



# Financial Services and Markets Act 2000

## 2000 CHAPTER 8

### PART XVIII

#### RECOGNISED INVESTMENT EXCHANGES AND CLEARING HOUSES

### CHAPTER II

#### COMPETITION SCRUTINY

#### **302 Interpretation.**

- (1) In this Chapter and Chapter III—
- “practices” means—
- (a) in relation to a recognised investment exchange, the practices of the exchange in its capacity as such; and
  - (b) in relation to a recognised clearing house, the practices of the clearing house in respect of its clearing arrangements;
- “regulatory provisions” means—
- (a) the rules of an investment exchange or a clearing house;
  - (b) any guidance issued by an investment exchange or clearing house;
  - (c) in the case of an investment exchange, the arrangements and criteria mentioned in section 287(3);
  - (d) in the case of a clearing house, the arrangements and criteria mentioned in section 288(3).
- (2) For the purposes of this Chapter, regulatory provisions or practices have a significantly adverse effect on competition if—
- (a) they have, or are intended or likely to have, that effect; or
  - (b) the effect that they have, or are intended or likely to have, is to require or encourage behaviour which has, or is intended or likely to have, a significantly adverse effect on competition.

*Status: Point in time view as at 01/04/2002.*

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- (3) If regulatory provisions or practices have, or are intended or likely to have, the effect of requiring or encouraging exploitation of the strength of a market position they are to be taken, for the purposes of this Chapter, to have an adverse effect on competition.
- (4) In determining under this Chapter whether any regulatory provisions have, or are intended or likely to have, a particular effect, it may be assumed that persons to whom the provisions concerned are addressed will act in accordance with them.

### *Role of Director General of Fair Trading*

#### **303 Initial report by Director.**

- (1) The Authority must send to the Treasury and to the Director a copy of any regulatory provisions with which it is provided on an application for recognition under section 287 or 288.
- (2) The Authority must send to the Director such information in its possession as a result of the application for recognition as it considers will assist him in discharging his functions in connection with the application.
- (3) The Director must issue a report as to whether—
  - (a) a regulatory provision of which a copy has been sent to him under subsection (1) has a significantly adverse effect on competition; or
  - (b) a combination of regulatory provisions so copied to him have such an effect.
- (4) If the Director's conclusion is that one or more provisions have a significantly adverse effect on competition, he must state his reasons for that conclusion.
- (5) When the Director issues a report under subsection (3), he must send a copy of it to the Authority, the Competition Commission and the Treasury.

#### **304 Further reports by Director.**

- (1) The Director must keep under review the regulatory provisions and practices of recognised bodies.
- (2) If at any time the Director considers that—
  - (a) a regulatory provision or practice has a significantly adverse effect on competition, or
  - (b) regulatory provisions or practices, or a combination of regulating provisions and practices have such an effect,
 he must make a report.
- (3) If at any time the Director considers that—
  - (a) a regulatory provision or practice does not have a significantly adverse effect on competition, or
  - (b) regulatory provisions or practices, or a combination of regulatory provisions and practices do not have any such effect,
 he may make a report to that effect.
- (4) A report under subsection (2) must contain details of the adverse effect on competition.
- (5) If the Director makes a report under subsection (2), he must—

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- (a) send a copy of it to the Treasury, to the Competition Commission and to the Authority; and
  - (b) publish it in the way appearing to him to be best calculated to bring it to the attention of the public.
- (6) If the Director makes a report under subsection (3)—
  - (a) he must send a copy of it to the Treasury, to the Competition Commission and to the Authority; and
  - (b) he may publish it.
- (7) Before publishing a report under this section, the Director must, so far as practicable, exclude any matter which relates to the private affairs of a particular individual the publication of which, in the opinion of the Director, would or might seriously and prejudicially affect his interests.
- (8) Before publishing such a report, the Director must exclude any matter which relates to the affairs of a particular body the publication of which, in the opinion of the Director, would or might seriously and prejudicially affect its interests.
- (9) Subsections (7) and (8) do not apply to the copy of a report which the Director is required to send to the Treasury, the Competition Commission and the Authority under subsection (5)(a) or (6)(a).
- (10) For the purposes of the law of defamation, absolute privilege attaches to any report of the Director under this section.

