Exchange of information by regulators
They're talking. Are you?

Knowledge itself is power. And businesses – especially those the subject of a regulatory or tax investigation – can often feel that regulators and tax authorities have an advantage in knowing more than the businesses they regulate, tax or investigate, especially across a sector or industry. The announcement on 7 November 2014 that the FCA, the PRA and HMRC have entered into a Memorandum of Understanding to give each organisation "better access to information and expertise" will therefore be given a mixed reception.

In one sense, more regular and transparent information exchange may prove to be positive for businesses, as it allows the relevant regulator or tax authority to take a consistent approach when dealing with different organisations or issues. Certainly those in the insurance or banking sectors will welcome the tax and regulatory authorities considering "on a timely basis any taxation, regulatory [and] prudential …implications that may arise as a result of our policy work", not least when it comes to issues such as regulatory capital or hybrid securities. (A point made in the 2013 Parliamentary Commission Report on Banking Standards that led to this new Memorandum of Understanding.)

On the other hand, there is likely to be less enthusiasm for the sort of information exchange that involves HMRC going to the FCA or the PRA to explain what it sees as "tax avoidance schemes and the motivations for such structures as well as the risks therein". This is particularly the case since we are also seeing how the OECD 'Base Erosion and Profit Shifting' (BEPS) proposal for country by country reporting will, in effect, amount to an increase in sharing of tax information between tax authorities. Likewise, given the scale and breadth of regulatory investigations already underway and regulatory scrutiny generally, few businesses will relish the prospect of the PRA or the FCA giving HMRC their views on "conduct motivated structuring of transactions". Either scenario is only likely to expose the relevant business to further scrutiny or investigation, which may cause problems if there is perceived to be a lack of consistency between the ways that the same arrangements are presented to each regulator.

What about business and taxpayer confidentiality? The announcement is clear that the confidentiality safeguards already in the relevant UK legislation will continue to operate – and indeed the new arrangements between the FCA, the PRA and HMRC reflect a new way of working rather than any new legislative approach. In that vein, HMRC has accepted that there is no need to extend the PRA's remit to providing specific reports to assist HMRC. The NAO will also continue to oversee how the organisations implement their information sharing arrangements. However, even if the confidentiality safeguards protect individual businesses on a day to day basis, much of this protection falls away either when dealing with aggregated or sector-based information or once there is a civil or criminal investigation underway. Add in the likely cross border element on any such investigation – whether between regulators or tax authorities – and the balance of knowledge continues to look stacked against businesses.

That said, most large businesses will be familiar with the need to deal with multiple regulators, often on an international basis. What's clear from this joint announcement from the PRA, the FCA and HMRC is that it will no longer be enough for businesses to be joined up simply within their particular specialities but, whether in the investigation context or not, the information and risk assessment will need to encompass legal, regulatory and tax.

If you have any questions or want to know more, please get in touch with your usual Slaughter and May contact or a member of the Global Investigations Group.

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