where no application for listing

178. Where securities are to be offered to the public in the United Kingdom for the first time and there has been no application for listing, listing rules may allow issuers to submit prospectuses to the competent authority for approval. This section refers to such prospectuses as “non-listing prospectuses”. Where such a prospectus has been approved by the competent authority, under EC law it must be recognised by competent authorities in other member States as complying with their own rules on prospectuses. Accordingly, there is no need in these circumstances to obtain further approval from another competent authority if the securities are to be issued in another member State.

Section 88: Sponsors

179. This section enables the competent authority to make listing rules requiring issuers of listed securities, or issuers seeking admission to the list, to appoint a sponsor.
180. *Subsections (2) and (3)* allow the competent authority to approve persons who may act as a sponsor, and to maintain a list of such persons. They also allow the relevant listing rules to specify particular services which must be performed by a sponsor (for example a sponsor might be required to certify that certain requirements for listing are met).
181. *Subsections (4) to (7)* apply the standard warning notice and decision notice procedure where the competent authority proposes to refuse a person’s application for approval as a sponsor, or to cancel such approval, and provide the right to refer the matter to the Tribunal where a decision notice is given.

Section 89: Public censure of sponsor

182. This section permits the competent authority to make listing rules which allow it to make public statements to the effect that a sponsor has contravened a requirement imposed on him by the listing rules, subject to the warning and decision notice

procedure and a right to refer the matter to the Tribunal. The power to impose financial penalties does not, however, apply to sponsors.

Section 90: Compensation for false or misleading particulars

183. This section provides that a person responsible for listing particulars (or, under this Part as applied by sections 86, 87(5) and Schedule 9, prospectuses or non-listing prospectuses) is liable to pay compensation to those who suffer loss as a result of untrue or misleading statements or the omission of any information which must be contained in those documents. There are some circumstances in which there is no liability to pay compensation. These are set out in Schedule 10.

Section 91: Penalties for breach of listing rules

184. This section gives the competent authority a power to impose financial penalties on issuers who have breached the listing rules. Under the FS Act 1986, the competent authority can issue private or public censures or suspend or cancel the listing of securities. The additional power conferred by this section is intended to provide further flexibility in this area. The competent authority will also be able to impose penalties upon present and former directors (which is defined in section 417 to include shadow directors) who were knowingly involved in a breach of the listing rules. However, it may not impose a penalty later than two years after it first became aware of the breach.
185. **Section 92** sets out the procedures the competent authority must follow when imposing a penalty. The competent authority is also required to publish a statement of its policy as regards penalties (see sections 93 and 94). Before issuing or altering such a statement, the competent authority must consult on its proposals.

Section 95: Competition scrutiny

186. This section gives the Treasury a power to subject the “regulating provisions” of the competent authority (which is to say the listing rules and general guidance it produces) and its practices to a competition scrutiny regime. The Treasury proposes to use this power to create a competition scrutiny regime for the competent authority which is broadly similar to the regime for the Authority, in its role as financial services regulator, as provided for by Chapter III of Part X of the Act. The power will enable the Treasury to provide for exclusions from the provisions of the Competition Act 1998 analogous to those for which Chapter III of Part X of the Act makes provision.
187. *Subsection (2)* makes clear that such a regime will require the person responsible for the competition scrutiny procedure to consider whether any provision or practice, or combination of provisions and practices, has at any time a significantly adverse effect on competition as defined in *subsections (6) and (7)*.

Section 96: Obligations of issuers of listed securities

188. This section provides that listing rules may place obligations on issuers and may make provision for non-compliance. *Subsection (2)* provides that the competent authority can make listing rules which allow it to publish information which an issuer has been required but has failed to publish.

Section 97: Appointment by competent authority of persons to carry out investigations

189. This section allows the competent authority to appoint investigators if it appears to it that there are circumstances suggesting that there may have been a breach of the listing rules; that a director or former director of an issuer was knowingly concerned in a breach; or that there has been a contravention of the criminal offences in sections 83, 85, or 98. The section applies the provisions of Part XI as if the investigator were

appointed under section 167(1). This means that the procedures set out in section 170 must be followed and that the investigator will have the powers set out in section 171.

Section 98: Advertisements etc in connection with listing applications

190. This section makes it an offence to issue an advertisement or other information of a kind specified in listing rules (for example an invitation to purchase securities) unless the contents have been approved by the competent authority or the issue of an unapproved advertisement or information has been authorised by the competent authority. This offence only applies where listing particulars are, or are to be, published.
191. *Subsection (3)* provides a defence against this criminal offence where someone reasonably believed that the advertisement had been approved or its issue authorised by the competent authority.

Section 100: Penalties

192. This section provides that the competent authority must not seek to recover its costs when imposing financial penalties. It also provides that it must operate a scheme to redistribute monies received from financial penalties to issuers. It must consult on the scheme and have regard to representations before making the scheme. The provisions of this section are analogous to those applying to the Authority more generally under paragraph 16 of Schedule 1.

Section 102: Exemption from liability in damages

193. This section gives the competent authority and its staff immunity against legal action for damages in respect of anything done or omitted in the discharge of its functions. This immunity does not apply where the act or omission was in bad faith or where it was unlawful as a result of section 6(1) of the Human Rights Act 1998. Section 6(1) of that Act makes it unlawful for a public authority to act in a way which is incompatible with a right conferred by the European Convention on Human Rights and Fundamental Freedoms which is included in Schedule 1 to the 1998 Act.