### **305 Investigations by Director.**

- (1) For the purpose of investigating any matter with a view to its consideration under section 303 or 304, the Director may exercise the powers conferred on him by this section.
- (2) The Director may by notice in writing require any person to produce to him or to a person appointed by him for the purpose, at a time and place specified in the notice, any document which—
  - (a) is specified or described in the notice; and
  - (b) is a document in that person’s custody or under his control.
- (3) The Director may by notice in writing—
  - (a) require any person carrying on any business to provide him with such information as may be specified or described in the notice; and
  - (b) specify the time within which, and the manner and form in which, any such information is to be provided.
- (4) A requirement may be imposed under subsection (2) or (3)(a) only in respect of documents or information which relate to any matter relevant to the investigation.
- (5) If a person (“the defaulter”) refuses, or otherwise fails, to comply with a notice under this section, the Director may certify that fact in writing to the court and the court may enquire into the case.
- (6) If, after hearing any witness who may be produced against or on behalf of the defaulter and any statement which may be offered in defence, the court is satisfied that the defaulter did not have a reasonable excuse for refusing or otherwise failing to comply with the notice, the court may deal with the defaulter as if he were in contempt.

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- (7) In this section, “the court” means—
- (a) the High Court; or
  - (b) in Scotland, the Court of Session.

**Commencement Information**

- II** S. 305 wholly in force at 1.12.2001; s. 305 not in force at Royal Assent see s. 431(2); s. 305 in force for specified purposes at 3.9.2001 by S.I. 2001/2632, art. 2(2), Sch. Pt. 2; s. 305 in force in so far as not already in force at 1.12.2001 by S.I. 2001/3538, art. 2(1)

*Role of Competition Commission*

**306 Consideration by Competition Commission.**

- (1) If subsection (2) or (3) applies, the Commission must investigate the matter which is the subject of the Director’s report.
- (2) This subsection applies if the Director sends to the Competition Commission a report—
  - (a) issued by him under section 303(3) which concludes that one or more regulatory provisions have a significantly adverse effect on competition, or
  - (b) made by him under section 304(2).
- (3) This subsection applies if the Director asks the Commission to consider a report—
  - (a) issued by him under section 303(3) which concludes that one or more regulatory provisions do not have a significantly adverse effect on competition, or
  - (b) made by him under section 304(3).
- (4) The Commission must then make its own report on the matter unless it considers that, as a result of a change of circumstances, no useful purpose would be served by a report.
- (5) If the Commission decides in accordance with subsection (4) not to make a report, it must make a statement setting out the change of circumstances which resulted in that decision.
- (6) A report made under this section must state the Commission’s conclusion as to whether—
  - (a) the regulatory provision or practice which is the subject of the report has a significantly adverse effect on competition, or
  - (b) the regulatory provisions or practices or combination of regulatory provisions and practices which are the subject of the report have such an effect.
- (7) A report under this section stating the Commission’s conclusion that there is a significantly adverse effect on competition must also—
  - (a) state whether the Commission considers that that effect is justified; and
  - (b) if it states that the Commission considers that it is not justified, state its conclusion as to what action, if any, the Treasury ought to direct the Authority to take.

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- (8) Subsection (9) applies whenever the Commission is considering, for the purposes of this section, whether a particular adverse effect on competition is justified.
- (9) The Commission must ensure, so far as that is reasonably possible, that the conclusion it reaches is compatible with the obligations imposed on the recognised body concerned by or under this Act.
- (10) A report under this section must contain such an account of the Commission's reasons for its conclusions as is expedient, in the opinion of the Commission, for facilitating proper understanding of them.
- (11) The provisions of Schedule 14 (except paragraph 2(b)) apply for the purposes of this section as they apply for the purposes of section 162.
- (12) If the Commission makes a report under this section it must send a copy to the Treasury, the Authority and the Director.

