

FINANCIAL SERVICES AND MARKETS ACT 2000

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part Iii: Authorisation and Exemption

78. This Part sets out who is to be authorised and how authorisation is obtained. It also deals with exemptions from the general prohibition for particular persons or classes of persons. The Act provides for a single route to authorisation to operate in the financial services industry, replacing several sector-based regimes.
79. The main route to authorisation is through an application for a permission under Part IV, but authorisation may also be obtained by virtue of:
- notification in accordance with the relevant single market directive from the competent authorities under that directive in another EEA member State. The directives in question are the 2nd Banking Co-ordination Directive for banks and other credit institutions, the Investment Services Directive for investment firms, and the 3rd Life and 3rd Non-life Insurance Directives for insurance companies, including mutual insurers such as friendly societies. The person, who must come from or be incorporated in, or formed under the law of, another member State, is referred to under the Act as an “EEA firm” as defined in Schedule 3;
 - exercise, in accordance with Schedule 4, of EU Treaty rights other than or beyond those governed by the single market directives, in which case the person is then referred to in the Act as a “Treaty firm”. Again the person must come from, or be incorporated in, or formed under the law of another member State to qualify;
 - exercise of rights under the EC directive relating to collective investment undertakings to market in the United Kingdom collective investment schemes or product authorisation of certain open-ended investment companies (“oeics”) under regulations to be made under Chapter IV of Part XVII;
 - a person being “grandfathered” by virtue of the transitional provisions (see sections 426 and 427). Broadly, the arrangements will cover persons authorised (however described) under the Banking, Financial Services, Insurance, Building Societies, Friendly Societies, Credit Unions and Lloyd’s Acts (including members of self-regulating organisations and certain members of recognised professional bodies).
80. The Society of Lloyd’s is an authorised purpose by virtue of section 315.
81. It is possible for a person who becomes authorised through one of these routes to carry on regulated activities by virtue of other routes. For instance an EEA firm that is authorised by virtue of its home State notification under a single market directive may extend the range of regulated activities it may carry on through notification under Schedule 4 or an application to the Authority under Part IV for an extension of its permission. A Treaty firm may also obtain additional permission under Part IV.

82. For a person authorised by virtue of having permissions under Part IV, authorisation generally ends when that person no longer has permission to carry on regulated activities, whether at the initiative of the Authority or themselves.

Section 32: Partnerships and unincorporated associations

83. This section makes particular provision for partnerships and unincorporated associations. In principle, it is possible to view a change of partners in a partnership, or a change of the membership of an unincorporated association, as the formation of a new partnership or association. It would be very burdensome and unsatisfactory if such changes meant that a partnership or association that was substantially the same had to renew its authorisation simply because of such a change to its membership. This section therefore ensures that in such circumstances the authorisation is not interrupted. It also allows the authorisation to pass to a successor partnership or association in the event of dissolution, but only where the members and the business of the successor are substantially the same as the original.

Section 33: Withdrawal of authorisation by the Authority

84. This section requires the Authority to withdraw authorisation from a person who does not have a permission.

Section 34: EEA firms

85. So long as an EEA firm retains its home State authorisation, the Authority may not remove the firm's authorisation under Schedule 3. Such a person will only cease to qualify for authorisation under Schedule 3 if their home State regulator, that is the competent authority under the relevant directive from the person's home State, notifies the Authority that it is withdrawing authorisation for the person to continue to carry on the regulated activities in the United Kingdom, which may or may not be as part of withdrawing the person's authorisation completely, including in the home State.
86. However, if the person has also obtained a permission under Part IV, loss of the grounds for its authorisation under Schedule 3 does not necessarily lead to loss of its authorisation unless the Authority decides that as a result of the changed circumstances it should also withdraw the permission granted by it under Part IV. The Authority may also cancel an authorisation under Schedule 3 if it is requested to do so by the EEA firm.

Section 35: Treaty firms

87. As for an EEA firm, a Treaty firm ceases to qualify for authorisation under Schedule 4 if the relevant home State authorisation is withdrawn. The Authority may remove any additional permission under Part IV, but loss of home State authorisation does not necessarily mean that Part IV permission would be withdrawn. The Authority can also cancel an authorisation on request from a Treaty firm.

Section 36: Persons authorised as a result of paragraph 1(4) of Schedule 5

88. This section enables the Authority to cancel the automatic authorisation under Schedule 5 of managers and depositaries of UCITS schemes at their request. However, if the person also has permissions under Part IV, he does not cease to be an authorised person as a result.

Section 37: Exercise of EEA rights by UK firms

89. Part III of Schedule 3 governs home State regulation by the Authority of UK credit institutions, investment firms and insurance companies exercising their passport rights under the single market directives to establish a branch or provide services in other EEA states.

90. UK firms do not need to be authorised persons in order to exercise EEA passport rights. For example, lending is covered by both the Second Banking Co-ordination directive and the Investment Services Directive. Consequently a firm holding a licence under the Consumer Credit Act 1974 may have an EEA right to carry on Consumer Credit Act business in another EEA state.

Section 38: Exemption orders

91. This section gives the Treasury the power by order to exempt specific natural or legal persons or classes of person from the general prohibition and therefore from the need to be authorised.
92. *Subsection (2)* provides that a person may not benefit from an exemption under an order made under this section if they hold a Part IV permission. However, if they cease to hold a Part IV permission and the exemption from which they formerly benefited is still extant, they may benefit from it again.

Section 39: Exemption of appointed representatives

93. This section makes an exemption from the general prohibition for appointed representatives of authorised persons. An authorised person cannot be an appointed representative. The exemption only applies if the authorised person, referred to as the principal, has:
- contracted with the representative for the latter to carry on the relevant sort of investment business on their behalf; and
 - accepted responsibility in writing for the conduct of those regulated activities.
94. Any regulated activities which are carried on by the representative in accordance with such an arrangement are the responsibility of the principal, who must therefore have permission for all the regulated activities they carry on. The Authority may therefore take regulatory action against the principal in respect of anything said or done (or not said or not done) by the representative in carrying on the regulated activities as if they had expressly authorised the action or inaction in question. Such acts or omissions will be taken into account by the Authority in determining whether the principal has breached any rules or requirements under the Act. However, nothing in this section would make the principal liable to prosecution for a criminal offence in place of the representative. The representative may also be subject to the arrangements under Part V.
95. This section is similar to, and replaces, section 44 of the FS Act 1986. The Treasury have the power to limit the types of business that may be carried on under this exemption. The intention is that an order under *subsection (1)* will broadly reproduce the breadth of the provision under the FS Act 1986, except that it will no longer be possible under this section for an appointed representative to be exempt for some activities and authorised for others. Under a single authorisation regime, it would not be appropriate to allow an authorised person to obtain an exemption rather than have their permission extended to cover those additional activities.
96. The Treasury have the power to prescribe further conditions which the contract between the principal and his representative has to meet. The intention is that this power would be used to reproduce the detailed requirements in sections 44(4) and (5) of the FS Act 1986. These are aimed at ensuring that the principal has adequate control over the activities that the appointed representative may carry on for the benefit of, or on behalf of, other providers of investment products to ensure that the exemption is not misused.