Financial Regulatory Alert

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UK Financial Conduct Authority Consults on Amending Decision-Making Process

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Key Points:

- The FCA is consulting on changing its internal decision-making process.
- If the FCA's proposals are made into final rules, certain decisions which are currently taken by the quasi-independent RDC will instead be made by senior members of the FCA under the Executive Procedures.
- The FCA's principal argument for these proposals is that it will allow the regulator to act with more speed. However, the FCA also appears to support these changes as part of its desire to "test [its] powers to the limit" and make "bolder" decisions.
- If the FCA proposals do go into effect, we expect that there will be an increase in the number of FCA decisions which are referred to the Upper Tribunal (part of the judiciary) for review. This may include challenges to the FCA's decision making on substantive and public law grounds.
- As such, far from allowing the FCA to act faster, we expect the proposals may in fact slow down the FCA's regulatory decision-making processes.

Introduction

The United Kingdom Financial Conduct Authority (FCA) has issued a Consultation Paper (here) setting out proposed changes to its decision-making processes. In particular, it is proposed to transfer the authority to make certain regulatory decisions from the quasi-independent Regulatory Decisions Committee (RDC) to senior members of the FCA under the "Executive Procedures".

Each of the types of decision which the FCA is proposing to move to the Executive Procedures has significant—sometimes business changing or career changing—effects on the firms or individuals affected. Until now, the current procedure has given comfort to firms and individuals that these major decisions have generally been taken following an adversarial hearing before the RDC.

In the Consultation Paper, the principal reason put forward to justify the proposed changes is that it would allow the FCA to make decisions more quickly. A more sceptical—but certainly not unjustified in light of recent statements by the FCA—view

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of the proposals is that they are sought to remove the quasi-independent scrutiny of the RDC in decision making, and in doing so to allow the FCA to make "bolder" and novel actions which the RDC might otherwise prevent.

It is unfortunate that the Consultation Paper does not grapple with whether this removal of the RDC's function as the "unbiased judge" might lead to greater distrust of the FCA's decision making. The Consultation Paper also does not appear to consider whether the proposals would comply with the FCA's public law duties to ensure that decisions are made by decision makers who are unbiased, and who are seen to be unbiased. We expect that if the proposals go into effect, the general public and the regulated sector more generally will have lower confidence in the decisions, on account of their being made under the Executive Procedures. As a result, we would expect more referrals of these decisions to the Upper Tribunal (which is part of the UK's judiciary) to ensure that the decisions are lawful and just. Indeed, contrary to the principal aim of speeding up decision making, we would expect the proposals to slow the decision-making process down and add costs for both the FCA and the relevant firm/individual.

The FCA Flexing Its Muscles

The FCA's primary stated rationale for these proposals is that it they would "increase our ability to make some of our decisions more quickly".[1] Whilst speed is certainly one reason why the FCA may want to amend its decision-making process, it by no means appears to be the only motivator behind the proposed changes. This is especially true since—as explained below—there is reason to believe that the proposals may in fact slow down certain decisions.

Indeed, in the Consultation Paper itself, the FCA notes that it wants "to be more robust and assertive in the decisions [it] make[s] in order to prevent and stop harm faster and more effectively, including **being bolder when making decisions**" (emphasis added).[2]

This concept of "being bolder" in decision making chimes with recent comments made by the FCA chief executive Nikhil Rathi in presenting the first FCA Business Plan under his leadership. In that presentation, Mr. Rathi stated that the FCA's "instinct will be to test [its] powers to the limit".[3] Mr. Rathi also noted that where a case "falls outside [of the FCA's] jurisdiction, it should not mean that [the regulator should] simply stand by".[4]

The FCA's appetite for bringing novel actions has been visibly growing for a number of years. One only needs to look at the unprecedented Business Interruption Insurance litigation which the FCA brought last year and prosecuted all the way through to the Supreme Court in under 12 months. Whilst not apparently argued in that case, it is not entirely clear from where the FCA derived its power to litigate in that fashion.

In this context, it seems relatively clear that the FCA's aim is not merely speed; rather, the FCA appears to believe that without the RDC being involved in decision making, it will be able to make "bolder", novel decisions which might not otherwise be approved.

