

DECISION MAKING MANUAL (AMENDMENT NO 2) INSTRUMENT 2002

Powers exercised

- A. The Financial Services Authority makes this instrument in the exercise of the following powers in or under the Financial Services and Markets Act 2000 (the “Act”):
- (1) section 157(1) (Guidance); and
 - (2) section 395(5) (The Authority’s procedures).

Commencement

- B. This instrument comes into force immediately.

Amendments to the Decision making Manual

- C. The Decision making Manual is amended in accordance with the Annex to this instrument.

Citation

- D. This instrument may be cited as the Decision Making Manual (Amendment No 2) Instrument 2002.

By order of the Board
21 November 2002

Annex

Amendments to the Decision making Manual

In this annex, underlining indicates new text, and striking through indicates deleted text.

- 1.1.1G This manual gives *guidance* on the *FSA's* decision making and other procedures for giving *statutory notices* listed in *DEC 2 Ann 1G* and *DEC 3 Ann 1G*. This manual also gives *guidance* on the *FSA's* procedure for using its own powers under Part XXIV of the *Act* (Insolvency), Part XXV of the *Act* (Injunctions and restitution) and Part XXVII of the *Act* (Criminal Offences). It also gives guidance on the *FSA's* procedures for using certain similar powers with respect to insolvency and criminal offences under the Building Societies Act 1986, the Friendly Societies Acts 1974 and 1992, the Credit Unions Act 1979 and the Industrial and Provident Societies Act 1965. It is relevant to *firms, approved persons, applicants for Part IV permission, persons for whom an application for approval under section 59 of the Act has been made, and other persons, whether or not they are regulated by the FSA.* The *UKLA's* procedure for giving *statutory notices* under Part VI of the *Act* (official listing) is set out in the *listing rules* and related *guidance*.
- 1.1.2G Section 395 of the *Act* (The *FSA's* procedures) requires the *FSA* to publish a statement of its procedure for the giving of *statutory notices*. The purpose of the Decision making manual (*DEC*) is to fulfil this obligation. ~~The following constitute the required statement of procedure:~~
- ~~(1) *DEC*; and~~
- ~~(2) the *UKLA's* procedure for giving *statutory notices* under Part VI of the *Act* (Official Listing) arising out of the *FSA's* exercise of its regulatory powers as the competent authority for official listing (see the *listing rules* and related *guidance*).~~
- 1.1.3G *DEC 4.6.1G* and *DEC 4.6.2G* sets out the *FSA's* policy on the procedure to be followed:
- (1) if the *FSA* decides to use its:
- (a) powers to apply to the civil courts for insolvency orders, injunctions and restitution orders; or
- (b) powers under Part XXVII of the *Act* to prosecute criminal offences; and

(2) if the *FSA* decides to discontinue any proceedings begun by the use of these powers.

1.1.4G *DEC 4.6.2AG* and *DEC 4.6.2BG* set out the *FSA*'s policy on the procedure to be followed:

(1) if the *FSA* decides to use its powers to prosecute criminal offences under the Building Societies Act 1986, the Friendly Societies Acts 1974 and 1992, the Credit Unions Act 1979 and the Industrial and Provident Societies Act 1965, in each case as amended; and

(2) if the *FSA* decides to discontinue any proceedings begun by the use of these powers.

...

2.1.1G The *Act* and certain other enactments requires the *FSA*, when proposing to exercise its powers in certain circumstances, to use the *warning notice* and *decision notice* procedure.

...

2 Ann 1G

Statutory notice procedure: Warning notice and decision notice procedure

1 Table List of warning notices and decision notices under the Act (other than (heading) Part VI) and certain other enactments

...			
385(1)/386(1)
Paragraph 19(8)/(12) of Schedule 3	when the <i>FSA</i> is proposing/deciding to refuse to give a <i>consent notice</i> to a <i>UK firm</i> wishing to establish a <i>branch</i> under an <i>EEA right</i>	<i>SUP 13</i>	<i>RDC</i>
<u>Section of the Building Societies Act 1986 (Note 5)</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>

