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FCA's Concurrent Competition Powers – Final Guidance and Handbook Amendments Are Published

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The FCA has published final guidance on use of its new competition law powers, together with amendments to its Handbook introducing a specific competition law self-reporting obligation which will have significant ramifications for authorised firms.

Background

On 1 April 2015 the FCA obtained concurrent competition powers in relation to the provision of financial services. These powers are in addition to the FCA's powers under FSMA and allow the FCA to: (i) conduct investigations under the Competition Act 1998 (“**CA98**”) and the Treaty on the Functioning of the European Union (“**TFEU**”); and (ii) carry out market studies and make market investigation references to the Competition and Markets Authority (“**CMA**”) under the Enterprise Act 2002 (“**EA02**”). The CMA's broad competition powers already allowed it to regulate competition in respect of financial services; hence the CMA and the FCA have ‘concurrent powers’ in this sector.

In advance of its powers coming into force, the FCA launched a consultation process in January 2015 to provide interested parties, including regulated firms, other businesses who provide financial services and firms in the legal sector, the opportunity to comment on its proposed competition law guidance and amendments to the FCA Handbook. This consultation process closed on 13 March 2015.

Today, the FCA has published its Policy Statement¹ which provides feedback on the responses to the Consultation Paper², finalised procedural guidance on use of its new competition law powers³ and final rules which will be introduced as amendments to the Supervision Manual (“**SUP**”) of the FCA Handbook.

¹ Policy Statement (PS15/18) (the “**Policy Statement**”). See <http://www.fca.org.uk/your-fca/documents/policy-statements/ps15-18>

² Consultation Paper (CP15/1) (the “**Consultation Paper**”). See <http://www.fca.org.uk/your-fca/documents/consultation-papers/cp15-01>

³ Finalised Guidance (FG15/8) and (FG15/9). See <http://www.fca.org.uk/your-fca/documents/finalised-guidance/fg15-08> and <http://www.fca.org.uk/your-fca/documents/finalised-guidance/fg15-09> respectively.

Implications

A key amendment to the SUP is a new specific competition law disclosure obligation under SUP 15.3. The FCA's view is that the new SUP 15.3.32R is merely a clarification of the pre-existing general self-reporting obligation under Principle 11 as it applies to competition law infringements.

However, the new notification obligation arises "*as soon as*" the firm "*becomes aware, or has information which reasonably suggests, that a significant infringement has, or may have occurred*" in respect of an infringement of "*any applicable competition law*". This raises two distinct issues which may not only increase the administrative burden on authorised firms but also potentially increase their legal exposure:

- (i) the new reporting obligation is not limited to infringements with a UK nexus but rather of "*any applicable competition law*". Firms will therefore be required to report an infringement of any competition law regime worldwide; and
- (ii) the timing of a notification to the FCA, "*as soon as [the firm] becomes aware*", means that a firm may have to notify the FCA before the legal position is properly understood, in particular before a firm can decide whether or not a leniency application is appropriate. This is significant because the notification must be made in writing unless a leniency application has or will be made – and a written submission could be subject to a disclosure obligation in Court proceedings.

Equally, the FCA's original proposal would have been materially more burdensome as it applied to all types of infringement, irrespective of seriousness. The FCA has taken on board criticism during the consultation process and has responded by bringing the new disclosure obligation in to line with Principle 11 by requiring that only *significant* infringements are reportable. Currently, under Principle 11, firms are required to notify the FCA of anything "*the FCA would reasonably expect notice*". How *significance* will be judged will be an unfolding story, and may take into account both financial and reputational matters. Whilst the reporting obligation presents a reduced burden on authorised firms compared to the proposal, the implications for leniency programmes in the UK, EU, US and further afield as well as the implications for follow on civil litigation remain. Firms will also need to align their competition compliance programmes with the self-reporting obligation.

Next Steps

The FCA has been acting in its role of 'concurrent regulator' since 1 April 2015 and the finalised guidance is a welcome clarification how the FCA will utilise its new powers. The FCA has not yet set out detailed substantive guidance in line with the CMA on how it will apply competition law under CA98 in respect of the provision of financial services. However, the FCA will consider the more detailed guidance of the CMA where such issues are not yet covered by its own guidance.

The amendments to Part 15 of the SUP imposing a self-reporting obligation in the case of competition law infringements will have effect from 1 August 2015.

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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