

Financial Services (Banking Reform) Bill

Government annotated amendments: Functions of FCA under competition legislation

Part 1

Amendments of Financial Services and Markets Act 2000

Amendment 70 – After Clause 12 insert the following new Clause-

“PART 7

MISCELLANEOUS

“Functions of FCA under competition legislation

Schedule (Functions of FCA under competition legislation) (which contains provision conferring on the FCA functions under competition legislation) has effect.”

This Schedule contains provision conferring on the FCA functions under competition legislation.

Amendment 73 – Amendment to Clause 14 of the Bill:

Page 27, line 11, at end insert “and (b) after “213(1A),” insert “234I(2),”.”

This amendment ensures that any order made under the new section 234I of FSMA (see below) must be made in accordance with the “affirmative” Parliamentary procedure, whereby the order only comes into force if both Houses approve it.

Amendment 82 – Before Schedule 2 insert the following new Schedule

“FUNCTIONS OF FCA UNDER COMPETITION LEGISLATION

PART 1

AMENDMENTS OF FINANCIAL SERVICES AND MARKETS ACT

1 - Part 16A of FSMA 2000 (consumer protection and competition) is amended as follows.

2 - Omit section 234H (power of FCA to make request to Office of Fair Trading).

Section 234H gives the FCA a power to ask the Office of Fair Trading to consider whether a feature, or combination of features, of a market in the United Kingdom for financial services may prevent, restrict or distort competition in connection with the supply or acquisition of any financial services in the United Kingdom or a part of the United Kingdom. The section

obliges the OFT to respond to such a request. These provisions are no longer necessary now that the FCA is to have concurrent competition functions.

3 - After section 234H insert –

“234I Matters in relation to which the FCA has competition functions

(1) In sections 234J to 234K “financial sector activities” means the provision of financial services.

(2) The Treasury may by order amend this section.

New Section 234I(1) defines the scope of the matters in respect of which the FCA has concurrent competition functions. Subsection (2) contains a power which allows the Treasury to amend this section by order. Any order made under this power is subject to the affirmative Parliamentary procedure.

234J The FCA.s functions under Part 4 of the Enterprise Act 2002

(1) The functions to which this subsection applies (“the concurrent functions”) are to be concurrent functions of the FCA and the Competition and Markets Authority (referred to in this Part as “the CMA”).

This subsection specifies that the functions set out in this section are to be exercisable concurrently by the FCA and the Competition Markets Authority (CMA) (formed by the merger of the OFT and the Competition Commission).

(2) Subsection (1) applies to the functions of the CMA under Part 4 of the Enterprise Act 2002 (market investigations), so far as those functions –

- (a) are exercisable by the CMA Board (within the meaning of Schedule 4 to the Enterprise and Regulatory Reform Act 2013), and
- (b) relate to financial sector activities.

Subsection (2) provides that the FCA has a concurrent market study function but only in so far as it relates to “financial sector activities” as defined in subsection (1). Subsection (4)(a) ensures that the FCA can exercise this function by stipulating that references in Part 4 to the Enterprise Act 2002 (EA02) to the CMA are to be read as including references to the FCA.

(3) But subsection (1) does not apply to functions under the following sections of that Act - section 166 (duty to maintain register of undertakings and orders); section 171 (duty to publish guidance).

Subsection (3), in conjunction with subsection (5), excludes certain functions of the CMA contained in Part 4 of EA02 from those that the FCA may exercise concurrently. Those excluded functions relate to the maintaining of registers and the publishing of guidance. These exclusions reflect a lack of value in replicating CMA guidance and that a register is

not needed because of the requirement that these amendments will place on the CMA to report on the FCA's use of its new competition functions.

- (4) So far as is necessary for the purposes of, or in connection with, subsections (1) and (2).
 (a) references in Part 4 of the Enterprise Act 2002 to the CMA (including references in provisions of that Act applied by that Part) are to be read as including references to the FCA, and
 (b) references in that Part to section 5 of that Act are to be read as including references to section 234N of this Act.

