SQUIRE PATTON BOGGS

CONCERNS REMAIN AS FINAL FCA GUIDANCE ON COMPETITION POWERS PUBLISHED

The FCA has recently released finalised guidance on the way it will enforce its competition law powers.

On 1 April 2015, the Financial Conduct Authority (FCA) gained concurrent powers to enforce competition law under the Financial Services and Markets Act 2000 (FSMA).

This means that the FCA has the power to enforce breaches of Part 1 of the Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), and the power to conduct market studies under the Enterprise Act 2002 or refer markets to the Competition and Markets Authority (CMA) for investigations, as far as they relate to the provision of financial services. While financial services have not been defined, the FCA states that it considers it to include "any service of a financial nature such as banking, credit, insurance, personal pensions or investments". As the FCA itself concedes, this extends beyond the financial services currently regulated by the FCA or other bodies.

In a speech in November 2014, FCA Director of Competition Deb Jones noted that the FCA's powers were not changing the law as it applied to financial services businesses. Ms Jones noted that "competition law already applies to all businesses in the UK, including financial services firms, so the main changes…are institutional". These institutional changes have, however, brought with them a number of concerns for firms trying to ensure compliance with both competition law, and their duties to the regulator.

Last month (July 2015) the FCA released finalised guidance relating to the way it will enforce its powers and addressing the concerns that had been raised relating to the practical operation of the rules. However, the guidance does not resolve all of the issues, and a number of questions remain outstanding.

The FCA's Competition Law Powers

The FCA is authorised to investigate companies for breach of UK and EU laws on anti-competitive agreements, decisions and concerted practices or abuse of dominance, in the financial services sphere; and to sanction companies that fail to comply with their competition law obligations. In doing so, the FCA will, in part, follow the guidance set out and implemented by the CMA, with its substantial body of experience in this area, but the FCA will also follow its own guidance recently published.

The key concerns in respect of the FCA's enforcement of competition law relate to the settlement of proceedings and notification requirements:

- The FCA has stated that parties who are investigated for a breach of competition law and choose to settle with the FCA may, as part of their settlement agreement, have to waive their right to appeal. This is not the position with regard to settlement employed by the CMA (although if a settling business does appeal a CMA infringement decision to the Competition Appeal Tribunal, the settlement discount to any fine will no longer apply). The ability to appeal acts as a safety net for settlement, whereby if an infringement decision is reached on a different basis, or successfully challenged by a connected party, the settling party may have a right to challenge their decision, albeit that they risk that their own penalty may be revised upwards if they choose to appeal the decision unsuccessfully. The FCA's view is that settlement is a voluntary procedure which parties are free not to utilise if they want to retain the right of appeal. Settlements with the FCA relating to investigations under FSMA operate in the same way and the FCA argues that efficiency would be lost if the settlement process was different under each piece of legislation. However, the current guidance means that firms will be in very different positions if they choose to settle an FCA investigation compared to one brought by the CMA.

"Additional" Notification Obligations

In connection with the FCA's new competition powers, it has amended Part 15 of the Supervision Manual of the FCA Handbook with effect from 1 August 2015. Firstly, the existing disclosure obligation at SUP 15.3.15R has been amended to oblige firms to notify the FCA where disciplinary measures or sanctions have been imposed by a competition authority (for example the CMA or Payment Systems Regulator) or when the firm becomes aware that the competition authority has started an investigation into the firm's affairs. Secondly, a new provision, SUP 15.3.32R, has been drafted that requires firms to notify the FCA "if it has or may have committed a significant infringement of applicable competition law".

The FCA takes the view that this new requirement does not actually add an additional obligation on firms. The FCA states that these amendments reflect the existing disclosure obligation under Principle 11 of the FCA's Principles for Business, which requires financial services firms to be open and transparent with the FCA. However this was a key area of concern during the FCA's consultation on the guidance and Handbook amendments for the following reasons:

