

FINANCIAL SERVICES ACT 2012

EXPLANATORY NOTES

COMMENTARY

Part 2 - Amendments of Financial Services and Markets Act 2000

Consumer protection and competition

Section 43: Provision about consumer protection and competition

477. *Section 43* inserts new Part 16A (new sections 234C to 234H) into FSMA. These provisions relate to complaints and references which may be made to the FCA in relation to competition or matters which adversely affect the interests of consumers.
478. *New section 234C* enables bodies which represent the interests of consumers and which have been designated by the Treasury to make a complaint to the FCA that a feature of the market in the United Kingdom for financial services or combination of features is or appears to be significantly damaging to the interests of consumers. Sections 425A and 425B (meaning of “consumers”) apply for the purposes of this section but those who are authorised persons are not to be treated as consumers for this purpose. This means that bodies which primarily represent the interests of authorised persons cannot be designated for these purposes. This provision is similar to the mechanism in section 11 of the Enterprise Act 2002 for designated consumer bodies to make “super-complaints” to the Office of Fair Trading.
479. *New section 234D* enables the scheme operator under Part 16 of FSMA (the Financial Ombudsman Scheme) or “regulated persons” (which is defined as authorised persons and certain other financial institutions) to make a reference to the FCA. References may be made on two separate bases. First a reference may be made where it appears that there may have been regular failure by one or more regulated persons to comply with requirements and as a result consumers have suffered, or may suffer, loss of damage in respect of which a remedy or relief could be obtained in legal proceedings. Second a reference may be made where it appears that one or more regulated persons has on a regular basis acted in such a way that were a complaint made under the ombudsman scheme it is likely that the complaint would be determined in favour of the complainant and also that the ombudsman would be likely to make an award or give a direction in favour of the complainant (provided the ombudsman has power to make awards or give directions). In either case, where the reference is made by a regulated person, the reference must relate to his own failure. *New section 234E* deals with the response by the FCA to a complaint under section 234C or a reference under section 234D. The FCA must within 90 days publish a response stating how it proposes to deal with the matter and in particular whether it has decided to take any action. There may be a range of responses open to the FCA. For example, the FCA could indicate that it proposes to consult on making rules on a particular matter or that it is still considering the matter and proposes to carry out further analysis of the matter referred to in the complaint or reference. The FCA may also wish to set out a timetable for taking action which would allow the Financial Ombudsman Service to consider how to proceed with complaints which have been made to it which relate to the subject matter of the

*These notes refer to the Financial Services Act 2012
(c.21) which received Royal Assent on 19 December 2012*

reference. Alternatively, it may be that having examined the issue it does not consider that it merits detailed investigation.

480. The response must include a copy of the complaint or reference and must state the FCA's reasons for its proposals.
481. *New section 234F* provides for a limited exception to the duty to respond where a reference has been made under new section 234D by a regulated person. The FCA need not respond in the manner provided for in new section 234E if the FCA considers that the reference is frivolous, vexatious or has been made in bad faith. For example, where a reference has been made by a regulated person with the deliberate intention of frustrating or delaying action that the FCA is, or is proposing to, take in relation to the regulated person for breach of a regulatory requirement, the FCA might consider that it is inappropriate to provide a response to the reference under new section 234E. Similarly, it may be appropriate for the FCA to decide not to provide a response under section 234E where the reference has been made with the intention of delaying or frustrating the determination by the ombudsman service of complaints made to it.
482. *New section 234G* requires the FCA to give guidance under section 139A of FSMA about the presentation of a complaint under section 234D or a reference under section 234D.
483. *New section 234H* enables the FCA to ask the OFT to consider whether a feature of the market in the United Kingdom for financial services may prevent, restrict or distort competition in the United Kingdom. The OFT is required to respond within 90 days explaining how it proposes to respond to the request. The OFT is not however required to take any specified action in response to the request. The FCA might make such a request where, for example, it did not have the powers to address the potential problem in the market or where the FCA considered that the matter would benefit from the competition expertise of the OFT.