



# Financial Services and Markets Act 2000

## 2000 CHAPTER 8

### PART X

#### RULES AND GUIDANCE

### CHAPTER III

#### COMPETITION SCRUTINY

#### 159 Interpretation

(1) In this Chapter—

“Director” means the Director General of Fair Trading;

“practices”, in relation to the Authority, means practices adopted by the Authority in the exercise of functions under this Act;

“regulating provisions” means any—

- (a) rules;
- (b) general guidance (as defined by section 158(5));
- (c) statement issued by the Authority under section 64;
- (d) code issued by the Authority under section 64 or 119.

(2) For the purposes of this Chapter, regulating provisions or practices have a significantly adverse effect on competition if—

- (a) they have, or are intended or likely to have, that effect; or
- (b) the effect that they have, or are intended or likely to have, is to require or encourage behaviour which has, or is intended or likely to have, a significantly adverse effect on competition.

(3) If regulating provisions or practices have, or are intended or likely to have, the effect of requiring or encouraging exploitation of the strength of a market position they are to be taken, for the purposes of this Chapter, to have an adverse effect on competition.

- (4) In determining under this Chapter whether any of the regulating provisions have, or are likely to have, a particular effect, it may be assumed that the persons to whom the provisions concerned are addressed will act in accordance with them.

## **160 Reports by Director General of Fair Trading**

- (1) The Director must keep the regulating provisions and the Authority's practices under review.
- (2) If at any time the Director considers that—
- (a) a regulating provision or practice has a significantly adverse effect on competition, or
  - (b) two or more regulating provisions or practices taken together, or a particular combination of regulating provisions and practices, have such an effect,
- he must make a report to that effect.
- (3) If at any time the Director considers that—
- (a) a regulating provision or practice does not have a significantly adverse effect on competition, or
  - (b) two or more regulating provisions or practices taken together, or a particular combination of regulating provisions and practices, do not have any such effect,
- he may make a report to that effect.
- (4) A report under subsection (2) must include details of the adverse effect on competition.
- (5) If the Director makes a report under subsection (2) he must—
- (a) send a copy of it to the Treasury, the Competition Commission and the Authority; and
  - (b) publish it in the way appearing to him to be best calculated to bring it to the attention of the public.
- (6) If the Director makes a report under subsection (3)—
- (a) he must send a copy of it to the Treasury, the Competition Commission and the Authority; and
  - (b) he may publish it.
- (7) Before publishing a report under this section the Director must, so far as practicable, exclude any matter which relates to the private affairs of a particular individual the publication of which, in the opinion of the Director, would or might seriously and prejudicially affect his interests.
- (8) Before publishing such a report the Director must, so far as practicable, exclude any matter which relates to the affairs of a particular body the publication of which, in the opinion of the Director, would or might seriously and prejudicially affect its interests.
- (9) Subsections (7) and (8) do not apply in relation to copies of a report which the Director is required to send under subsection (5)(a) or (6)(a).
- (10) For the purposes of the law of defamation, absolute privilege attaches to any report of the Director under this section.

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

- (1) For the purpose of investigating any matter with a view to its consideration under section 160, the Director may exercise the powers conferred on him by this section.
- (2) The Director may by notice in writing require any person to produce to him or to a person appointed by him for the purpose, at a time and place specified in the notice, any document which—
  - (a) is specified or described in the notice; and
  - (b) is a document in that person’s custody or under his control.
- (3) The Director may by notice in writing—
  - (a) require any person carrying on any business to provide him with such information as may be specified or described in the notice; and
  - (b) specify the time within which, and the manner and form in which, any such information is to be provided.
- (4) A requirement may be imposed under subsection (2) or (3)(a) only in respect of documents or information which relate to any matter relevant to the investigation.
- (5) If a person (“the defaulter”) refuses, or otherwise fails, to comply with a notice under this section, the Director may certify that fact in writing to the court and the court may enquire into the case.
- (6) If, after hearing any witness who may be produced against or on behalf of the defaulter and any statement which may be offered in defence, the court is satisfied that the defaulter did not have a reasonable excuse for refusing or otherwise failing to comply with the notice, the court may deal with the defaulter as if he were in contempt.
- (7) “Court” means—
  - (a) the High Court; or
  - (b) in relation to Scotland, the Court of Session.