<u>36A(5)/(5A)</u> <u>(Note 6)</u>	<u>when the FSA is proposing/deciding to issue a prohibition order under section 36A prohibiting the continuance or carrying on of an activity and requiring the disposal of assets acquired or otherwise in a <i>building society's</i> possession by virtue of the activity, where the society has failed to carry into effect a restructuring plan which it has been directed to carry out by the FSA under section 36(8)</u>	<u>None</u>	<u>RDC</u>
<u>46A(1)(a)/(3)(a)</u> <u>(Note 7)</u>	<u>when the FSA is proposing/deciding to give a direction under section 36(3), (5), (6), (7) or (10) requiring a <i>building society</i> to submit for its approval a restructuring plan or to submit to the society's members the requisite transfer resolutions for a transfer of the society's business to a company or (if such a direction is given) imposing limitations on the issue of shares, acceptance of deposits or making of loans or requiring the society to take certain steps or refrain from certain action or requiring the removal of a director or other officer (Note 8)*</u>	<u>None</u>	<u>RDC</u>
<u>46A(1)(b)/(3)(b)</u> <u>(Note 7)</u>	<u>when the FSA is proposing/deciding to give a direction under section 42B(1) (other than a direction varying a previous direction with the agreement of the <i>building society</i> concerned) that a <i>building society</i> transfers all its engagements to one or more other <i>building societies</i> under section 94 or that it transfers its business to an existing company under section 97*</u>	<u>None</u>	<u>RDC/ executive procedures (Note 9)</u>
<u>93(6)</u> <u>(Note 10)</u>	<u>when the FSA, on an amalgamation between <i>building societies</i> each of which has a <i>Part IV permission to accept deposits</i>, notifies the successor society of the terms of its <i>Part IV permission</i></u>	<u>None</u>	<u>RDC/ executive procedures (Note 11)</u>

<u>Section of the Credit Unions Act 1979</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>
20	where the <i>FSA</i> is proposing to cancel or suspend the registration of a <i>credit union</i> or to petition for the winding up of a <i>credit union</i>	<i>CRED 15</i> Ann 1G	<i>RDC</i>
<u>Section of the Friendly Societies Act 1992 (Note 5)</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>
<u>58A(1)(a)/(3)(a)</u> (Note 12)	<u>when the <i>FSA</i> is proposing/deciding to give a direction under section 54 or section 55 requiring a <i>friendly society</i> to take or refrain from taking steps where certain activities have become disproportionate to those of the <i>friendly society</i> group or, as the case may be, the society, or varying such a direction other than at the request of the society*</u>	<u>None</u>	<u><i>RDC</i></u>
<u>58A(1)(b)/(3)(b)</u> (Note 12)	<u>when the <i>FSA</i> is proposing/deciding to give a direction under section 90 providing for a transfer of the engagements of a <i>friendly society</i>*</u>	<u>None</u>	<u><i>RDC</i></u>
<u>85(4A)</u> (Note 10)	<u>when the <i>FSA</i>, on an amalgamation between <i>friendly societies</i> each of which has a <i>Part IV permission</i>, notifies the successor society of the terms of its <i>Part IV permission</i></u>	<u>None</u>	<u><i>RDC/ executive procedures</i></u> (Note 11)
OEIC Regulations reference	Description	Handbook reference	Decision maker
...
Note 1: ...			
...			
Note 4: The FSA <i>FSA</i> must give a <i>decision notice</i> ...			

Note 5: As amended by the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001 (SI 2001/2617).

Note 6: There is no right to refer a decision to issue a prohibition order under section 36A to the Tribunal. Accordingly, a decision notice under section 36A(5A) is not required to give an indication of whether any such right exists. A decision notice under section 36A(5A) may only relate to the issue of a prohibition order under section 36A. Where such a decision notice is given, no final notice is required under section 390 of the Act and the FSA may issue the order at the same time as or after giving the decision notice. For the purposes of section 391 of the Act (Publication), the decision notice is treated as if it were a final notice.

Note 7: These powers become exercisable by the FSA if a building society fails to comply with any of the following requirements imposed by the Building Societies Act 1986: section 5(1)(a) or (b) (purpose or principal purpose and principal office); section 6(1) (the lending limit); and section 7(1) (the funding limit).

Note 8: The warning notice and decision notice must set out the terms of the direction which the FSA proposes/has decided to give. A decision notice given under section 46A(3) must give an indication of the society's right, given by section 46A(5), to have the matter referred to the Tribunal. A decision notice under section 46A(3) may only relate to action under the same section of the Building Societies Act 1986 as the action proposed in the warning notice. A final notice under section 390 of the Act must set out the terms of the direction and state the date from which it takes effect. Section 392 of the Act is to be read as if it included references to a warning notice given under section 46A(1) and a decision notice given under section 46A(3).

