



Building Societies Act 1986

1986 CHAPTER 53

PART VI

POWERS OF CONTROL OF THE COMMISSION

Power to determine extent of building society powers

38 Power to determine building society's powers

- (1) The Commission shall have power to determine whether a particular activity of a building society or its subsidiary is or is not within the existing powers of the society and may, if it thinks fit, take such professional advice as it considers it needs to enable it to make the determination.
- (2) A determination may be made under this section in relation to an activity which is proposed to be carried on as well as in relation to one which is being carried on.
- (3) The powers of the Commission in relation to a building society are exercisable—
 - (a) on an application made by the society, requesting the Commission to make the determination,
 - (b) on an application made by the society at the direction of the central office under Part II of Schedule 2 to this Act, or
 - (c) on the Commission's own motion or on an application made by the society at its direction,as provided in subsection (4), (5), (6) or (8) below.
- (4) A building society may at any time, on complying with the following provisions of this section, make an application to the Commission for a determination under this section whether an activity specified in the application is or is not within its powers if the directors of the society are of the opinion that there is a doubt about the existence or extent of the powers to carry on the activity which requires to be resolved in the interests of the society.

Status: This is the original version (as it was originally enacted).

- (5) A building society which has been directed by the central office under Part II of Schedule 2 to this Act to make an application to the Commission under this section shall, in accordance with the direction, make an application to the Commission for a determination whether the activity specified in the application is or is not within its powers.
- (6) If it appears to the Commission at any time that a building society or its subsidiary is carrying on or is about to carry on an activity which is or may be outside the existing powers of the society, the Commission may, by notice to the society specifying the activity and its opinion, direct it to make an application for a determination under this section whether the activity is or is not within its powers and it shall be the duty of the society to comply with the direction.
- (7) A direction under subsection (6) shall require the application to be made within the period of 21 days beginning with the date on which the notice is given, but the Commission may extend or further extend the period within which the application is to be made.
- (8) If a building society fails, within the time allowed by or under subsection (7) above, to make an application as directed under subsection (6) above, the Commission may, of its own motion, proceed to make a determination under this section as if an application had been made by the society.
- (9) An application by a building society under subsection (4), (5) or (6) above shall be made in writing, signed by the secretary as such an application, and shall comprise—
- (a) a statement of the question for determination, specifying the activity and the powers in question, the nature of the doubt and (except in the case of an application under subsection (6)) the arguments for and against the activity being within those powers, as they appear to the society, and
 - (b) such documents or draft documents and such other information as are necessary to enable the determination to be made.
- (10) The statement of the question for determination may, with the agreement of the Commission, be amended at any time before the determination is made and in that event further documents and other information may be included in the application.
- (11) The Commission may, by notice to the society, require a society making an application under subsection (4), (5) or (6) above to amend the statement of the question for determination or to furnish such further documents or other information or such explanations of the statement, documents or information as appear to it to be necessary to enable the determination of the question to be made ; and the Commission may allow or require the explanations to be made orally instead of in writing.
- (12) In this section and sections 39 and 40—
- " activity " includes the exercise, or purported exercise, of any power under this Act, including the holding of any property or rights;
- " existing", with reference to powers, means existing at the relevant date and, in relation to a building society, " existing powers " denotes the powers it has, or has adopted, under this Act, with any restrictions it has assumed, as at that date but disregarding anything done by the Commission and then in force (otherwise than under section 39 or 40) by virtue of which the society is precluded from exercising, or is subject to restrictions on the exercise of, its powers ;
- " the relevant date", in relation to a building society, means—

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- (a) in a case where the Commission decides to proceed of its own motion, the date when the Commission so decides;
 - (b) in a case where the society makes the application at the direction of the central office, the date specified in the direction; and
 - (c) in any other case, the date on which the society makes the application.
- (13) Nothing in this section or section 39 or 40 implies that it is improper for the Commission to give to a building society or building societies generally an indication of the action it might or might not take in relation to any proposed activity of theirs; and if any determination comes to be made in relation to the activity the proceedings shall not be liable to be set aside by reason of the indication having been given.

39 The determination: notification, effect, appeal

- (1) A determination of the Commission under section 38 shall be in writing and, as soon as practicable after it is made, the Commission shall notify the society of the determination and the reasons for it.
- (2) On receiving notice of the determination the society shall, if it is a determination that the activity in question was outside its powers, forthwith send a copy of it to every person who the society has reason to believe will or may be affected by it other than a person whose only interest is as a shareholder in, or depositor with, the society.
- (3) Subject to subsection (4) below, the Commission shall, within the period of one month beginning with the date of the notice to the society under subsection (1) above, publish the determination in such manner as it thinks appropriate.
- (4) Where the determination is made on an application made by the society under section 38(4), the Commission may, on the application of the society, postpone the publication of the determination for such period as it thinks fit, not exceeding the period of six months beginning with the date of the notice to the society under subsection (1) above, if it appears to the Commission that it is just to do so.
- (5) A determination under section 38 shall bind all persons, whether or not (in the case of an application) they were parties to it and, subject to any appeal under subsection (8) below, shall be final and conclusive for all purposes.
- (6) Where the activity in question was at the relevant date being carried on by the society and the determination is that the activity is outside the powers of the society the directors of the society shall be personally liable, jointly and severally, for any loss or expense to the society consequent on the activity's being outside its powers (including, if a prohibition order under section 40 is made, any loss or expense consequent on the order).
- (7) If it appears to the Commission that proceedings under subsection (6) above have not been, but ought in the interests of the society to be, brought, the Commission may bring such proceedings in the name and on behalf of the society; and if it does so the Commission may indemnify the society against the costs or expenses incurred by the society in, or in connection with, proceedings brought by virtue of this subsection.
- (8) Any person affected by a determination under section 38 shall be entitled within the period of six weeks beginning with the date of the notice under subsection (1) above or such further period as the Court may allow, to appeal to the High Court against the determination in accordance with rules of court on the ground that it is erroneous in law and the Commission shall be made respondent on the appeal.

