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FCA PROPOSALS TO CUT OUT RDC INVOLVEMENT IN SIGNIFICANT SUPERVISORY CASES WILL LEAD TO UNDESIRABLE OUTCOMES FOR THE REGULATOR AND THE REGULATED

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SUMMARY

At the end of July 2021, the FCA published a consultation paper, CP21/25, setting out proposals to reduce the decision-making remit of its quasi-independent Regulatory Decisions Committee ("**RDC**") and instead bring those decisions into its day-to-day operational functions. These proposed changes are part of a wider transformation programme being undertaken by the FCA, outlined in its 2021/22 Business Plan, in which it is seeking to become a more assertive and decisive regulator that acts fast to prevent harm (for more information on the FCA's 2021/22 Business Plan, please read our blog: The FCA's new "game plan" – What do banks need to know about the FCA Business Plan for 2021/22?). In this article we provide an overview of the proposed changes and assess whether the FCA has gone too far in sacrificing procedural fairness for efficiency.

WHAT ARE THE PROPOSED CHANGES?

The FCA's proposals seek to reduce the decision making-remit of the RDC by transferring responsibility for the following decisions to FCA staff members within its operational divisions (Authorisations, Supervision and Enforcement):

- decisions to use the FCA's own-initiative intervention powers to impose a fundamental variation of permission or a requirement in relation to a firm;
- final decisions in relation to a firm's authorisation or an individual's approval that are contested;
- decisions to take action in "straightforward" cancellation cases (where a firm does not meet the FCA's regulatory requirements) where that action is contested; and

- decisions to commence civil or criminal proceedings.

The RDC would continue to decide cases where the FCA is pursuing disciplinary cases for suspected breaches of the Principles for Businesses, Conduct Rules or other binding rules.

Although the RDC is part of the FCA and is required to operate in accordance with FCA policy, it is staffed by respected individuals who are wholly separate from the other activities of the regulator and who are therefore generally considered to reach decisions on a more independent and objective basis than the FCA executive team.

The FCA explains that the consequence of these changes would be that the RDC is left to focus on contentious enforcement cases, whilst the FCA's divisions, under Executive Procedures, would focus on situations where the FCA needs to prevent firms from offering financial services, or needs to intervene to prevent or stop harm to consumers or the market occurring or increasing. It believes that allowing its divisions to take decisions in the areas proposed would enable it to act more swiftly and assertively in these areas, where it considers the greatest risk of harm exists, because of "*the flexibility that follows from the ability to have individual decision makers as opposed to decision making by committee.*"

EFFICIENCY OVER FAIRNESS?

The FCA is adamant that "*none of the proposed changes removes any of the rights and protections that firms and individuals subject to our decision-making processes have.*" However, in all practical senses the proposed changes do quite plainly undermine the protections that currently exist for both firms and individuals. This is concerning in circumstances where the FCA's decisions in the areas covered by the proposals can sometimes have very a significant impact on firms and individuals and where the FCA has already shown an increased appetite for using its powers in these areas in recent years – in particular, using its own-initiative powers to impose variations of permission or requirements on firms.

The most obvious procedural fairness concern with the proposals is that, by removing the RDC from the decision-making processes concerned, the benefit is lost of having a committee of (usually) three people, separate from the FCA's operational divisions, examining the evidence on a matter and providing a fresh perspective, in addition to objective and independent decision-making. Indeed, many firms take comfort from the protections that this separation affords, particularly where their relations with the FCA may have become strained. However, for the decisions impacted by its proposals, it appears that the FCA intends to revert to the minimum requirements allowed under FSMA. Under these minimum requirements, a statutory notice decision can be taken by any single FCA staff member, provided they were not directly involved in establishing the evidence upon which the decision is based - or alternatively by any two or more FCA staff members, provided that at least one of them was not directly involved in establishing that evidence.

In our view, these changes would be likely to significantly increase the number of FCA statutory notice decisions referred to the Upper Tribunal, as firms and individuals feel the need to refer FCA decisions that would not have been made with the checks and balances provided by the RDC under the existing regime. The RDC currently provides firms and individuals with a sense of their "day in court", an opportunity to have their arguments heard which, even if rejected by the RDC, provides comfort that the issues have been aired and independently considered, and therefore reducing the need to refer the case to the Upper Tribunal.