Note 9: The decision will be made under executive procedures if the society has agreed to the giving of the direction and its terms.

Note 10: The FSA notifies the successor of the permission by giving it a decision notice. The decision notice is not preceded by the giving of a warning notice. No final notice is required under section 390 of the Act and for the purposes of section 391 of the Act (Publication), the decision notice is treated as if it were a final notice. The giving of permission is treated for the purposes of section 55 of the Act (Right to refer matters to the Tribunal) as if it were the determination of an application made by the successor under Part IV of the Act. Part IX of the Act (Hearings and appeals) accordingly applies, but with the omission of section 133(9), which would otherwise prevent the FSA from giving the permission on the terms notified in the decision notice until after any reference and appeal.

Note 11: The decision will be made under executive procedures where the terms of the permission have been agreed with the successor.

Note 12: The *warning notice* and *decision notice* must set out the terms of the direction which the *FSA* proposes/has decided to give and any specification of when the society is to comply with it. A *decision notice* given under section 58A(3) must give an indication of the society's right, given by section 58A(5), to have the matter referred to the *Tribunal*. A *decision notice* under section 58A(3) may only relate to action under the same section of the Friendly Societies Act 1992 as the action proposed in the *warning notice*. A *final notice* under section 390 of the *Act* must set out the terms of the direction and state the date from which it takes effect. Section 392 of the *Act* is to be read as if it included references to a *warning notice* given under section 58A(1) and a *decision notice* given under section 58A(3).

...

3.1.5G If the *FSA* decides to give a first *supervisory notice* to a *person*, in accordance with the sections of the *Act* listed in *DEC 3 Ann 1G*, the notice must:

...

(2) inform him when the action takes effect, which may be immediately, on a date specified in the notice or (except for a *supervisory notice* given under section 321 of the *Act*) when the matter is no longer open to review;

...

3.1.5AG Except for a *supervisory notice* given under section 321 of the *Act*, the action may take effect immediately (or on a specified date) only if the *FSA* considers this necessary, having regard to the ground on which it is taking the action.

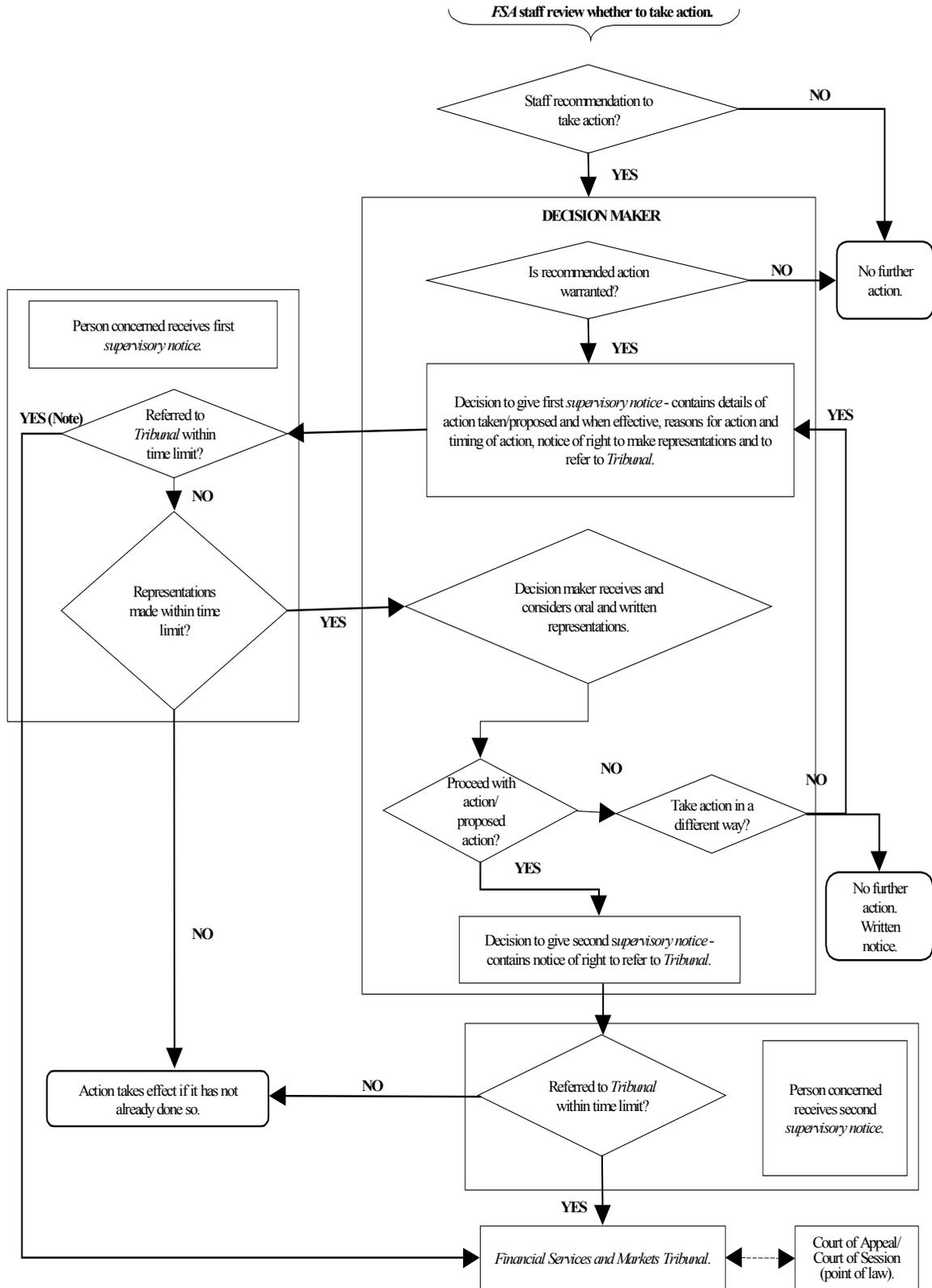
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3.1.7G The procedures for making representations are set out in *DEC 4.4*. If the *FSA* receives no representations within the period specified in the first *supervisory notice*, the default procedures set out in *DEC 4.4.13AG* apply.

