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Briefing note November 2015

The FCA's new competition enforcement powers

The Financial Conduct Authority ("**FCA**") has a statutory objective of promoting effective competition in the interests of consumers in the financial services sector. On 1 April 2015, its ability to take enforcement action in relation to breaches of competition law was substantially increased when it obtained concurrent competition powers under both the Competition Act 1998 ("**CA98**") and the Enterprise Act 2002 ("**EA02**"). These powers add to the FCA's existing ability to use its regulatory powers under the Financial and Services Markets Act 2000 ("**FSMA**").

The FCA's new competition enforcement powers

The FCA and the Competition and Markets Authority ("**CMA**") now have concurrent competition powers meaning that the FCA can enforce competition law alongside the CMA. Specifically, this means that the FCA can now conduct market studies and make market investigation references to the CMA and take enforcement action against breaches of Chapter I/II CA98 and Articles 101(1)/102 of the Treaty on the Functioning of the European Union ("**TFEU**") which prohibit anti-competitive agreements and abuses of a dominant position. The FCA will be able to exercise these powers in relation to the provision of financial services generally; it is not limited by reference to the activities that it regulates, nor to the firms that it authorises. The FCA is not able to prosecute the criminal cartel offence (set out in section 188 of EA02) – this remains the preserve of the CMA and the Serious Fraud Office.

Which regulator will take action in financial services cases?

Only one regulator can investigate a potential breach of the CA98 or take a decision that there has been an infringement at any one time. The general principle is that the regulator responsible for a case depends on which one is "better or best placed" to do so. Before launching any investigation, the FCA will discuss with the CMA whether it (or possibly another concurrent regulator) should lead an investigation, with the CMA having the ultimate say in who takes a particular case forward. In accordance with a Memorandum of Understanding ("**MoU**") between the FCA and the CMA, this should be a collaborative decision and will include consideration of whether the issue affects more than one sector, and which regulator has experience in dealing with any of the parties or issues.

Irrespective of which authority exercises jurisdiction over an investigation, the FCA and the CMA have committed to sharing information about their work. The exchange of information between the FCA and CMA is governed by Part 9 of the EA02 which ensures that adequate safeguards are in place to prevent the unlawful disclosure of information.

From an EU perspective, as a concurrent competition authority[1], the FCA is now a National Competition Authority ("**NCA**"). This means that whilst the FCA can investigate potential breaches of Articles 101(1)/102 of TFEU, it must inform the European Commission when doing so. The European Commission has the power to take over cases involving an alleged breach of Articles 101(1)/102, which it would likely do in respect of EU-wide cartels.

[1] This "concurrency" means that the FCA (like the CMA) has the power to apply the relevant competition laws.

FCA's investigatory powers under the CA98

If the FCA conducts an investigation, it will largely follow the CMA's procedure. However, there are some distinguishing features. For example, each investigation will have a Case Sponsor (a role we understand is likely to be performed by two people) who will take important decisions on the conduct of the case (such as whether there is sufficient evidence to issue a Statement of Objections or whether it is appropriate to settle a case).

Investigations pursued by the FCA will be broken down into a number of stages:

Information gathering

Once the FCA has reasonable grounds for suspecting an infringement, it may use various information gathering powers. It can issue requests for information and documents in writing (section 26 notices), conduct compulsory interviews with any individual connected to a business under investigation (under section 26A), enter business and domestic premises, require the production of documents and take copies of documents. Such entry may be with or without a warrant (a warrant will be required to enter domestic premises). If the FCA has obtained a warrant, it may search for and seize documents.

As with the CMA, there are some limits on the FCA's powers of investigation. For example, the FCA cannot require the production or disclosure of legally privileged communications and it cannot force a business to provide answers that would require an admission that it has infringed the law. In contrast, under FSMA, the FCA is not prevented from compelling subjects of interviews to provide answers which may incriminate them (although it is prevented by section 174 FSMA from using such statements in market abuse and criminal proceedings against the maker except in certain limited circumstances).

Statement of Objections and following steps

The FCA will issue a Statement of Objections ("**SO**") setting out its assessment of the conduct and proposed next steps where its provisional view is that there has been an infringement. At the same time, addressees of the SO will have the opportunity to access the FCA's case file and can respond formally through written and/or oral representations to a Competition Decisions Committee ("**CDC**") comprising at least three members drawn from a panel appointed by the FCA Board.

