

FINANCIAL SERVICES AND MARKETS ACT 2000

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part Xviii: Miscellaneous

Section 404: Schemes for reviewing past business

716. This section enables the Treasury, by order under *subsection (2)*, to set out the framework for a scheme to be established and operated by the Authority to require authorised persons to review their past business and, where appropriate, to determine the amounts payable by those persons by way of compensation for liabilities that they have incurred to private investors and certain others. This power will facilitate the handling of issues such as those which arose in cases of mis-selling - most notably of personal pensions.

Reciprocity powers

717. *Sections 405 to 408* concern reciprocity powers. Under certain EC directives a decision can be taken by the Council of the European Union or the Commission to require individual member States' regulators to take reciprocal action to deprive subsidiaries of firms from a country outside the European Economic Area (EEA) of access to their markets. This is referred to in the Act as a "third country decision". Such a decision may be taken where it appears to the Commission that EEA firms wishing to establish themselves or provide financial services in third countries are not being treated on the same basis and offered the same competitive opportunities as domestic firms.
718. The potential for reciprocity action has diminished following World Trade Organisation ("WTO") negotiations on financial services which resulted in the EU, along with many other WTO member countries, making a commitment to offer Most Favoured Nation treatment to other WTO members on a permanent basis. This commitment came into force on 1 March 1999 and means that EC reciprocity powers can now only be used against countries outside the WTO.

Section 405: Directions

719. This section defines the nature of reciprocity action that may be taken in order to comply with a third country decision. The section provides the Treasury with the power to direct the Authority to do the following:
- refuse, or put on hold, an application for authorisation from a person which is formed under the law of the United Kingdom but which is the direct or indirect subsidiary (the powers do not apply to branches) of a firm from a country which is the subject of a third country decision (*subsections (1)(a) and (b)*);
 - object to a person from a country which is the subject of a third country decision acquiring a 50 per cent share in an authorised person incorporated in the United

Kingdom or formed under UK law whether or not they have served the Authority with a notice of control as required under Part XII (*subsections (1)(c) and (d)*)

720. The circumstances in which a person is taken to acquire a 50 per cent share is defined in section 406.

Section 407: Consequences of a direction under section 405

721. This section sets out the procedure the Authority must follow if the Treasury directs them to implement a third country decision.

Section 408: EFTA firms

722. If a subsidiary of a firm from a country subject to a third country decision is already authorised in an EU member State then its entitlement to exercise passport rights (see explanatory notes to Schedule 3) to establish a branch or provide services in another member State is not affected if by the third country decision. This is not the case for subsidiaries of third country firms authorised in EEA States which are not also EU member States (Norway, Iceland or Liechtenstein), referred to in the Act as “EFTA firms” (*subsection (8)*). EFTA firms may not exercise their passport rights following a third country decision relating to the country of their parent. This section therefore gives the Treasury the power to make a determination that a particular firm does, or class of firms do, not qualify for authorisation under Schedule 3. *Subsections (6) and (7)* set out the procedure the Treasury must follow if it makes such a determination.

Section 409: Gibraltar

723. This section provides for matters arising from Gibraltar’s status within the EEA.
724. *Subsection (1)(a)* gives the Treasury the power to extend Schedule 3 so that Gibraltar firms which are covered by one of the single market directives to which effect has been given in Gibraltar would be able to qualify for status as an authorised person and establish a branch or provide services within the United Kingdom. It also enables the Treasury to make the necessary provision to ensure that firms from other EEA States which exercise passport rights in relation to Gibraltar before they exercise them in relation to the United Kingdom proper are not required unnecessarily to duplicate notification requirements.
725. *Subsection (1)(d)* does the equivalent for Gibraltar based collective investment schemes. The Treasury also has the power under *subsection (1)(c)* to extend the application of Schedule 4 so that a financial services firm with its head office in Gibraltar or being otherwise connected with Gibraltar would acquire Treaty rights if it is authorised by the Gibraltar competent authority and the relevant conditions in Schedule 4 are met.
726. *Subsection (1)(e)* will enable the Treasury to modify the provisions of section 264 so that the Authority can refuse to admit a collective investment scheme from another member State if the way in which it proposes to market its units is incompatible with requirements imposed in Gibraltar in the general good.
727. *Subsection (1)(b)* gives the Treasury the power, by order, to extend the application of Schedule 3 to the Act so as to make provision as to the exercise by UK firms of rights which are afforded to them under the law of Gibraltar which corresponds to an EEA right.

