

SCHEDULES

SCHEDULE 8

FUNCTIONS OF FCA UNDER COMPETITION LEGISLATION

PART 1

AMENDMENTS OF FINANCIAL SERVICES AND MARKETS ACT 2000

- 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).
- 3 After section 234H insert—

“234I 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”).
- (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 the provision of financial services.
- (3) But subsection (1) does not apply to functions under the following sections of the Enterprise Act 2002—
 - section 166 (duty to maintain register of undertakings and orders);
 - section 171 (duty to publish guidance).
- (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 234M of this Act.
- (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.
- (6) Section 130A of the Enterprise Act 2002 has effect in relation to the FCA by virtue of subsections (1) and (2) as if—

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- (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 the acquisition or provision in the United Kingdom of financial services, 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.
- (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.

234J The FCA’s functions under the Competition Act 1998

- (1) The functions to which this subsection applies are to be concurrent functions of 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 the provision of financial services—
- (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.
- (3) But subsection (1) does not apply to functions under the following provisions 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).
- (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.
- (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.

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234K 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.
- (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.
- (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.

234L 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 234I.
- (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.
- (4) A CMA group, in carrying out a relevant investigation, must take into account any information given to it 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.

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234M Function of keeping market under review

- (1) For the purpose of the functions conferred on it by sections 234I to 234L the FCA is to have the function of keeping under review the market for 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.

234N 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 234I to 234L.
- (2) But in the carrying out of any functions by virtue of sections 234I to 234L, the FCA may 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.

234O Supplementary provision

- (1) If any question arises as to whether, by virtue of section 234I or 234J, 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.
 - (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.”
- 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 234I to 234M”.
- 5 In section 348 of FSMA 2000 (restrictions on disclosure of confidential information by FCA, PRA etc), after subsection (6) insert—
- “(7) Nothing in this section applies to information received by a primary recipient for the purposes of, or in the discharge of, any functions of the FCA under the Competition Act 1998 or the Enterprise Act 2002 by virtue of Part 16A of this Act.
- (For provision about the disclosure of such information, see Part 9 of the Enterprise Act 2002.)”
- 6 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 234I (but see section 234L).”
- 7 (1) Schedule 1ZA to FSMA 2000 (the Financial Conduct Authority) is amended as follows.

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(2) In paragraph 8 (arrangements for discharging functions), after sub-paragraph (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.”

(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; but this sub-paragraph is not to be regarded as limiting the effect of the definition of “functions” in paragraph 1.”