Decision and penalties

The CDC will be the final decision-maker on whether or not there has been an infringement. It can take infringement decisions, penalty decisions and decisions that there are no grounds for action. In this regard it is broadly equivalent to the Regulatory Decisions Committee which makes decisions on sanctions in relation to non-settled cases pursued under FSMA. The FCA will have a wide degree of discretion when setting an appropriate level of penalty. It will draw on the Penalties Guidance issued by the CMA rather than the Decisions Enforcement and Penalties Manual within its Handbook ("**DEPP**") and can impose a fine up to a maximum of 10% of worldwide turnover of the undertaking in question in the last business year.

Appeal

Both the decision and any penalties imposed can be appealed to the Competition Appeal Tribunal ("**CAT**"). The CAT may confirm or set aside the FCA's decision (or any part of it). It may also remit the matter to the FCA or impose, revoke or vary any penalty. The fact that this is an appeal differs from cases where the FCA exercises its powers under FSMA, where those wishing to challenge findings made against them or penalties imposed refer the matter to the Upper Tribunal (Tax and Chancery Chamber) for it to be heard afresh.

Applications for leniency to the FCA

It is unclear which of the CMA or the FCA will now take the lead in investigating cartels in the financial services sector. The MoU suggests that UK based cartel cases will still be a matter for the CMA. The FCA can however accept leniency applications from those who have participated in cartel activity and if an applicant fulfils the criteria set out in the CMA's leniency policy, the FCA can grant immunity from fine, or a reduction in the fine. In reality, the FCA expects that leniency applications will be made directly to the CMA in particular because it does not have concurrent powers to prosecute the criminal cartel offence and cannot grant immunity from prosecution in relation to this offence. Nonetheless, it remains to be seen if applications in civil cases (which, in practice, account for the majority of cases) will be made to the FCA. This overlapping jurisdiction creates some ambiguity for applicants, who will have to consider whether they make an application to the FCA or the CMA where the matter relates to the provision of financial services in the UK.

The FCA has also included some provisions in its Supervision Manual (SUP) concerning firms' obligations to make disclosures to the FCA about competition law infringements. These provisions came into force on 1 August 2015. The obligations are broad in scope and require firms to notify the FCA if they have, or may have, committed a significant infringement of competition law. These obligations are in addition to those arising from Principle 11 of the Principles for Businesses and Chapter 15 of SUP which require regulated firms to deal with their regulators in an open and cooperative way and disclose to the FCA anything relating to the firm of which the FCA would reasonably expect notice. It is not clear how comfortably these obligations will sit alongside the obligations on leniency applicants. The obligations potentially raise practical issues for leniency applicants who will have to consider what they report to which authority and, critically, when.

FCA Settlement

Finally, like the CMA, the FCA has discretion to settle a competition case. A decision to initiate a settlement procedure will be taken by the Case Sponsor subject to approval from at least two members of the FCA's senior management who will not have been directly involved in establishing the evidence on which an infringement decision is based. This mirrors the process under FSMA cases, with the involvement of Settlement Decision Makers.

In order to settle, an undertaking must admit liability in relation to the nature, scope and duration of the infringement, cease the infringing behaviour immediately from the date on which it enters into settlement discussions (where it has not already done so) and confirm that it will pay a penalty set at a maximum amount. This maximum penalty will reflect the application of a settlement discount to the penalty that would have otherwise been imposed. It will reflect the circumstances of the case, in particular whether the case is being settled before or after issue of an SO. Settlement discounts will be capped at a level of 20% for settlement pre-SO and at 10% for settlement post-SO. Again, this differs from the mechanisms used by the FCA in cases where it exercises its enforcement powers under FSMA. In these cases, the amount of discounts available under DEPP ranges from 30% for settlement at the earliest opportunity to zero for settlement after the matter has been heard by the Regulatory Decisions Committee.

A further distinguishing feature of cases settled with the FCA under its new competition enforcement powers will be that settling parties will have to accept an infringement decision and that this will remain final and binding as against them.

Conclusion

The FCA's new competition enforcement powers supplement its existing powers under FSMA and put it on a par with other sectoral regulators and NCAs. Early cases will provide some insight as to how the FCA and the CMA will work together in practice and how firms will manage their obligations to report infringements, including in the context of leniency. However, having been given these powers, there seems little doubt that the FCA will be keen to exercise them.

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