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3 Ann 2G Delete the flow diagram and replace it with the following flow diagram:

DEC 3 Annex 2G
Supervisory notice procedure



Note: This assumes that there is a reference to the *Tribunal* but no representations are made to the *FSA*.

Specimen first supervisory notice

To: [firm or other person]

...

EFFECTIVE DATE

[The date on which any own-initiative variation of permission, intervention or direction is to take effect (if a direction imposes a requirement under section 257(2)(a) of the *Act* or regulation 25(2)(a) or (b) of the *OEIC Regulations*, state that the requirement has effect until a specified date or a further direction)]

...

...

4.1.4G

...

- (14) to refuse to give a *consent notice* to a UK *firm* wishing to establish a *branch* under an *EEA right*;
- (15) to give a direction under any of the following sections of the Building Societies Act 1986:
- (a) section 36(3), (5), (6), (7) or (10) (power to direct restructuring of business or submission of resolutions for a transfer of society's business to a company when society is failing to comply with principal purpose or the lending or funding nature limits);
 - (b) section 42B(1) (power to direct transfers of engagements or business), other than a direction where the giving of the direction and its terms have been agreed with the society concerned;
- (16) to issue a prohibition order under section 36A of the Building Societies Act 1986;
- (17) to determine the appropriate *Part IV permission* for the successor society on an amalgamation:
- (a) under section 93 of the Building Societies Act 1986 between *building societies* each of whom has a *Part IV permission* to *accept deposits*; or
 - (b) under section 85 of the Friendly Societies Act 1992 between *friendly societies* each of whom has a *Part IV permission*; in a case where it has not been possible to agree the terms of the proposed *permission* with the successor society; and
- (18) to give a direction under any of the following sections of the Friendly Societies Act 1992:
- (a) sections 54 and 55 (power to direct a society to refrain from taking steps where certain activities have become disproportionate);
 - (b) section 90 (power to direct a transfer of engagements).

...

- 4.2.3G The *RDC* is a body outside the *FSA*'s management structure. Apart from the Chairman, none of the members of the *RDC* is an *FSA* employee. The members represent the public interest and comprise:
- (1) current and recently retired practitioners with financial services industry skills and knowledge; and
 - (2) other suitable individuals representing the public interest non-practitioners.

...

