

# **FINANCIAL SERVICES AND MARKETS ACT 2000**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part X: Rules and Guidance**

##### ***Chapter III: Competition Scrutiny***

293. Chapter III provides for competition scrutiny of the Authority's rules, guidance, codes and practices.

##### ***Section 160: Reports by the Director General of Fair Trading***

294. This section concerns reports by the DGFT on possible adverse effects on competition of the Authority's regulating provisions and practices. A significant adverse effect on competition is defined in section 159(2) and (3). It includes things which have the effect of requiring or encouraging exploitation of the strength of a market position.

295. *Subsection (1)* provides that the DGFT must keep the Authority's practices and regulating provisions (which are defined in section 159 and include rules, guidance and codes) under review. The DGFT can, at any time, investigate the Authority's practices and regulating provisions under the powers conferred by section 161.

296. Following an investigation, if the DGFT finds that regulating provisions or practices, either singly or in combination, have a significant adverse effect on competition then he must produce a report. The DGFT has discretion as to whether to produce a report or not if he finds that there is no such effect.

297. *Subsections (5) and (6)* provide that the DGFT must send a copy of any report he produces to the Competition Commission (the "Commission"), the Treasury and the Authority. The DGFT must, so far as is practicable, exclude from the published version of the report any matter which relates to the affairs of a person which might seriously prejudice that person's interests. (*Subsection (9)* provides that such matters do not need to be excluded from the version which goes to the Commission, the Treasury and the Authority.)

##### ***Section 161: Power of Director to request information***

298. This section provides that, in carrying out his functions under section 160, the DGFT has powers to request relevant documents from any person, and to request relevant information from any business.

299. *Subsections (5) and (6)* provide that if a person fails to produce a required document, or piece of information, then the DGFT may report the matter to the court, and if the court is satisfied that there was no reasonable excuse for this failure, that person may be dealt with as if he were in contempt of court.

**Section 162: Consideration by the Competition Commission**

300. This section concerns the role and duties of the Competition Commission following receipt of a report from the DGFT. It is supplemented by the provisions of Schedule 14.
301. There are two types of report which the Commission must consider under this section and on which it must produce a report. The first is a report by the DGFT which concludes that particular regulating provisions or practices of the Authority have a significantly adverse effect on competition (type A). The second is a report by the DGFT which concludes that particular regulating provisions or practices do not have such an effect, but where the DGFT has referred the matter to the Commission for further consideration (type B). (If the DGFT does not ask the Commission to consider a type B report, then that is the end of the matter.)
302. *Subsection (4)* provides that the Commission's report must state its conclusions as to whether the regulatory provisions or practices have a significantly adverse effect on competition. If it concludes that there is no such effect (that is, it agrees with a type B report or disagrees with a type A report), then that is the end of the matter. No further action can be taken.
303. If, however, the Commission concludes that there is such an effect, then *subsection (5)* requires it to state in its report whether it considers that the effect is justified. In taking this decision, *subsection (7)* requires the Commission, as far as is reasonably possible, to reach a conclusion which the Authority could have reached given the obligations which the Act places on the Authority and the functions which it confers. In its report, the Commission has to state what action, if any, ought to be taken by the Authority in the light of the unjustified anti-competitive effect. This could include the Authority changing its rules or practices in specified ways.
304. Any report produced by the Commission under this section has to be sent to the Treasury, the Authority and the DGFT. *Subsection (2)* provides that the Commission does not need to produce a report where there has been a change of circumstances which makes it unnecessary. For example, the Authority may, once it has received the DGFT's report, change the rule in question, or stop engaging in a particular practice, so that the adverse effect on competition identified by the DGFT is removed.

**Section 163: Role of the Treasury**

305. This section concerns the Treasury's powers to take action following an adverse report from the Commission.
306. If the Commission's report is that the significantly adverse effect on competition is not justified, *subsection (2)* requires the Treasury, unless exceptional circumstances exist, to direct the Authority to take appropriate action. *Subsection (4)* provides that the Treasury must have regard to the Commission's conclusion as expressed in its report. The special circumstances in which the Treasury do not have to direct the Authority to make changes following an adverse Commission report are where:
- the Authority has already taken action, for example through changes to its rules or practices, which means that the Commission's recommendations are no longer relevant; or
  - the Treasury concludes that the existence of exceptional circumstances mean that it would not be appropriate or necessary to direct the Authority to make changes. For example, the Treasury may conclude that there would be a grave risk to the financial system if certain regulating provisions were changed.
307. *Subsection (7)* provides that the Authority cannot be directed by the Treasury to take any action which it would not have the power to take itself. If the Commission were to recommend changes which did not, for example, provide an appropriate level of

*These notes refer to the Financial Services and Markets Act  
2000 (c.8) which received Royal Assent on 14 June 2000*

protection for consumers, the Treasury could not direct the Authority to make those changes.

308. If the Commission's view is that a significantly adverse effect is justified, *subsections (5) and (6)* allow the Treasury to override that decision and direct the Authority to make changes where there are exceptional circumstances, for example, in order to meet international obligations.
309. *Subsections (10), (11) and (12)* provide that if the Treasury decide, because of exceptional circumstances, not to take action following a Commission report that a regulating provision or practice has an adverse effect on competition, or decide to take action in the opposite case, they must produce a statement giving their reasons. Any such statement must be made available to the public and must be laid before Parliament.

***Section 164: The Competition Act 1998***

310. This section makes clear that neither the prohibition in Chapter I (of agreements preventing, restricting or distorting competition within the United Kingdom) nor the prohibition in Chapter II (of abuse of a dominant position in a market which may effect trade in the United Kingdom) of the Competition Act 1998 apply to any action taken by a person in order to comply with the Authority's regulating provisions or practices.