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Competition Law Update

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CMA unveils memoranda of understanding with FCA and PSR

This competition law update provides an overview of the two memoranda of understanding, signed in December 2015, between the Competition and Markets Authority and each of the Financial Conduct Authority and the Payment Systems Regulator.

On 22 December 2015, the Competition and Markets Authority (CMA) published two memoranda of understanding (MoUs) on the exercise of concurrent competition powers, one with the Financial Conduct Authority (FCA) and one with the Payment Systems Regulator (PSR). The two MoUs, which largely mirror one another, set out how the CMA and the two regulators will coordinate their competition enforcement activities in practice. Given the close similarities between the two MoUs, they will be considered together for the purposes of this update. It should be borne in mind, however, that, strictly speaking, each MoU remains a separate, bilateral agreement between the CMA and each regulator.

BACKGROUND

UK competition law has two principal components: (i) the prohibition of anti-competitive agreements and the abuse of a dominant market position, as set out in the Competition Act 1998 (CA98)[1]; and (ii) the market investigation regime, which is set out in the Enterprise Act 2002 (EA02). The Competition and Markets Authority (CMA) is the primary competition authority in the UK. While the CMA has the power to apply these laws in any sector of the UK economy, its general competition law powers are shared with sectoral regulators in regulated sectors through a process known as concurrency. Financial services remained an exception to this concurrency principle for several years, with competition law being applied in the sector exclusively by the CMA and its predecessor the Office of Fair Trading (OFT). This changed on 1 April 2015, when the FCA and PSR gained full powers to apply UK competition law in the financial services and payment systems sectors, respectively.

Consistent with the approach adopted for relations with other sectoral regulators, the CMA has now entered into new MoUs with each of the FCA and PSR. These MoUs provide a framework for cooperation between the authorities when one of them is considering exercising its competition law enforcement powers in the financial services or payment systems sectors.

The stated aim of the parties is to use their powers to achieve more competitive outcomes in the financial services industry and the payment systems industry (as the case may be) in the UK, for the benefit of consumers. With this objective in mind, the CMA and FCA/PSR commit to: (i) co-operate and coordinate when dealing with suspected anti-competitive behaviour under the CA98 with respect to which they have concurrent powers; (ii) co-operate and coordinate when dealing with market studies and market investigation references with respect to which they have concurrent powers; (iii) efficiently and effectively handle cases of anti-competitive behaviour in the financial services or the payment systems sectors (as the case may be); (iv) avoid duplication of activity, wherever possible; and (v) ensure transparency as to the respective roles of the CMA and the FCA/PSR for affected individuals and consumers.

As a general starting point, the MoUs state that the CMA and FCA (or PSR, for the payments sector) will always consult each other before the initial exercise of concurrent competition law powers. The FCA and PSR also commit to consult the CMA before launching a market study under their regulatory powers, as set out in the Financial Services and Markets Act 2000 (FSMA) or the Financial Services (Banking Reform) Act 2013 (FSBRA), respectively.

The CMA and FCA (or PSR, for the payments sector) will meet each other to discuss matters of mutual interest, share relevant information in relation to particular CA98 or EA02 cases, and attend internal meetings held by the authority carrying out an investigation or study under the CA98 or EA02. However, the non-investigating authority will not normally attend the constitutional decision-making meetings, meetings of governance bodies or meetings with external parties, such as those under investigation

or complainants. It will remain possible for the authorities to enter into less formal staff secondments, for example to ensure access to relevant sectoral expertise in the course of a CMA investigation.

CO-OPERATION IN RELATION TO CA98 CASES

Where the CMA or FCA (or, for the payments sector, the PSR) is considering exercising its powers of investigation under the CA98, it will inform the other that there are reasonable grounds for suspecting an infringement. The CMA and FCA (or PSR, as the case may be) will then endeavour to agree between themselves which authority will exercise its concurrent competition powers within one month. The authorities will share sufficient information between themselves to allow an informed discussion to be made as to which authority is best placed to investigate. There is, however, no obligation to share information if an authority is carrying out general monitoring activity and there is no consideration of exercising its concurrent powers. In practice, it is likely that the CMA will discuss a potential CA98 investigation with the FCA or PSR even before the authority proposing an investigation has established reasonable grounds for suspecting an infringement (the point at which an authority's statutory investigation powers are triggered).