Section 410: International obligations

728. This section provides the Treasury with the general power to direct a number of bodies with powers under the Act to take, or refrain from taking, any action which is either required by, or is incompatible with, the United Kingdom’s international obligations. For example, if the Authority’s rules on capital requirements were such

that the UK's obligations under EC law were not being met, this section would allow the Treasury to direct the Authority to change their rules so as to ensure compliance.

Section 411: Tax treatment of levies and repayments

729. This section relates to levies and payments relating to the legal assistance scheme under Part IX, the compensation scheme under Part XV and the ombudsman scheme under Part XVI. This section amends the Income and Corporation Taxes Act 1988 so that it provides for such levies to be treated as a tax deductible expense and for levy rebates made to authorised persons to be treated as trading receipts.

Section 412: Gaming contracts

730. Legislation governing gaming contracts includes provisions for such contracts not to be legally enforceable. Some regulated activities involve entering into or performing contracts which could potentially be covered by this legislation, for example derivative contracts such as "put options", and the effect of this section is to make certain that such contracts are legally enforceable.

Section 413: Protected items

731. This section provides that no power under the Act can be used to require any person to produce, disclose or permit the inspection of "protected items". These are defined in terms which are materially identical to the definition of items subject to legal professional privilege in section 10 of the Police and Criminal Evidence Act 1984.

Section 414: Service of notices

732. This section enables the Treasury to make regulations prescribing the procedure for giving notices and other documents under the Act. The power covers any such provision in the Act, regardless of its precise wording, and includes provisions about giving directions or imposing requirements.
733. In particular, the regulations may specify how a document may be given, the address to which it should be sent, and whether the document or notice may be sent electronically. They may also specify the date and time a document is to be regarded as having been served (this may be important, for example, where a time limit begins to run from that date). The regulations may also make particular provision for cases where the person to whom the document is being sent is not an individual (for example, in the case of a limited company or partnership) or is outside the United Kingdom. The precise arrangements required under the regulations may vary depending on the nature of the document in question.

Section 415: Jurisdiction in civil proceedings

734. This section enables civil proceedings, such as judicial review, to be brought against any of the bodies corporate on which functions are conferred by this Act in the courts of any part of the United Kingdom. This is necessary because these bodies are companies incorporated under the Companies Acts and, as such, the effect of the Civil Jurisdiction and Judgments Act 1982 would otherwise be that civil proceedings could be brought against them only in the courts in England and Wales because that is the part of the United Kingdom in which they are treated as being domiciled for the purposes of that Act. That Act is amended by paragraph 3 of Schedule 20.

Section 416: Provisions relating to industrial assurance and certain other enactments

735. This section provides for the Industrial Assurance Acts 1923-48 (and the equivalent Northern Ireland Order) to cease to have effect and for the repeal of the Insurance Brokers (Registration) Act 1977. It also provides for the dissolution of certain statutory

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

bodies mentioned in *subsection (3)*. The section also confers on the Treasury a power by order to make such provisions as it considers necessary in consequence of the provisions of this section. Such consequential provisions would allow, for example, for the protection of existing policyholders under the Industrial Assurance Acts, and to make provision for the orderly dissolution of the bodies mentioned.

736. The repeals and dissolutions set out in this section are dealt with on the face of the Act because they may not be entirely consequential on the other provisions of the Act and therefore maybe outside the scope of section 426, which allows for consequential repeals to be made by order.