See notes on subsections (2) and (6).

- (5) But subsection (4) does not apply -
 (a) in relation to section 166 or 171 of that Act, or
 (b) where the context otherwise requires.

See note on subsection (3).

- (6) Section 130A of the Enterprise Act 2002 is to have effect in relation to the FCA by virtue of subsections (1) and (2) as if -

- (a) in subsection (2)(a) of that section, the reference to the acquisition or supply of goods or services of one or more than one description in the United Kingdom were a reference to [financial sector activities involving services provided or received in the United Kingdom], and
 (b) in subsection (2)(b) of that section, the reference to the extent to which steps can and should be taken were a reference to the extent to which steps that might include steps under Part 4 of that Act can and should be taken.

Subsection (6) concerns the application of section 130A of EA02 in relation to the FCA. Section 130A is the provision under which the CMA is able to conduct market studies. This section has been amended by the Enterprise and Regulatory Reform Act 2013 so as to introduce a statutory time frame in which market studies are to be carried out. The provisions of subsection (6), in conjunction with subsection (4)(b), ensure that when the FCA exercises its concurrent market study function, the statutory time frame applies.

- (7) Before the CMA or the FCA first exercises any of the concurrent functions in relation to any matter, it must consult the other.

- (8) Neither the CMA nor the FCA may exercise any of the concurrent functions in relation to any matter if any of those functions have been exercised in relation to that matter by the other.

Subsections (7) and (8) impose a requirement on the CMA and the FCA to consult each other before exercising any of their concurrently held functions and to ensure they do not both exercise the same functions in relation to the same matter.

234K The FCA's functions under the Competition Act 1998

(1) The functions to which this subsection applies ("the concurrent Functions") are to be concurrent functions of the FCA and the Competition and Markets Authority ("the CMA").

Subsection (1) specifies that the functions set out in this section are to be exercisable concurrently by the FCA and the CMA.

(2) Subsection (1) applies to the functions of the CMA under the provisions of Part 1 of the Competition Act 1998, so far as relating to any of the following that relate to financial sector activities.

- (a) agreements, decisions or concerted practices of the kind mentioned in section 2(1) of that Act,
- (b) conduct of the kind mentioned in section 18(1) of that Act,
- (c) agreements, decisions or concerted practices of the kind mentioned in Article 101(1) of the Treaty on the Functioning of the European Union, and
- (d) conduct which amounts to abuse of the kind mentioned in Article 102 of the Treaty on the Functioning of the European Union.

Subsection (2) specifies those functions in Part 1 of the Competition Act 1998 (CA98) - around investigation and enforcement - that the FCA is to be able to exercise concurrently with the CMA, so far as they relate to financial sector activities. Subsection (4) ensures that the FCA can exercise those functions by stipulating that references in Part 1 of CA98 to CMA are to be read as including references to the FCA. The effect of subsections (2) and (4) is that the FCA will have powers to address restrictions and distortions in competition so far as those arise in the context of financial sector activities.

(3) But subsection (1) does not apply to functions under the following sections of that Act -
 section 31D(1) to (6) (duty to publish guidance);
 section 38(1) to (6) (duty to publish guidance about penalties);
 section 40B(1) to (4) (duty to publish statement of policy on penalties);
 section 51 (rules).

Subsection (3), in conjunction with subsection (5), excludes certain functions of the CMA contained in Part 1 of CA98 from those that the FCA may exercise concurrently. Those excluded functions relate to the publishing of guidance and statements of policy.

(4) So far as necessary for the purposes of, or in connection with, the provisions of subsections (1) and (2), references to the CMA in Part 1 of the Competition Act 1998 are to be read as including references to the FCA.

See note on subsection (2).

(5) But subsection (4) does not apply.

- (a) in relation to sections 31D(1) to (6), 38(1) to (6), 40B(1) to (4), 51, 52(6) and (8) and 54 of that Act, or
- (b) where the context otherwise requires.

See note on subsection (3).