#### Commencement Information

- I2** S. 306 wholly in force at 1.12.2001; s. 306 not in force at Royal Assent see s. 431(2); s. 306 in force for specified purposes at 3.9.2001 by S.I. 2001/2632, art. 2(2), Sch. Pt. 2; s. 306 in force in so far as not already in force at 1.12.2001 by S.I. 2001/3538, art. 2(1)

### *Role of the Treasury*

#### **307 Recognition orders: role of the Treasury.**

- (1) Subsection (2) applies if, on an application for a recognition order—
  - (a) the Director makes a report under section 303 but does not ask the Competition Commission to consider it under section 306;
  - (b) the Competition Commission concludes—
    - (i) that the applicant's regulatory provisions do not have a significantly adverse effect on competition; or
    - (ii) that if those provisions do have that effect, the effect is justified.
- (2) The Treasury may refuse to approve the making of the recognition order only if they consider that the exceptional circumstances of the case make it inappropriate for them to give their approval.
- (3) Subsection (4) applies if, on an application for a recognition order, the Competition Commission concludes—
  - (a) that the applicant's regulatory provisions have a significantly adverse effect on competition; and
  - (b) that that effect is not justified.
- (4) The Treasury must refuse to approve the making of the recognition order unless they consider that the exceptional circumstances of the case make it inappropriate for them to refuse their approval.

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### **308 Directions by the Treasury.**

- (1) This section applies if the Competition Commission makes a report under section 306(4) (other than a report on an application for a recognition order) which states the Commission's conclusion that there is a significantly adverse effect on competition.
- (2) If the Commission's conclusion, as stated in the report, is that the adverse effect on competition is not justified, the Treasury must give a remedial direction to the Authority.
- (3) But subsection (2) does not apply if the Treasury consider—
  - (a) that, as a result of action taken by the Authority or the recognised body concerned in response to the Commission's report, it is unnecessary for them to give a direction; or
  - (b) that the exceptional circumstances of the case make it inappropriate or unnecessary for them to do so.
- (4) In considering the action to be specified in a remedial direction, the Treasury must have regard to any conclusion of the Commission included in the report because of section 306(7)(b).
- (5) Subsection (6) applies if—
  - (a) the Commission's conclusion, as stated in its report, is that the adverse effect on competition is justified; but
  - (b) the Treasury consider that the exceptional circumstances of the case require them to act.
- (6) The Treasury may give a direction to the Authority requiring it to take such action—
  - (a) as they consider to be necessary in the light of the exceptional circumstances of the case; and
  - (b) as may be specified in the direction.
- (7) If the action specified in a remedial direction is the giving by the Authority of a direction—
  - (a) the direction to be given must be compatible with the recognition requirements applicable to the recognised body in relation to which it is given; and
  - (b) subsections (3) and (4) of section 296 apply to it as if it were a direction given under that section.
- (8) "Remedial direction" means a direction requiring the Authority—
  - (a) to revoke the recognition order for the body concerned; or
  - (b) to give such directions to the body concerned as may be specified in it.

### **309 Statements by the Treasury.**

- (1) If, in reliance on subsection (3)(a) or (b) of section 308, the Treasury decline to act under subsection (2) of that section, they must make a statement to that effect, giving their reasons.
- (2) If the Treasury give a direction under section 308 they must make a statement giving—
  - (a) details of the direction; and
  - (b) if the direction is given under subsection (6) of that section, their reasons for giving it.

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- (3) The Treasury must—
- (a) publish any statement made under this section in the way appearing to them best calculated to bring it to the attention of the public; and
  - (b) lay a copy of it before Parliament.

### **310 Procedure on exercise of certain powers by the Treasury.**

- (1) Subsection (2) applies if the Treasury are considering—
- (a) whether to refuse their approval under section 307;
  - (b) whether section 308(2) applies; or
  - (c) whether to give a direction under section 308(6).
- (2) The Treasury must—
- (a) take such steps as they consider appropriate to allow the exchange or clearing house concerned, and any other person appearing to the Treasury to be affected, an opportunity to make representations—
    - (i) about any report made by the Director under section 303 or 304 or by the Competition Commission under section 306;
    - (ii) as to whether, and if so how, the Treasury should exercise their powers under section 307 or 308; and
  - (b) have regard to any such representations.

#### **Commencement Information**

- I3** S. 310 wholly in force at 1.12.2001; s. 310 not in force at Royal Assent see s. 431(2); s. 310 in force for specified purposes at 3.9.2001 by S.I. 2001/2632, art. 2(2), Sch. Pt. 2; s. 310 in force in so far as not already in force at 1.12.2001 by S.I. 2001/3538, art. 2(1)

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