If the authorities cannot agree who should conduct the investigation within two months of the sharing of this preliminary information, the CMA may unilaterally decide which authority shall carry out the investigation. Cases opened by one authority can be transferred to another, and the CMA may direct the transfer of a case that is already in progress before the FCA or PSR to itself, should it deem this appropriate.

In addition to the specific provisions relating to case allocation, the MoUs provide that the CMA and FCA (or, for payments issues, the PSR) will meet regularly. They also commit to pool their resources where appropriate, for example by providing training or practical know-how and expertise to each other and seconding staff. The MoUs also provide for other mutual support by, for example, committing to answer specific questions from another authority, or provide information, views or training on a specific sector, market or area of competition law or policy, and providing updates on ongoing cases.

The Enterprise and Regulatory Reform Act 2013 (ERR) introduced a number of changes to improve the operation of the concurrency regime. These included the introduction of a duty on the CMA to publish an annual concurrency report. Before publishing its report, the CMA will consult with the FCA and PSR and provide them with a draft report. In return, the FCA and PSR will provide information and data required by the CMA for the report, and may also provide comments on the draft report.

The Consumer Rights Act 2015 introduced a new CMA power to approve "voluntary redress schemes". Such a scheme may be offered by a company found to have infringed the CA98 to provide compensation for victims of the infringement without their having to go to court. As well as reducing an infringing company's litigation exposure, the creation of a redress scheme may also lead to a reduction in administrative fines. Consistent with the concurrency regime, the CMA's power to approve such schemes is shared with the FCA and PSR in their respective sectors. If the CMA or FCA (or PSR, as the case may be) proposes to exercise its power to certify a voluntary redress scheme, it will liaise with the other authority "as appropriate".

While both the FCA and PSR will "have regard" to the CMA's guidance on voluntary redress schemes, it is notable that the FCA launched a consultation on its own guidance on voluntary redress schemes on 19 January 2016.[2] The draft FCA guidance shares many characteristics with the CMA guidance (which is unsurprising, given the identical statutory basis). It is interesting to note, however, that the FCA has a wider regulatory power to *require* authorised firms to provide redress, under s 55L FSMA. The FCA notes in its draft guidance that, in principle, an infringement of the CA98 could trigger its power under s 55L. It also notes that it may consider using its FSMA powers, even if an authorised firm applies for FCA approval of a voluntary redress scheme under the CA98. Given the rather onerous procedural requirements for approval of a CA98 voluntary redress scheme, the FSMA route may prove to be a more attractive option for both sides. Since the FCA indicates that it will consider granting a similar reduction in fines for a CA98 infringement, irrespective of whether a firm implements a voluntary redress scheme under the CA98 or applies for the imposition of a requirement under s 55L FSMA, the choice of procedure may not make a significant difference in practice.

The CMA has the power to issue short form opinions regarding potential infringements of CA98. Before issuing such an opinion in relation to conduct in the financial services or payment systems sectors, the CMA will discuss the draft opinion with the FCA or PSR respectively and give that authority the opportunity to provide comments.

CO-OPERATION IN RELATION TO MARKET STUDIES AND MARKET INVESTIGATIONS UNDER EA02

Under the EA02, the CMA may undertake a market study to examine any market in the UK to consider whether competition is working well. The CMA may make a "market investigation reference" for an in-depth investigation into the market concerned by the CMA if the market study leads to it having reasonable grounds for suspecting that any feature or combination of features of a market or markets prevents, restricts or distorts competition. In practice, this is a low threshold, as relatively few real world markets are perfectly competitive. In keeping with the concurrency regime, the FCA and PSR have the power to make market investigation references in the financial services and payment systems sectors, respectively. Any resulting market investigation will be undertaken by the CMA, rather than the referring regulator. Each of the CMA, FCA and PSR also has a statutory obligation to respond to "super-complaints" from designated consumer bodies, to the effect that any

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feature or combination of features of a market is or appears to be significantly harming the interests of consumers.

The MoUs establish a framework for the authorities' handling of super-complaints for cooperation when carrying out market studies. Broadly, the approach outlined in relation to CA98 cases applies equally to market studies, and the MoUs additionally clarify that the duties of cooperation apply equally to market studies launched under FSMA (by the FCA) or FSBRA (by the PSR).