- The obligation to notify under SUP 15.3.15R applies immediately upon the competition authority commencing an investigation into the firm's affairs, but the point at which an investigation is started is not always clear. The FCA's response to this concern in its Policy Statement was that SUP 15.3.15R is not a new requirement, and it is only the addition of competition authorities that is novel. Interpretation of this provision prior to the amendment has not, as far as the FCA is aware, caused difficulties so the FCA does not anticipate that this change will do so.
- The additional disclosure obligation under SUP 15.3.32R runs uncomfortably close to the leniency regime. The leniency regimes available under UK and EU law provide for reductions in financial penalties for companies that come forward with information regarding competition law infringements. However, one of the conditions for "Type A" leniency (immunity from fines) is that there is no pre-existing investigation and the applicant is the first to apply. Despite the FCA's view that the leniency regime and notification obligation do not conflict if firms act swiftly enough, a concern remains that compliance with the notification requirement may jeopardise a party's application for leniency. The FCA also suggests that if Type A leniency does become unavailable, for example where the FCA opens an investigation as a result of the notification before the leniency application is submitted, "Type B" leniency may still be applied for. Type B leniency also grants up to 100% reduction in administrative fines but importantly, and unlike Type A leniency, such reduction is discretionary. The FCA does suggest that firms who are concerned about the interaction of these two regimes may contact the FCA and CMA who will work together to discuss how to proceed based on the particular circumstances but this still seems unsatisfactory for the purpose of compliance with both the notification and leniency regimes.
- This issue is worsened by the concern that the notification obligation applies so quickly that firms may find themselves with the duty to notify the FCA before they have been able to consider their legal position and whether a leniency application might be advisable. Leniency applications require the undertaking to admit liability and accept that it participated in the anticompetitive conduct. The FCA notification regime applies even where the undertaking *may have* committed a significant infringement. Given the clear need for firms in this position to act quickly, there is a risk that firms may be forced to accept liability in order to take advantage of the leniency regime, while at the same time being uncertain of whether they have in fact breached competition law. Taking such an action carries the risk that, although administrative fines will not be imposed, the undertaking may then become liable for third party damages (and the associated costs) further down the line. Given the significant sums of money at stake in a number of ongoing antitrust damages actions, this risk should not be underestimated.
- The FCA has retained the right to use information contained as a result of its regulatory functions for the purposes of exercising its competition enforcement powers. This means that, for example, where information is gathered by the FCA through the notification regime, it could use this for enforcement of the FCA's other, non-competition powers. The concern with this is that, for example, compliance with the FCA's notification requirements, coupled with an application for leniency, could be used by the FCA to impose fines for a breach of a financial regulation. The FCA has suggested that the advantage it has in acting as a concurrent regulator is the information it holds about the sector, and this would be lost were it unable to use the information for dual purposes. However, the CMA and FCA have agreed that information provided in connection with a leniency application may only be used for the purpose of competition law enforcement (although the FCA has suggested that it may also be used to "remind" a firm of its obligations of disclosure under Principle 11).

Market Studies

As part of its competition function, the FCA has the power to instigate market studies under the Enterprise Act 2002, or to refer market investigations to the CMA to conduct where appropriate. Market studies or investigations are examinations into a particular market to assess the way it works and any competition concerns. The market study takes an overview of the market, and where there are concerns a market investigation will examine, in more detail, any adverse effects on competition. The FCA has published separate guidance on its market studies and market investigation references powers and the procedures that the FCA will follow when operating under these powers.

The key concern in respect of the FCA's power to conduct market studies and make market investigation references relates to clarity from the FCA regarding which power it is using. In addition to its new power under the Enterprise Act 2002, the FCA has existing powers under FSMA to conduct market studies. The FCA has the power to choose which regime it should use, and even has the ability to change from a FSMA market study, to an Enterprise Act market study during the process. The concern with this is that the FCA may switch to an Enterprise Act market study to avail itself of the additional information gathering powers. While the FCA has stated that they will aim to carefully determine the study at the outset, to avoid the need to switch part-way through, this does not remove the concern that this ability could be exploited.

Organisations in the financial services sector will doubtless not have long to wait before the FCA flexes its muscles and the picture of how the FCA will exercise its new competition powers starts to become clearer. In the meantime, firms must endeavour to ensure that they are compliant in all respects with competition law, their notification requirements to the FCA, and their broader obligations with respect to the regulator. Firms may consider conducting an audit of their policies and practices (by external counsel, to ensure the resulting report is privileged) in order to identify any potentially problematic areas.Please feel free to get in touch if you would like any further information on the FCA's competition enforcement powers or have any queries on any other aspects of competition law.

Contacts

Martin H. Rees
T +44 20 7655 1137
E martin.rees@squirepb.com

Diarmuid Ryan
T +44 20 7655 1310
E diarmuid.ryan@squirepb.com