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- (9) On any appeal to the High Court under subsection (8) above the High Court may confirm, reverse or vary the determination appealed from.
- (10) In the application of this section to a building society whose principal office is in Scotland, references to the High Court shall be read as references to the Court of Session.
- (11) The Commission may, if it thinks fit, require a building society in whose case it has made a determination under section 38 to pay such fee as the Commission directs.

40 Power to make prohibition orders

- (1) On or at any time after making a determination under section 38 that a specified activity is outside the powers of a building society, the Commission shall, if it appears to it—
 - (a) that the activity is being carried on by the society, or
 - (b) that the activity has not been but, unless a prohibition order is made under this section, may be carried on by the society,serve on the society a notice of the Commission's intention to issue a prohibition order directed to the society.
- (2) A prohibition order under this section is an order prohibiting, subject to the saving or transitional provisions of the order, the continuance or, as the case may be, the carrying on of the activity specified in the order, either absolutely or unless conditions specified in the order are complied with, after a date specified in the order and requiring, subject to the saving or transitional provisions of the order, the disposal within a specified period of all assets acquired or otherwise in its possession by virtue of the activity.
- (3) A disposal of assets in pursuance of a prohibition order shall vest the assets in the transferee but without prejudice to any claim against the society by a person who had an interest in the assets.
- (4) The saving or transitional provisions which may be included in a prohibition order shall be such as appear to the Commission to be just having regard to the interests of shareholders of and depositors with the society and the interests of other persons who will be affected by the order; but the provisions shall not in any respect suspend the operation of the order beyond the period of one year.
- (5) A prohibition order may include a direction for treating assets of any description as assets of the class specified in the direction for the purposes of the requirements of Part III for the structure of commercial assets.
- (6) A notice under subsection (1) above of the Commission's intention to issue a prohibition order shall—
 - (a) specify the date on which the order is to be issued, being a date not earlier than the end of the period of 21 days beginning with the date of the notice;
 - (b) specify the terms of the order, including any saving or transitional provisions proposed to be included in it;
 - (c) inform the society of its right to make representations to the Commission before the order is issued as to the saving or transitional provisions to be included in the order; and
 - (d) inform the society of its duty under subsection (7) below.

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- (7) On receiving a notice under subsection (1) above the society shall forthwith send a copy of it to every other person whom it has reason to believe will or may be affected by the determination under section 38 on which the order will be founded.
- (8) Any person who may be affected by the determination under section 38 on which the order will be founded may, at any time before the order is made, make representations to the Commission as to the inclusion in it of saving or transitional provisions affecting his interests and they may be made orally or in writing.
- (9) After considering any representations made under subsection (8) above the Commission shall make the prohibition order with such saving and transitional provisions (if any) as it thinks just, shall issue the order by causing it to be served on the society and shall direct the central office to keep a copy of it in the public file of the society.
- (10) A prohibition order so made and issued shall, subject to subsection (15) below, take effect on the date specified in the order.
- (11) A copy of any order issued under subsection (9) above shall also be served on each director and on the chief executive of the society.
- (12) The requirement of subsection (11) above, so far as it relates to directors, is satisfied by serving a copy on each director whose appointment has been officially notified and the non-receipt of a copy by a director or the chief executive does not affect the validity of the direction.
- (13) Subject to subsection (14) below, a prohibition order shall remain in force until revoked by the Commission.
- (14) The Commission may suspend or revoke a prohibition order so far as it relates to an asset the disposal of which appears to it, on the application of the society, to be impracticable.
- (15) If, when a prohibition order has been made, an appeal is pending before the High Court under section 39(8) against the determination on which the order is founded the High Court may, on application made to it, order that the operation of the prohibition order be stayed until the determination of the appeal; but it shall not do so unless it is satisfied that it is in the public interest that it be stayed.
- (16) If a society contravenes a prohibition order issued against it under this section the Commission may certify the contravention in writing to the High Court; and the Court may thereupon inquire into the case and, after hearing any witnesses who may be produced against or on behalf of the society and after hearing any statement which may be offered in defence, may punish the society in like manner as if it had been guilty of contempt of the court.
- (17) In the application of this section to a building society whose principal office is in Scotland, references to the High Court shall be read as references to the Court of Session and references to staying shall be read as references to sisting.