CO-OPERATION IN RELATION TO COMPETITION SCRUTINY UNDER FSMA

The CMA has a power, under s 140B FSMA, to advise the FCA or PSR (as the case may be) if it considers that a regulatory provision or practice may cause or contribute to a reduction of competition in a regulated sector or might be expected to do so in future. The MoUs provide a short overview on the CMA's obligations to consult with the FCA or PSR before giving such advice. Specifically, the CMA will consult with the FCA (or PSR, as appropriate) before officially publishing s 140B advice and will provide the FCA or PSR with guidance on how it intends to use this power. The FCA (or PRS, as the case may be) must, within 90 days after the day on which it receives s 140B advice from the CMA, publish a response stating how it proposes to deal with the advice.

LIMITATIONS ON INFORMATION SHARING

An important section of the MoUs describes the restrictions on the CMA and FCA/PSR in sharing information on markets generally or specific cases. The MoUs state that information will be shared "to the extent permitted by law", as specified by Pt 9 EA02, relevant sector-specific legislative provisions and any other provisions relating to the disclosure, handling and use of information, such as the Data Protection Act 1998 and FSMA.

Before making a disclosure of information to each other, the CMA and FCA or PSR will not generally give the person to whom the information relates prior notice of the intended disclosure. An exception to this is made with regard to leniency information (ie information which came into the possession of any of the CMA, the FCA or PSR or any other public authority as a direct or indirect result of having been provided in the context of an application for leniency, ie a full or partial reduction of fines in return for 'blowing the whistle' on an infringement), in which case the authority will inform the applicant or its legal adviser before disclosure. If leniency information is disclosed for the purpose of the receiving authority carrying out an investigation under the CA98 or the cartel offence (in the case of the CMA), that information will not be used for any other purpose. Where a leniency application is made to the CMA, the CMA will remind the applicant that it may have obligations to notify the FCA or the PSR of its conduct, under Principle 11 of the FCA's Principles for Business or Principle 4 of the FCA's Statements of Principle for Approved Persons, or under the PSR's General Direction 1.

COMMENT

While the MoUs are stated as not being intended to have any legal effect, and are set out in sufficiently flexible terms to allow the authorities' practice to develop in light of their experiences, they do provide some welcome transparency to the level of cooperation expected between the CMA and the FCA (or, for payments, the PSR). This transparency is particularly important because all three authorities have already or are currently conducting various market studies or market investigations in these sectors. For example, in November 2015 the FCA published the terms of reference for its asset management market study and its interim report on its credit card market study, and the CMA's market investigation into retail banking (which began with a joint market study by the CMA and FCA) is due to be completed in early 2016.

While there currently appear to be good relations between the CMA, FCA and PSR, it remains to be seen whether the authorities will continue to "play nicely". While the general assumption is that sectoral regulators will take the lead in enforcing competition law in their respective sectors, it is notable that the CMA and the OFT before it were particularly active in the retail financial services sector and may find it hard to leave enforcement to the FCA and PSR in future. The CMA is also taking a more assertive co-ordination and oversight role, buttressed by its new concurrency powers and responsibilities under the ERR. These include the power to decide which authority should exercise concurrent competition law powers in a particular case, and it may ultimately use this power to carry out an investigation itself in the face of FCA or PSR opposition. The introduction of this power materially changes the balance between the authorities, as does the fact that it is now the CMA that undertakes in-depth market investigations, rather than the independent Competition Commission (whose functions were absorbed by the CMA). Given the continued political focus on finance, and its importance for the wider economy, there is bound to be extensive recourse to the MoUs in the months and years ahead. ■

1 Generally referred to as the Chapter I and Chapter II prohibitions, respectively. References in this update to the CMA's and sectoral regulators' powers to enforce the CA98 prohibitions apply equally to the enforcement of the prohibitions set out in Arts 101 and 102 of Treaty on the Functioning of the EU (TFEU) and should be read accordingly. In contrast, the CMA's powers to examine potentially anticompetitive mergers and to prosecute individuals under the criminal cartel offence are not shared with sectoral regulators.

2 Available at: http://www.fca.org.uk/news/guidance-consultations/gc16-01-proposed-guidance-voluntary-redress-schemes-under-the-competition-act-1998