Furthermore, there is a real risk that decisions made by FCA staff would be less carefully considered and analysed, as they would no longer have it in their mind that they will need to convince the RDC that the chosen course of action is fair, appropriate and proportionate. Rather, they would be more focused in practice on the quite different issue of whether the defendant is likely to have the resolve and resources required to refer the case to the Upper Tribunal.

One potentially positive effect for firms and individuals of increased numbers of Upper Tribunal referalls is that it would, in the longer term, lead to a body of thorough and reasoned judgments on the scope of the FCA's decision-making powers in the areas concerned (which is lacking at the moment). However, the necessity of having to refer unmeritorious cases to the Upper Tribunal for determination would, in the shorter term, give rise to a range of negative consequences for firms and individuals:

- Firstly, this would increase the costs of challenging FCA decisions, in circumstances where, even where the Upper Tribunal overrules the FCA decision, the costs of taking the case to the Upper Tribunal can only be recovered from the FCA if it has acted unreasonably (a high threshold in practice).

- Secondly the lack of an RDC hearing and the lengthy wait for a hearing before the Upper Tribunal would significantly increase the time it takes to challenge unfair FCA decisions. This in turn would exacerbate the adverse consequences that flow from FCA decision-making for firms' businesses and for individuals' careers. Of particular concern is the fact that the FCA has the power to impose own-initiative variations of permission or requirements on firms even whilst the Upper Tribunal process is ongoing, leaving scope for significant (possibly irreversible) damage to be done to a firm that is then able to successfully challenge that decision.

- Thirdly, and perhaps most significantly, having to challenge the action before the Upper Tribunal would bring all of the details of the matter into the public domain – giving rise to the risk of reputational and commercial damage even where the FCA action is successfully challenged before the Upper Tribunal – when, under current procedures, a successful challenge before the RDC would have been in private. This may be of particular concern in the context of FCA individual approval decisions, where firms (and the relevant individuals) will, in many cases, be sensitive about the details of such matters being aired in a public forum and in

practice would make it less likely that firms would be willing to challenge unfair decisions on individual approvals by the FCA (although some firms would, no doubt, still do so).

From the FCA's perspective too, more referrals to the Upper Tribunal would increase its own costs and impose a significant additional strain on its limited resources – the opposite outcome to the efficient decision-making process it is seeking to achieve. Furthermore, the RDC currently affords some real protection to the FCA by providing a forum in which unmeritorious cases can be thrown out at a private hearing without the negative publicity (and attention from Parliament) that this would create for the FCA if such hearings were in public, as will be the case before the Upper Tribunal.

Moreover, it is also unclear how much additional efficiency the FCA's proposals will actually achieve in exchange for these undoubted compromises to procedural fairness. In particular, we note that CP21/25 does not criticise the current RDC process and, in circumstances where the resources of the FCA's divisions are already stretched, it is unclear how much capacity they have to take over this additional responsibility from the RDC.

SCOPE OF CHANGES

While it may be arguable that, in relation to certain variation of permissions, imposition of requirements, and cancellation of authorisation cases, there is a need for the FCA to act more quickly in order to seek to prevent harm to consumers or the market more generally, the same rationale does not apply to FCA decisions to refuse a firm's authorisation or refuse the approval of an individual as a Senior Manager Function holder (SMF). In such cases the relevant individual or firm is not able to begin carrying out the relevant activity until the FCA provides its consent. These are of course very important decisions for the individual or firm to which the application relates. As a result it is even more difficult to understand why the FCA is proposing to remove the availability of an RDC hearing in these cases.

CONCLUSION

The proposed changes clearly reflect the FCA's desire to become a more assertive regulator – in the words of FCA Chief Executive Nikhil Rathi, to "test our powers to the limit". Removing certain decisions from RDC oversight will certainly free up the FCA to test some of their powers to the limit, and beyond.

The proposals are, however, controversial, as they would clearly result in the rights and protections afforded to firms and individuals being compromised. There is a real risk that the changes would lead to a more cursory approach to decision-making by the FCA, in what are fundamentally important decisions for individuals and firms. While a move towards a more efficient and timely process within the FCA must be seen as desirable, the changes sacrifice an important check and balance that benefits both the FCA and the firms and individuals who are the subject of the cases.

If implemented, we would expect a significant increase in the number of FCA statutory notice decisions being challenged in the Upper Tribunal and a much higher proportion of FCA cases being thrown out by the Upper Tribunal with criticisms of the FCA in full view to the press, Parliament and the public.

The consultation closes to responses on 17 September 2021 and the FCA expects to publish a policy statement in or around November 2021.

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