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BRIEFING
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FCA: New competition powers and handbook amendments

On 1 April 2015, the FCA gained concurrent powers to enforce the prohibitions on anti-competitive behaviour in the Competition Act 1998 and the Treaty on the Functioning of the EU in relation to the provision of financial services.[1] The FCA has adopted a wide interpretation of 'financial services' as including any service of a financial nature, even where the service is not regulated by the FCA.

On 15 July 2015, the FCA published its final guidance on the use of its new concurrent competition powers. At the same time, it also published its final amendments to Part 15 of its Supervision Manual within the FCA Handbook (SUP 15), which contain firms' reporting requirements. It is important to note that these requirements apply to authorised firms only. The final amendments bring in new rules, which have effect from 1 August 2015. They require authorised firms to notify the regulator:

- immediately if disciplinary measures or sanctions have been imposed on the authorised firm by any competition authority or the firm becomes aware that a competition authority has started an investigation into it (SUP 15.3.15 R); and

- as soon as the authorised firm becomes aware, or has information which reasonably suggests, that a significant infringement of any applicable competition law has, or may have, occurred (SUP 15.3.32R). In determining whether a matter is significant, a firm should have regard to the actual or potential effect on competition, any customer detriment and the duration of any infringement and implications for the firm's systems and controls (SUP 15.3.34G).

The FCA says that these changes reflect authorised firms' existing disclosure obligations under Principle 11, i.e. the obligation to notify the FCA of anything "*relating to the firm of which that regulator would reasonably expect notice*".

The requirement that an infringement be 'significant' in order for SUP 15.3.32R to apply is new in the final guidance; the version on which the FCA consulted earlier this year included a requirement for authorised firms to notify the FCA of *any* actual or potential infringement whether significant or not. The addition of 'significant' appears to be the FCA's response to consultation feedback that the unqualified notification requirement originally proposed was inconsistent with, and significantly wider than, the pre-existing self-reporting requirements in SUP 15 and would result in firms making 'fail-safe' notifications of conduct or agreements.

[1] The FCA also gained concurrent powers to carry out market studies under the Enterprise Act 2002 (EA02) and will be able to choose whether to carry out market studies under its EA02 powers or its FSMA powers.

Nevertheless, the new rule requiring the notification of any actual or potential significant infringement of competition law has wide application, as it applies to:

- activities of the authorised firm that are not regulated by the FCA (although it would not apply to infringements relating to either regulated or non-regulated activities by other members of the firm's corporate group that may be part of the same undertaking for competition law purposes – unless these infringements directly or indirectly affect the authorised firm); and

- any potential significant infringement of any competition law worldwide that may apply to the firm, including 'grey areas'.

It is the FCA's view that any breach outside of the UK and/or of non-UK or EU competition laws could still be relevant to the FCA as it may reflect issues that fall within the scope of the Principle 11 disclosure obligation: for example, the breach may relate to the firm's systems and controls, or its fitness and propriety or that of its individuals.

Having said that, the FCA has stated that it expects firms to take a 'sensible approach' in relation to reporting potential infringements, just as firms do now with the existing reporting requirements under SUP 15.

Just as now, the question of whether to make a notification will always be a matter of judgement and assessment of the significance of the relevant activity. It is important to note that any notification (whether in relation to a 'grey area' or otherwise) could result in a formal investigation, significant fines imposed on the firm and possibly also director disqualification orders. The FCA may also look to take action under other legislation such as FSMA.

If the infringement could be categorised as cartel activity, then the new rule will effectively force the authorised firm to seriously consider making a separate application to the Competition and Markets Authority (CMA) for immunity/leniency from fines. The new rule makes it clear that notification does not constitute an immunity/leniency application and the FCA's guidance emphasises that the two rules are independent of each other. That said, the FCA does not consider that the Principle 11 regime and the CMA leniency regime conflict: firms can meet the requirements of both regimes if they act promptly.

For further information, please speak to your usual Slaughter and May contact or Lisa Wright or Jackie Holland.

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