234L Duty to consider exercise of powers under Competition Act 1998

(1) Before exercising a power listed in subsection (3), the FCA must consider whether it would be more appropriate to proceed under the Competition Act 1998.

Subsection (1) imposes a requirement on the FCA to consider whether it would be more appropriate to take action under its new powers in CA98 before exercising certain powers in FSMA. This is in line with requirements on other sector regulators and is designed to ensure that regulators make full use of their powers under CA98.

(2) The FCA must not exercise such a power if it considers that it would be more appropriate to proceed under the Competition Act 1998.

Subsection (2) prohibits the FCA from using those FSMA powers if it considers that it would be more appropriate to proceed under CA98.

(3) Those powers are -

- (a) the power under section 55J(2) to vary or cancel a Part 4A permission;
- (b) the power under section 55L to impose a requirement on an authorised person with a Part 4A permission, or to vary a requirement imposed under that section;
- (c) the power to take action under section 88E;
- (d) the power to take action under section 89U;
- (e) the power to give a direction under section 192C;
- (f) the power to impose a requirement under section 196.

Subsection (3) sets out the powers that subsection (1) and (2) apply to. The powers listed are all powers under FSMA which the FCA could exercise in respect of particular firms rather than generally.

234M Provision of information and assistance to a CMA group

(1) For the purpose of assisting a CMA group in carrying out a relevant investigation, the FCA must give the CMA group -

- (a) any relevant information which the FCA has in its possession, and
- (b) any other assistance which the CMA group may reasonably require in relation to any matters falling within the scope of the investigation.

(2) A "relevant investigation" is an investigation carried out on a reference made by the FCA under section 131 of the Enterprise Act 2002 by virtue of section 234J.

(3) "Relevant information", in relation to a relevant investigation, is information -

- (a) which relates to matters falling within the scope of the investigation, and
- (b) which -
 - (i) is requested by the CMA group for the purpose of the investigation, or
 - (ii) in the FCA's opinion, it would be appropriate to give to the CMA group for that purpose.

Subsections (1), (2), and (3) ensure that for the purposes of assisting a CMA group to carry out market investigations - in response to a reference from the FCA - the FCA must provide the CMA with any information relevant to the investigation and with any other assistance that the CMA might reasonably require.

(4) A CMA group, in carrying out a relevant investigation, must take into account any information given to it under this section.

Subsection (4) requires a CMA group to take into account information that it is given under this section.

(5) In this section “CMA group” has the same meaning as in Schedule 4 to the Enterprise and Regulatory Reform Act 2013.

234N Information relating to FCA’s competition functions

(1) For the purpose of the functions conferred on it by sections 234J to 234M the FCA is to have the function of keeping under review the market in financial services.

(2) The function conferred by subsection (1) is to be carried out with a view to (among other things) ensuring that the FCA has sufficient information to take informed decisions and to carry out its other functions effectively.

New Section 234N confers on the FCA the function of keeping under review those markets in which it may exercise its concurrent competition functions. The FCA is placed under an obligation to carry out its market review function with a view to (amongst other things) ensuring that the FCA has sufficient information to take informed decisions and to carry out its other functions effectively.

234O Exclusion of general duties

(1) Section 1B (the FCA’s general duties) does not apply in relation to anything done by the FCA in the carrying out of its functions by virtue of sections 234J to 234M.

This subsection ensures that where the FCA exercises any of its concurrent competition functions, its general duties under section 1B of FSMA do not apply. This is to ensure that the FCA is free to exercise its new competition functions in relation to “financial sector activities” without being bound by general duties to which the CMA would not itself be bound when exercising those functions.

(2) In the carrying out of any functions by virtue of sections 234J to 234M, the FCA may however have regard to any of the matters in respect of which a duty is imposed by section 1B if it is a matter to which the CMA is entitled to have regard in the carrying out of those functions.

This subsection nonetheless allows (for the avoidance of doubt) the FCA to take account of the matters in respect of which it is under a general duty under FSMA when carrying out its new competition functions if they are matters that the CMA is entitled to take into account when carrying out those functions. Again, this ensures that the FCA has the same freedom around the exercise of its new competition functions in relation to “financial sector activities” as the CMA.