## **162 Consideration by Competition Commission**

- (1) If the Director—
  - (a) makes a report under section 160(2), or
  - (b) asks the Commission to consider a report that he has made under section 160(3),the Commission must investigate the matter.
- (2) The Commission must then make its own report on the matter unless it considers that, as a result of a change of circumstances, no useful purpose would be served by a report.
- (3) If the Commission decides in accordance with subsection (2) not to make a report, it must make a statement setting out the change of circumstances which resulted in that decision.
- (4) A report made under this section must state the Commission’s conclusion as to whether—
  - (a) the regulating provision or practice which is the subject of the report has a significantly adverse effect on competition; or
  - (b) the regulating provisions or practices, or combination of regulating provisions and practices, which are the subject of the report have such an effect.

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- (5) A report under this section stating the Commission’s conclusion that there is a significantly adverse effect on competition must also—
  - (a) state whether the Commission considers that that effect is justified; and
  - (b) if it states that the Commission considers that it is not justified, state its conclusion as to what action, if any, ought to be taken by the Authority.
- (6) Subsection (7) applies whenever the Commission is considering, for the purposes of this section, whether a particular adverse effect on competition is justified.
- (7) The Commission must ensure, so far as that is reasonably possible, that the conclusion it reaches is compatible with the functions conferred, and obligations imposed, on the Authority by or under this Act.
- (8) A report under this section must contain such an account of the Commission’s reasons for its conclusions as is expedient, in the opinion of the Commission, for facilitating proper understanding of them.
- (9) Schedule 14 supplements this section.
- (10) If the Commission makes a report under this section it must send a copy to the Treasury, the Authority and the Director.

### **163 Role of the Treasury**

- (1) This section applies if the Competition Commission makes a report under section 162(2) which states its conclusion that there is a significantly adverse effect on competition.
- (2) If the Commission’s conclusion, as stated in the report, is that the adverse effect on competition is not justified, the Treasury must give a direction to the Authority requiring it to take such action as may be specified in the direction.
- (3) But subsection (2) does not apply if the Treasury consider—
  - (a) that, as a result of action taken by the Authority in response to the Commission’s report, it is unnecessary for them to give a direction; or
  - (b) that the exceptional circumstances of the case make it inappropriate or unnecessary for them to do so.
- (4) In considering the action to be specified in a direction under subsection (2), the Treasury must have regard to any conclusion of the Commission included in the report because of section 162(5)(b).
- (5) Subsection (6) applies if—
  - (a) the Commission’s conclusion, as stated in its report, is that the adverse effect on competition is justified; but
  - (b) the Treasury consider that the exceptional circumstances of the case require them to act.
- (6) The Treasury may give a direction to the Authority requiring it to take such action—
  - (a) as they consider to be necessary in the light of the exceptional circumstances of the case; and
  - (b) as may be specified in the direction.
- (7) The Authority may not be required as a result of this section to take any action—

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- (a) that it would not have power to take in the absence of a direction under this section; or
  - (b) that would otherwise be incompatible with any of the functions conferred, or obligations imposed, on it by or under this Act.
- (8) Subsection (9) applies if the Treasury are considering—
- (a) whether subsection (2) applies and, if so, what action is to be specified in a direction under that subsection; or
  - (b) whether to give a direction under subsection (6).
- (9) The Treasury must—
- (a) do what they consider appropriate to allow the Authority, and any other person appearing to the Treasury to be affected, an opportunity to make representations; and
  - (b) have regard to any such representations.
- (10) If, in reliance on subsection (3)(a) or (b), the Treasury decline to act under subsection (2), they must make a statement to that effect, giving their reasons.
- (11) If the Treasury give a direction under this section they must make a statement giving—
- (a) details of the direction; and
  - (b) if the direction is given under subsection (6), their reasons for giving it.
- (12) The Treasury must—
- (a) publish any statement made under this section in the way appearing to them best calculated to bring it to the attention of the public; and
  - (b) lay a copy of it before Parliament.

## **164 The Competition Act 1998**

- (1) The Chapter I prohibition does not apply to an agreement the parties to which consist of or include—
- (a) an authorised person, or
  - (b) a person who is otherwise subject to the Authority’s regulating provisions, to the extent to which the agreement consists of provisions the inclusion of which in the agreement is encouraged by any of the Authority’s regulating provisions.
- (2) The Chapter I prohibition does not apply to the practices of an authorised person or a person who is otherwise subject to the regulating provisions to the extent to which the practices are encouraged by any of the Authority’s regulating provisions.
- (3) The Chapter II prohibition does not apply to conduct of—
- (a) an authorised person, or
  - (b) a person who is otherwise subject to the Authority’s regulating provisions, to the extent to which the conduct is encouraged by any of the Authority’s regulating provisions.
- (4) “The Chapter I prohibition” means the prohibition imposed by section 2(1) of the Competition Act 1998.
- (5) “The Chapter II prohibition” means the prohibition imposed by section 18(1) of that Act.