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ANATOMY OF A NEW ACT

Much has been written already about the *Financial Services and Markets Act 2000*, but there has been little scholarly attention to the Act as a piece of legislation in its own right, or the legislative technique employed in the making of it.

In the olden days Acts dealt with issues of principle, and conferred the substantive rights and duties. Generally, they did not explain themselves or their overriding policy objective. Where anything was left to subordinate legislation, it would be about procedure, supporting detail or subsidiary structures.

But the FSMA 2000 is different and is a new kind of 'framework legislation'. Despite its 433 sections and 22 schedules, it will depend for its workability on at least twice as much more in terms of statutory instruments, and FSA rules and guidance. Paradoxically however, the FSMA 2000 is also a detailed catalogue of supporting matters, many of which, thirty years ago, would never have found their way into the primary statute.

We can welcome the prominent statements of objectives, which the Act requires the FSA to strive to meet. Objectives which the judges can see and enforce are preferable to the silence or to the discursive preambles of earlier times.

However, with some exceptions (such as the qualifying conditions for authorisation, the test for success before the Ombudsman, and market abuse), there are fewer rights and duties in the Act than might have been expected. Most of the standards and obligations are left to the wide rule-making powers of the FSA. The scope of the Act itself for firms and for individuals alike is only lightly sketched in. So the 'framework' statute is more about structure than substance. The Parliamentary trust is placed to a very large extent on the FSA, on the objectives in the Act and on the procedural machinery of control over the regulator.

Large parts of the FSMA 2000 are concerned, in fine detail, with procedural rights and not with central points of principle. Examples are the procedure for warning notices and decision notices; the consultative machinery for rulemaking and the arrangements for competition scrutiny. Some of this machinery is repeated in different contexts though the enforcement procedure was made more uniform at a late Parliamentary stage. So Parliament appears to trust the FSA in an ample way on matters of substance, but much less on matters of process.

In part, this focus on process is driven by the philosophy. Transparency and competition prevent the scourge of over-regulation. The steer of the objectives and the hemming in of the process controls can be a substitute for substance.

In part too, the design is likely to enable the Act to last longer without radical amendment. This flexibility is a very clear advantage.

But there may well be another, somewhat unexpected, contributory factor. This is the *Human Rights Act 1998* with its stress on due legal process. To be sure that the Convention rights are secured, the FSMA 2000 contains a mass of procedural provisions. And, this is done direct, rather than of by requiring the FSA to deliver processes which were compatible with the constitutional guarantees.

So here is a combination of a framework approach, of the need for flexibility over time, of the importation into domestic jurisprudence of the European guarantees of liberty, and of trust over substance but not over process. And this has resulted in an Act that is strongly focused on the 'why' and the 'how', but rather less on the 'what'.

Michael Blair QC

Michael Blair is now in independent practice at the Bar, although he still acts as a part time consultant to the FSA; his views are not to be taken to be those of the FSA.

New publisher and frequency for *Amicus*

The Society for Advanced Legal Studies is pleased to welcome Sweet & Maxwell as the new publishers of *Amicus Curiae* following their takeover of CCH New Law in November 2000.

Amicus will now be published on a bi-monthly basis with effect from this issue (i.e. January / February; March / April; May / June; July / August; September / October; November / December).