The Proposal

There are four classes of decision which are proposed to be moved from the RDC to the Executive Procedures:

- Decisions to refuse an application for a firm's authorisation/approval of an individual.
- Certain cancellation decisions, which the FCA classes as "straightforward".
- Decisions to use the FCA's "own-initiative" intervention powers to impose a variation in a firm's permissions.
- Decisions to commence civil or criminal proceedings.

Each of these decisions can have major effects on the firms or individuals concerned.

Public Law Concerns

As a public body, the FCA is bound by general principles of public/administrative law. This notwithstanding, the Consultation Paper is very light in its considerations of public law, and indeed the only relevant legal restraint considered in the Consultation Paper is a provision of the Financial Services and Markets Act 2000 (FSMA) which requires decisions to be made by at least one person "not directly involved in establishing the evidence on which the decision is based".[5]

This provision of FSMA is not the only relevant limit on the FCA's decision-making powers, however, and there are other general principles of public law which also regulate decision making by public bodies. Such principles include that (i) no-one should be a judge in their own cause, (ii) decision makers must not be biased, nor be perceived as there being a real possibility of their being biased, and (iii) parties should have the opportunity to be heard before decisions are made.

The movement of decision-making authority from the RDC to the Executive Procedures potentially infringes each of these three principles of public law:

- The FCA staff will effectively be acting as both the prosecutor and the judge, as they will be seeking the decision to be made, and ultimately making the decision.[6]
- There would be a reasonable risk that the decision makers would be perceived as biased, given their role as prosecutor and judge.
- In this same Consultation Paper, the FCA is proposing to restrict a party's ability to seek an oral hearing under the Executive Procedures except in "exceptional circumstances", with "exceptionality" to be determined by the decision-maker him/herself. As such, parties may be being denied a proper hearing before the decision is made.

These public law concerns are especially potent given the FCA's desire that the decisions should be "bolder": indeed, the Consultation Paper appears to view the potential breaches of these public law principles as positive features, rather than negatives.

In these circumstances, we expect that many more of the decisions taken by the FCA in these four classes of cases are likely to be open to challenge on public law grounds, and they may end up being quashed by the Upper Tribunal or the High Court. As such, rather than speeding up the process, we expect that the decision-making process may in fact be slower, as an increased number of referrals to the Upper Tribunal may be taken.

Conclusion

These proposals are part of the FCA's current aim to "test [its] powers to the limit" and to bring novel and potent actions against firms and individuals they perceive as having acted wrongly.

Given certain political criticisms of the FCA over the past few years, the FCA's desire to be able to make decisions based on general perceptions of good policy is not surprising. At the same time, however, recent court and tribunal judgments (whether ultimately finding in favour or against the FCA) have indicated concern at the FCA's standard of decision making in certain cases, with the FCA being criticised for the manner in which it has made decisions. The FCA is therefore admittedly in a difficult situation: on the one hand it is being told it must act more boldly, on the other it is being criticised for insufficient or unsubstantiated decision making.

If the proposals are put into effect, there is a reasonable risk that firms and individuals, as well as consumers more generally, will view the decisions made by the FCA as being effectively policy decisions, rather than decisions made by applying the law to the facts. This would undermine confidence in the FCA's decision making and role as a regulator. It may also slow down the processes overall, since parties may reasonably feel like they have not had a fair and impartial hearing, and will want to refer these decisions to the Upper Tribunal for such a determination.

As a result, and notwithstanding the difficult position the FCA is in, the proposals put forward in the Consultation Paper are not an appropriate solution to the perceived problem.

Even so, if they are put into effect, firms and individuals should rest assured that ultimately they will still be able to pursue an independent and impartial determination, even if it is necessary to seek review from the courts and tribunals to obtain it.

[1] Consultation Paper, paragraph 2.7.

[2] Consultation Paper, paragraph 2.5.

[3] https://www.fca.org.uk/news/speeches/transforming-forward-looking-proactive-regulator.

[4] https://www.fca.org.uk/news/speeches/transforming-forward-looking-proactive-regulator.

[5] See section 395(2)(a) of the Financial Services and Markets Act 2000 (here).

[6] We note that the public law concerns in relation to the decision whether or not to institute civil/criminal proceedings may be lower than for the other decisions, as in those cases the FCA is only acting as prosecutor, and the relevant civil/criminal court will be acting as the judge. This notwithstanding, other public law concerns—particularly bias and the right to be heard—may still undermine the fairness of the decision making.

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