234P Supplementary provision

(1) If any question arises as to whether, by virtue of sections 234J and 234K, any functions fall to be, or are capable of being, carried out by the FCA in relation to any particular case, that question is to be referred to, and determined by, the Treasury.

This subsection requires the Treasury to settle any questions that arise as to whether, by virtue of the FCA’s concurrent competition functions, any functions fall to be, or are capable of being, carried out by the FCA in relation to a particular case. This provision provides a mechanism for determining whether the FCA or CMA should exercise competition powers in a particular case.

(2) No objection is to be taken to anything done under the Competition Act 1998 or Part 4 of the Enterprise Act 2002 by or in relation to the FCA on the ground that it should have been done by or in relation to the CMA.”

Subsection (2) is included to ensure that no objection can be raised to the taking by the FCA of any action under its concurrent competition powers on the basis that it could have been done by or in relation to the CMA.

4 - In section 3I of FSMA 2000 (power of PRA to require FCA to refrain from specified action), in subsection (3)(a), after “55I” insert “, a power conferred on it by sections 234J to 234N”.

Section 3I of FSMA contains a power for the Prudential Regulation Authority to direct the FCA not to act in certain circumstances. Section 3I(3)(a) lists certain “regulatory powers” over which the PRA veto power does not extend. The amendment made to section 3I(3)(a) ensures that the PRA does not have the power to require the FCA to refrain from a specified action in relation to the exercise of its concurrent competition powers.

5 - In section 354A of FSMA 2000 (FCA’s duty to co-operate with others), after subsection (2) insert -

“(2A) Subsection (1) does not apply in relation to the Competition and Markets Authority in a case where the FCA has made a reference under section 131 of the Enterprise Act 2002 as a result of section 234J (but see section 234M).”

This paragraph inserts a new subsection into section 354A of FSMA. Section 354A(1) provides that the FCA must take such steps as it considers appropriate to co-operate with other persons who have functions similar to those of the FCA. However, new section 234M requires the FCA to provide relevant information to the CMA where the FCA has made a reference to the CMA under its concurrent powers contained in EA09. This paragraph amends section 354A so that the provision in subsection (1) which only requires the FCA to take steps which it considers appropriate to co-operate does not conflict with the new information-sharing duty imposed on the FCA in new section 234M.

6 - (1) Schedule 1ZA to FSMA (the Financial Conduct Authority) is amended as follows.

(2) In paragraph 8 (arrangements for discharging functions), after subparagraph (4) insert -

“(5) In respect of the exercise of a function under Part 1 of the Competition Act 1998, the power in sub-paragraph (1) is subject to provision in rules made under section 51 of that Act by virtue of paragraph 1A of Schedule 9 to that Act.”

The power in subparagraph (1) provides for the FCA to make arrangements for its functions to be discharged by a committee, sub-committee, officer, or member of staff in the FCA. However, under section 51 of CA98, rules may be made by the CMA which specify that certain competition functions are to be carried out by certain specified persons. The effect of inserting the new subparagraph into paragraph 8 of Schedule 1ZA is that the FCA’s constitutional rules concerning delegation do not override any provisions relating to delegation contained in CMA rules made under section 51 of CA98.

(3) In paragraph 23 (fees), after sub-paragraph (2) insert -

“(2A) The functions referred to in sub-paragraph (1)(a) include functions of the FCA under the Competition Act 1998 or the Enterprise Act 2002 as a result of Part 16A of this Act.”

This new subparagraph makes it clear that the FCA may charge fees to cover the cost of exercising its new competition functions.

PART 2

AMENDMENTS OF OTHER LEGISLATION

Company Directors Disqualification Act 1986 (c. 46)

7 - In section 9E of the Company Directors Disqualification Act 1986 (interpretation of sections 9A to 9D), in subsection (2), after paragraph (f) insert -

“(g) the Financial Conduct Authority”.