- 4.3.16G *FSA* staff are required by their contract of employment to comply with a code of conduct which imposes strict rules to cover the handling of conflicts of interest which may arise from personal interests or associations. *FSA* staff who are subject to a conflict of interest must declare that interest to the ~~person~~ person to whom they are immediately responsible for the decision. In the case of decisions by a *senior staff committee*, any conflict of interest must be declared to the chairman of the committee (or, if the *person* with the conflict is the chairman, to any member of the *FSA* Chairman's Committee or, if the *person* with the conflict is the chairman of the *FSA* Chairman's Committee, to the Deputy Chairman of the *FSA*. He will also disclose the conflict to the secretariat to the *senior staff committee* (or *FSA* Chairman's Committee)). The individual to whom the conflict of interest is declared may ask another *person* to assist him in considering the potential conflict, and will decide whether that conflict precludes the involvement of the *FSA* staff member in making a decision.

- 4.3.16AG The secretariat to the *senior staff committee*, or to the *FSA* Chairman's Committee, or to the *FSA* Board, as appropriate, will record and document all disclosures of potential conflicts of interest and the steps taken to manage them.

...

- 4.4.13G If the *FSA* receives no response or representations ~~by the time a decision is to be made about the giving of the *decision notice* or second *supervisory notice*, within the period specified in a *warning notice*, the decision maker may regard as undisputed the allegations or matters in the *warning notice* or first *supervisory notice*. In such cases, a *decision notice* or second ~~*supervisory notice*~~ will be given accordingly. A *person* who has received a *decision notice* or second ~~*supervisory notice*~~ and has not previously made any response or representations to the *FSA*, may, nevertheless, refer the *FSA*'s decision to the *Tribunal* as described in *DEC* 5.3.~~

4.4.13AG

If the FSA receives no response or representations within the period specified in a first *supervisory notice*, the FSA will not give a second *supervisory notice*. The outcome depends on when the action took or takes effect (as stated in the notice). If the action:

- (1) took effect immediately, or on a specified date which has already passed, it continues to have effect (subject to any decision on a referral to the *Tribunal*); or
- (2) was to take effect on a specified date which is still in the future, it takes effect on that date (subject to any decision on a referral to the *Tribunal*); or
- (3) was to take effect when the matter was no longer *open for review*, it takes effect when the period to make representations (or the period for referral to the *Tribunal*, if longer) expires, unless the matter has been referred to the *Tribunal*.

4.4.14G

In exceptional cases, the decision maker may permit representations from a *person* who has received a *decision notice* (or a second *supervisory notice*) given in accordance with DEC 2.3 (or DEC 3.1.8G to DEC 3.1.10G) (or against whom action, detailed in a first *supervisory notice*, has taken effect as described in DEC 4.4.13AG), and shows on reasonable grounds that he did not receive the *warning notice* (or first *supervisory notice*), or that he had reasonable grounds for not responding within the specified period. In these circumstances, the decision maker may decide to give a *notice of discontinuance* (DEC 2.3.8G to DEC 2.3.9G) or a further *decision notice* (or a written notice or a *supervisory notice*).

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4.5.5G

~~If the *firm* makes no representations, by the time a decision is to be made about the giving of a *decision notice* FSA staff at the appropriate level of seniority will decide whether to confirm their original decision and, if so, will then give a *decision notice*, then the decision maker may regard the matters in the *warning notice* as undisputed. A *decision notice* will be given accordingly.~~

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4.6.2AG

Decisions to prosecute for criminal offences under the legislation listed in DEC 1.1.4G may be taken by the procedure described in DEC 4.6.1G and DEC 4.6.2G, or alternatively may be taken under executive procedures.

4.6.2BG

In determining which procedure should be followed in deciding to prosecute for an offence under the legislation listed in DEC 1.1.4G, the FSA will have regard to the seriousness of the offence involved, the size and profile of the defendant and the complexity of the issues. The less serious the offence and the less complex the issues, the more likely the decision to prosecute will be taken under executive procedures.

...

DEC App 1

1.4.3G

In each appropriate enforcement case (see DEC App 1.4.1G and 1.4.2G), the mediation scheme will be available to the person against whom a *warning notice* is issued. The mediation scheme will be available after the *warning notice* has been issued and before the ~~RDC~~ FSA issues a *final notice*. The relevant *warning notice* will state the circumstances in which mediation is available for that matter under the terms of the scheme.