Building Societies Association

CP 15/1: FCA Competition Concurrency Guidance and Handbook Amendments

Response by the Building Societies Association

Introduction

1. This BSA* response is brief because, as the CP notes, the changes are of a regulatory institutional nature and do not affect the main legal provisions relating to competition law. Therefore, we focus on some of the small number of new or amended provisions. In general terms, we believe that much of the explanatory material provided in the CP will be very useful to firms.

2. The BSA recognises that, as a trade association, it has an important role to play not only in helping our members with guidance and information on law and practice in this area, but also in ensuring that we - as a trade body - scrupulously adhere to good competition practice ourselves.

3. Our main concern in the CP relates to the impracticality of the proposed new rule on reporting competition law infringements (see paragraphs 12 - 17 below).

Concurrent Competition Enforcement - ***chapter 2 and Appendix 1***

4. The overview in the Appendix helpfully sets out the legislative context. In the BSA's view the most important message to firms is to ensure awareness among staff of what does, and what does not, constitute anti-competitive behaviour and to have proper compliance procedures in place.

5. We strongly support the FCA's commitment to a fair and transparent process, set out in chapter 2 of Appendix 1. The BSA believes that a particularly important commitment is that set out in paragraph 2.19; ie, *"We will make clear when using our formal information-gathering powers which we are using and the nature of the suspected infringement(s) that we are investigating"*. Firms must be fully aware of - and compliant with - their duties, but they also have rights and so this commitment from the FCA is welcome.

6. The BSA particularly notes the 'primacy' provisions, which mean that the FCA will have a duty, in many cases, to consider using its Competition Act powers before its FSMA powers.

7. Paragraph 3.1 usefully sets out the variety of sources of information for a regulator regarding possible competition law infringement. Firms should be under no illusion that certain breaches can easily take place under the radar without likelihood of detection.

8. We support the prioritisation assessment outlined in chapter 3 of Appendix 1 – clearly, as in other areas, the regulator has to prioritise cases and, in competition terms, must focus on those with the greatest anti-competitive impact across the relevant market. The information on the opening of a formal investigation indicates that firms should have arrangements relating to unannounced regulatory visits because, although they are rare, they can and do occur.

9. Firms will find the information about the conduct of an investigation and subsequent processes (chapters 4 - 6 of Appendix 1) useful. It is helpful that the FCA emphasises the importance of keeping the parties informed (paragraphs 4.4 - 4.6). It is also potentially helpful that chapter 7 sets out the parameters of disclosure and use of information by the FCA, in the context of its competition law enforcement functions.

Market Studies - ***chapter 3 and Appendix 2***

10. The information about the FCA's processes in relation to market studies is useful. Unlike competition law enforcement, which is new to the FCA, we already have some experience of FCA market studies. We note that the market study powers under the competition legislation are very similar to those under the FSMA, but with certain differences eg some procedural requirements and timetables.

Draft Legal Instrument - ***chapter 4 and Appendix 3***

11. We see no problem in amending SUP 15.3.15R to incorporate a specific reference to the disclosure of competition law infringements. While this change is presentational rather than substantive, it should be helpful in raising awareness among firms.

12. While it is clear that firms should, and must, report competition law infringements of which they are aware, the proposed new Rule SUP 15.3.32R lacks sufficient clarity to be workable in practice. It requires immediate notice in writing *"as soon as it becomes aware, or has information which reasonably suggest, that an infringement has, or may have, occurred."*

13. The proposed rule is consistent with the new regulatory theme of self-reporting. For example, under the separate *strengthening accountability in banking* proposals, firms will have to report (within 7 business days) if they have reasonable grounds for suspicion of a rules breach concerning senior managers or certification staff.

14. At first glance, provisions such as those outlined in the above two paragraphs are fair. However, except in clear-cut and obvious cases, firms will not be in a position to report in the absence of at least a reasonable degree of investigation. Simple suspicion that something might be wrong or mere indications that something is not right will not meet the criteria set out in either the competition CP or the strengthening accountability in banking CP. If the FCA wishes to underline and strengthen self-reporting, it needs to give firms the tools to do the job - ie well drafted rules that are workable in practice.

15. Returning specifically, to CP 15/1 and the proposed new SUP Rule, there is also a clear inconsistency within the new rule as drafted. Paragraph (4) of SUP 15.3.32R states that a notification "must" include, among other things, *"information about any steps which the firm or other person has taken or intends to take to rectify or remedy the infringement or prevent any future potential occurrence"*.

16. In only a tiny proportion of cases can this requirement be consistent with the obligation to "report immediately" or with the duty to report where information "reasonably suggests" that contravention "may have occurred". How can a remediation programme be put in place immediately in such circumstances? The remediation provision could be improved by including a qualification, such as "as soon as reasonably practicable."

17. The requirement appears to be unreasonable and, if implemented as currently drafted, would be likely to lead to inconsistency of reporting across firms and sectors.

*The Building Societies Association represents all 44 UK building societies. Building societies have total assets of over £330 billion and, together with their subsidiaries, hold residential mortgages of over £240 billion, 19% of the total outstanding in the UK. They hold over £240 billion of retail deposits, accounting for 19% of all such deposits in the UK. Building societies account for about 28% of all cash ISA balances. They employ approximately 39,000 full and part-time staff and operate through approximately 1,550 branches.

Chris Lawrenson
BSA 12 March 2015