The effect of this amendment is that the FCA has the power to apply to the court to make a disqualification order against a person who is a director of a company which has committed a breach of competition law.

Competition Act 1998

8 - In section 54 of the Competition Act 1998 (regulators), in subsection (1), omit the “and” at the end of paragraph (g) and after paragraph (h) insert -

“(i) the Financial Conduct Authority”.

The effect of this amendment is that the provisions contained in Part 1 CA98 concerning co-ordination of the activities of those regulators with concurrent competition functions apply to the FCA. This amendment also ensures that the FCA is a National Competition Authority for the purposes of EU competition law.

Enterprise Act 2002

9 - (1) Section 136 of the Enterprise Act 2002 (investigations and reports on market investigation references) is amended as follows.

(2) In subsection (7), after paragraph (e) insert -

“(ea) in relation to the Financial Conduct Authority, section 234J of the Financial Services and Markets Act 2000;”.

(3) In subsection (8), after “the Office of Rail Regulation,” insert “the Financial Conduct Authority,”.

This paragraph amends section 136 of EA02. That section provides that where the CMA receives a market investigation reference it must publish a report, and where a reference has been made by the CMA Board in circumstances where a regulator with concurrent market investigation reference powers could have made a reference, the CMA must give a copy of the report to the relevant regulator. The amendments made to section 136 by paragraph 9 mean that the provisions of that section apply in respect of the FCA.

Enterprise and Regulatory Reform Act 2013

10 - In section 52(4) of the Enterprise and Regulatory Reform Act 2013 (power to remove concurrent competition functions of sectoral regulators) after paragraph (f) insert-
“(g) the Financial Conduct Authority.”

Section 52 confers on the Secretary of State a power to remove from a regulator any of its concurrent competition functions. The amendment made by this paragraph ensures that the power to remove those functions extends to the FCA’s concurrent competition functions.

11 - In Schedule 4 to the Enterprise and Regulatory Reform Act 2013 (the Competition and Markets Authority), in paragraph 16 (concurrency report), at the end of sub-paragraph (7) insert -

“(h) the Financial Conduct Authority.”.

This paragraph amends paragraph 16 of Schedule 4 to the Enterprise and Regulatory Reform Act 2013 by adding the FCA to the list of regulators the CMA is required to report on in relation to their exercise of competition powers.

Amendment 85 Amendments to Schedule 2.

Page 34, line 11, at end insert –

“2B (1) In Schedule 1ZA to FSMA 2000 (the Financial Conduct Authority), paragraph 20 is amended as follows.

(2) In sub-paragraph (3)(b), after “this Act” insert “or under a provision mentioned in sub-paragraph (4)(cb) or (4A)”.

(3) In sub-paragraph (4), after paragraph (c) insert –

“(ca) its powers under the relevant competition provisions (as applied by Part 16A of this Act),”.

(4) After sub-paragraph (4) insert –

“(4A) “The relevant competition provisions” are –

- (a) section 31E of the Competition Act 1998 (enforcement of commitments);
- (b) section 34 of that Act (enforcement of directions);
- (c) section 36 of that Act (penalties);
- (d) section 40A of that Act (penalties: failure to comply with requirements);
- (e) section 174A of the Enterprise Act 2002 (penalties).”

(5) In sub-paragraph (5) –

- (a) in paragraph (a), for “FSMA 2000” substitute “this Act”,
- (b) in paragraph (b), for “that Act” substitute “this Act”,
- (c) in paragraph (c), omit “of that Act”, and
- (d) after paragraph (c) insert –
 - “(ca) offences under Part 1 of the Competition Act 1998,
 - (cb) offences under Part 4 of the Enterprise Act 2002.”.

These amendments insert and amend several provisions contained in paragraph 20 of Schedule 1ZA to FSMA, which is the provision that deals with the FCA’s penalty receipts. The effect of these amendments is that the costs the FCA incurs in enforcing its competition powers are deducted from the amount of penalty receipts the FCA receives in respect of penalties imposed under FSMA before the net sum is paid to the Treasury.

These amendments also correct some references in paragraph 20.