The FCA’s new competition powers - are you ready?

What’s happening?

From 1 April 2015 the Financial Conduct Authority (FCA) will have powers to enforce key provisions of UK and EU competition law. The FCA will be able to investigate and punish anti-competitive agreements and conduct, and to refer markets to the Competition and Markets Authority (CMA) for detailed investigation. These powers are “concurrent”, because the FCA will have them concurrently (i.e. in parallel with) the CMA, like other sector regulators, such as Ofcom and Ofgem. The FCA will not have powers to prosecute criminal cartels, or to review mergers: those will remain the CMA’s responsibility.

What does this mean for my organisation?

The key principles of UK and EU competition law are not changing; they already apply to financial services firms, like all other businesses. But the FCA’s “tool kit” will be one of the largest available to any regulatory authority. The FCA will now be able to enforce competition law in pursuit of its competition objective – promoting effective competition in the interests of consumers, including business customers. The FCA will be able to impose substantial fines (up to 10% of worldwide turnover) on firms who enter into unlawful anti-competitive arrangements, such as price-fixing or market-sharing cartels, or who abuse a dominant position.

The FCA can already use all its powers under FSMA, including powers to make rules, give directions or revoke authorisations, in pursuit of its competition objective.

The FCA’s concurrent competition powers will apply to all financial services activities – not just those within its regulatory perimeter.

So firms will be facing an even more powerful and versatile regulator – and unlike other businesses, they will be obliged to confess their infringements of competition law to that regulator. Awareness of and compliance with competition law is therefore essential.

Has the FCA produced any guidance about this?

The FCA has published draft guidance on competition concurrency, in preparation for its new concurrent powers (click here to view that guidance).

The FCA proposes to introduce a new rule requiring a firm to notify the FCA if it has or may have infringed any applicable competition law and to do so as soon as it becomes aware, or has information which reasonably suggests, that an infringement has or may have occurred. This goes further than the existing Principle 11 and SUP15, because the new rule will require immediate written disclosure, unless the relevant firm has made or intends to make an oral application to the CMA or European Commission for immunity or leniency. There appears to be no materiality threshold for the seriousness or significance of the relevant infringement: all infringements (or suspected infringements) of competition law must be disclosed, whenever they occurred (e.g. before 1 April 2015) and (arguably) wherever they occurred, as “applicable competition law” could extend outside the UK and/or EU.

Unfortunately, the FCA is not expecting to finalise and publish its guidance before it gains its new powers on 1 April; the FCA says that it will: “reflect on the feedback received before finalising the guidance documents and legal instrument and issuing a feedback statement as soon as possible after we get our concurrent competition powers on 1 April 2015”.

BLP’s leading competition team includes partner Adrian Magnus, who recently spent six months on secondment at the FCA helping them prepare for this reform, and James Marshall who spent six months working on concurrency at the CMA. Together with our financial regulatory colleagues, we are well placed and happy to assist.