A competition law first

As the FCA fines its first cartel, Diana Johnson considers the significance for competition lawyers

IN BRIEF

▶ Full FCA competition decision published in relation to the fines imposed on asset management firms for sharing strategic information.

On 22 May 2019, the Financial Conduct Authority (FCA) published the full text of a decision it made in February, in which it found three asset management firms to be in breach of competition law (the decision). The FCA has had competition powers since April 2015 when it was given the power to enforce competition law in the financial sector concurrently with the Competition and Markets Authority (CMA). However, this is first example of the FCA using its competition enforcement law powers and the fact that its competition law investigation has resulted in fines is likely to bolster the FCA's confidence in this area.

The case involved a cartel of three asset management firms, whose employees acted together to share price sensitive information during an initial public offering and a placing, shortly before the share prices were set. This sharing of strategic information allowed the three firms to know each other's plans during the initial public offering or placement, when they should have been competing for the shares. The fines imposed by the FCA in its decision follow its market study, commenced in October 2015, into the UK asset management sector. That study identified evidence of 'weak price competition in a number of areas of the asset management industry' and prompted closer scrutiny of investment consultancy, fiduciary management services and investment platforms. The UK's asset management industry is the second largest in the world, managing around £6.9 trillion of assets, according to the FCA's decision.

Two of the three asset management firms were subject to FCA fines for breach of the Chapter 1 prohibition of the Competition Act 1998 and Article 101 of the Treaty on the Functioning of the European Union. Hargreave Hale Limited was fined £306,300, River and Mercantile Asset Management was fined £108,600. The third firm, Newton Investment Management Limited (Newton) and its parent company the Bank of New York Mellon, were each given immunity from fines because Newton acted as a whistle-blower. Cartels are notoriously difficult to spot and once identified, they are extremely challenging to prove. Therefore, the FCA operates a leniency policy, where a whistle-blower is encouraged to come forward to the regulator with evidence of a cartel in return for immunity from prosecution.

The use of the leniency provisions in this case demonstrates their value because it is extremely unlikely that, without the involvement of a whistle-blower, the FCA would have been able to gather enough evidence to bring charges against the cartel members. It would be wise of the competition law regulators in the financial sector, the CMA and the FCA, to consider ways of increasing the profile and awareness of the leniency provisions among financial institutions and their staff, as this may aid the notification of a cartel in the future.

FCA competition law powers

The FCA has had competition law powers since April 2015 when legislative changes, enacted in the wake of the LIBOR crisis, came into force. The most significant legislative enactment was the Financial Services (Banking Reform) Act 2013, which conferred competition powers on the FCA. In particular, the Act inserted a new provision into the Financial Services and Markets Act 2000 which places an obligation on the FCA to consider, *before* using certain of its powers as financial regulator, whether its competition powers are more appropriate and, if so, to use them instead. This new competition objective is now one of the FCA's three operational objectives and it makes the FCA one of the few financial regulators in the world with a core objective to promote competition. The new competition objective was a significant change of direction and policy for the UK's financial services regulator. The FCA's new competition powers are to be used concurrently with those of the previously sole competition regulator in the UK; the CMA. Both of these relatively new regulators have had to learn how to work together in an effective manner over the past few years, in order to combat financial crime.

Brexit—possible impact

The FCA's first use of its new competition law powers should be viewed against the backdrop of Brexit and the possible changes to the UK competition regime that may occur. One key change that Brexit may bring to the FCA's competition law enforcement capability is that the UK could lose the current co-operation with the other national competition regulators throughout the EU and lose access to the National Competition Authorities database. This could have an impact on identifying and enforcing future multinational cartels in the financial services sector. It will also need to be considered who the future policy makers for UK competition law are or could be and the relative weighting between competition law and financial crime regulation in the future. Will there be a conflict post Brexit for policy makers between opening up the UK to international markets and increasing regulation for financial crime? This remains to be seen but will need to be watched carefully by the UK government and competition law and financial crime regulators.

Points for practitioners

The fines levied against the asset management companies in this case are significant because they represent the first use of the FCA's competition law powers since April 2015. The fines demonstrate that the FCA is willing to use its competition enforcement powers in the financial services sector and should be seen as a warning that the FCA is keen to comply with its competition objective.

This case also demonstrates that the cartel leniency provisions, previously operated only by the CMA, are working well for the FCA in the financial services sector. It is essential for future financial cartels that there is sufficient awareness of these provisions to tempt a cartel member to take evidence to the regulator.

From a compliance perspective, for both advisers and financial sector businesses, the competition law fines by the FCA demonstrate the need for further vigilance in relation to exchanges of information between competitors. Significantly, the FCA found in its decision that disclosure of competitive intentions between competitors can amount to a concerted practice even where the recipient of this information does not act on that information; simply the acceptance of this information will be sufficient to establish a concerted practice.

Finally, the FCA's competition powers should be viewed alongside the obligation to self-report under Principle 11 of the FCA's manual Principles for Businesses, where regulated firms have to bring their own actual and possible contraventions of competition law to the FCA's attention. This further demonstrates that these fines should be seen as a warning shot to financial services businesses of the FCA's competition law powers. NLJ

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