CLEARY GOTTLIEB

ALERT MEMORANDUM

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FCA AUTHORISED FIRMS REQUIRED TO DISCLOSE POSSIBLE COMPETITION INFRINGEMENTS

The Financial Conduct Authority ("FCA") now requires 'authorised firms'[1] to report to the FCA potential breaches of competition law, sanctions imposed by competition authorities, and any on-going investigations pursuant to Principle 11 of the FCA Handbook (the "Handbook") in order to comply with their terms of authorisation. This change comes as the FCA assumes greater competition duties, having become a UK competition authority in April 2015.

I. NOTIFYING SUSPECTED COMPETITION INFRINGEMENTS

Amendments to the Handbook require authorised firms to notify the FCA of disciplinary measures or sanctions imposed on them by a competition authority, as well as any competition investigation into their practices.[2] In principle, the requirement may apply to competition law issues in non-EU jurisdictions and can be triggered at an early stage, including receipt of a request for information.[3]

Controversially, the revised Handbook also expressly[4] requires authorised firms to notify **possible** breaches of applicable competition laws (the "Competition Disclosure Obligation"), even in the absence of any investigation or sanction:

> *A firm must notify the FCA if it has or may have committed a significant infringement of any applicable competition law. A firm must make the notification as soon as it becomes aware, or has information which reasonably suggests, that a significant infringement has, or may have, occurred*. [5]

Notifications need to identify the circumstances surrounding the possible infringement, the "relevant law," and any remedial steps taken to prevent recurrence.[6]

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1 Only firms approved by the FCA are able to carry out certain regulated activities in the financial services sector.

2 Supervision Manual ("SUP") 15.3.15(3) R, FCA Handbook.

3 FCA Policy Statement PS15/18, paras. 4.21 and 4.7.

4 The FCA's view – that the new wording merely clarifies a pre-existing obligation to be open and transparent with the FCA (Principle 11, Handbook) - has met considerable scepticism: FCA Policy Statement PS15/18, para. 4.8.

5 SUP 15.3.32(1) and (2) R, FCA Handbook.

6 SUP 15.3.33 G (2) and (3) G, FCA Handbook

The FCA acknowledges that remedial actions will not always be in place at the point of notification, and it may be sufficient to disclose measures that firms intend to implement.

II. IMPLICATIONS FOR AUTHORISED FIRMS

The Competition Disclosure Obligation raises three principal concerns, relating to (i) the regulatory burden imposed, (ii) the effect on applications for leniency, and (iii) firms' rights against self-incrimination.

- ***Significant regulatory burden.*** The requirement to self-report even potential competition law infringements to the FCA is burdensome. Assessments under competition law typically turn on an in-depth and complex review of the facts. The requirement to notify as soon as information "*reasonably suggests*" that an infringement "*may*" have occurred is therefore likely to be triggered before firms have had a chance to conduct a full self-assessment of the potential infringement, generating a vast quantity of notifications and numerous false alarms. The fact that only "*significant*" potential infringements must be notified provides little comfort, as its meaning is far from clear.[7] Furthermore, the reporting standard will likely be applied inconsistently in practice as firms may reasonably differ in their assessments of the possibility or significance of an infringement.

- ***Detrimental impact on leniency.*** The low threshold of the Competition Disclosure Obligation also affects the position of firms considering applications for leniency in cartel-type cases. Because authorised firms are required to notify possible infringements, and because such notification may lead to a competition law investigation, the voluntary nature of the leniency regime is considerably weakened. Notification also creates a tighter timeframe within which a firm can consider its position and gather the evidence needed to seek full immunity,[8] which becomes unavailable once an investigation has been opened.[9] The FCA acknowledges this risk and has expressed a degree of willingness to work with firms and the CMA on questions of immunity on a case-by-case

[7] FCA guidance states that "significance" will depend on, *inter alia*, actual or potential effects on competition, customer detriment, and duration. It is unclear how these factors will be weighted, and which other considerations may be taken into account (*e.g.*, whether the "hardcore" nature of an infringement, such as resale price maintenance, would be deemed relevant, even absent a lack of effects on the market).

[8] OFT 1495, Guidance on applications for leniency and no-action in cartel cases (the "Leniency Guidance") para. 3.11 and Charts A and B (obtaining a "marker" for immunity in the UK requires a "concrete basis for suspicion" and a "genuine intention to confess," which is usually achievable only after an internal investigation).

[9] Leniency Guidance, para. 2.9.

basis.[10] It has not, however, set out a procedure for addressing these issues where they arise in practice.

- ***Self-incrimination.*** Disclosures under the FCA's supervisory rules jeopardise the privilege against self-incrimination and, potentially, defences that firms may wish raise. The wording of such disclosures could become a frequent point of contention, especially if used in support of competition enforcement activities.[11] The FCA has stated that the fact that firms have to report conduct which "may" infringe competition law provides protection against self-incrimination and that only an obligation to report "actual" infringements would require an admission of breach. [12]

III. CLARIFICATIONS TO THE FCA'S APPROACH IN COMPETITION CASES

The FCA has also clarified its approach to competition enforcement in a number of ways, and published guidance on how it will carry out competition investigations and market studies. The most important clarifications are as follows:

- When applying competition law, the FCA will take into account CMA guidance notes where they provide greater detail than equivalent FCA guidance.[13]

- The FCA will decide on a case-by-case basis whether to bring actions on competition grounds or under the its pre-existing regulatory powers. It envisages challenging price-fixing, customer allocation, and exclusionary unilateral conduct under competition law.[14]

- Where conduct raises concerns for both competition and financial regulation, the FCA may address such conduct using both its competition

[10] FCA Policy Statement PS15/18, para. 4.27.

[11] The FCA does not consider that the right against self-incrimination would be breached, on the basis that the disclosure is made according to financial regulatory rules rather than competition law provisions: FCA Policy Statement PS15/18, para. 4.13.

[12] FCA Policy Statement PS15/18, para. 4.13.

[13] FCA Finalised Guidance FG15/8, para. 1.6.

[14] FCA Finalised Guidance FG15/8, para. 2.26.

enforcement and regulatory powers. However, it will take into account fines already imposed on the firm by authorities in connected cases.[15]

IV. CONCLUSION

The FCA views the notification of competition issues as consistent with the general obligation on authorised firms to deal with their regulators in an open and cooperative manner. Notifying the FCA of sanctions imposed and on-going investigations (insofar as applicable legal regimes allow) is relatively uncontroversial. However, the obligation to report conduct which is not being investigated and conduct that "may" infringe competition law creates complexity, undermines firms' rights of defence, and could effectively render leniency applications mandatory for authorised firms in cartel-type cases.

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[15] FCA Finalised Guidance FG15/8, para. 2.20.

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