Corporate & Financial Crime & Regulation

A TROJAN HORSE? THE FCA's PROPOSALS ON REFORMING THE RDC

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Contact at QEB: Jason Mansell

The FCA indicated in its Business Plan 2021/22 that it will consult on "proposals to streamline decisions about authorisation and specific supervisory and enforcement actions", and that it proposed "to change the balance of decisions taken by the FCA Executive and the Regulatory Decisions Committee" ("RDC").

True to its word, in its Consultation Paper ("CP") published on 29 July 2021, the FCA proposes to remove the role of the RDC in four categories of decision making: -

- intervening to impose a requirement on a firm, or to vary its permissions by limiting or removing certain types of business ("OIREQ's");
- making a final decision in relation to a firm's application for authorisation, or where an individual's approval has been challenged;
- making a final decision to cancel a firm's permissions because a firm does not meet the FCA's regulatory requirements; and
- the decision to start civil and/or criminal proceedings.

The role of the RDC in enforcement cases will, the FCA says in the CP, remain.

In early August, FCA Director of Enforcement Mark Steward emailed numerous lawyers in private practice specialising in contentious regulatory work to invite views on the CP. The covering email states that "*the changes proposed will help to increase the speed and reduce the regulatory costs of dealing with firms and individuals that fail to meet the FCA standards."*

It is significant that the changes proposed, publicly at least, are not borne out of any concern as to the appropriateness of the RDC's decision making, but simply a desire to increase the speed of decisions and to reduce internal cost. The proposals start off from the premise that the RDC makes correct decisions, albeit that there is a belief within the FCA that the decisions are too slow and too expensive.

Some proposals are relatively non-contentious. Certainly, FCA decisions to commence civil and criminal proceedings have sufficient checks and balances within the court process, once

commenced, to ensure procedural fairness. In such cases, the proposal to devolve this power from the RDC is not inappropriate and will reduce the RDC's workload by the relatively small number of cases each year which involve the commencement of civil or criminal proceedings. Further, in routine authorisation, OIREQ and cancellation cases, the justification advanced by the Authority is unobjectionable. Ultimately, if no one wishes to challenge the decision being made there is a good argument that the decision does not need the independent and detailed scrutiny which the RDC process inevitably entails.

However, for those cases where there is a real dispute, the justification advanced presupposes that the FCA's internal decision-makers are always right when they allege that persons and firms fail to meet regulatory standards. The supposed benefits of a more streamlined system must therefore be tempered by the risk of injustice to those firms and individuals who might be prevented or excluded from carrying out regulated business without adequate cause.

In these cases of dispute, the distinction the FCA seeks to draw between an enforcement case and an authorisation or supervisory case, as a justification for removing the RDC from the decision-making process, is inappropriate. Whilst these approval and intervention cases do not have disciplinary effects, in many cases the refusal of authorisation or the imposition of an OIREQ can have immediate and devastating consequences and result in a long-term stain on a firm's regulatory history. Firms can be closed virtually overnight; jobs can be lost, or start-up capital wasted. Equally, refusal of authorisation can have dire consequences for the firm or individual applying for authorisation. These consequences are particularly acute for firms from sectors grandfathered into the FCA regime which risk being forced to close, if not approved once their temporary permissions have lapsed. Further, unlike enforcement cases, these decisions can have an immediate effect.

The idea that individuals who consider they are fit and proper to be authorised, or firms which consider they meet the Threshold Conditions, should have access to a fair and transparent mechanism to challenge executive decisions, should not be controversial. The proposed substitution of the current right to make oral and written representations to the RDC with a right to make written representations to an internal executive of the FCA (with a right to make oral submissions only in exceptional cases) endangers that principle and brings with it a significant potential for injustice.

By contrast, the status quo, having a decision-maker truly independent of the Case Team, and autonomous from the management structure of the FCA, is an important check on executive powers and leads to better decisions. Regrettably, the amended process proposed is likely to lead to less transparency and less accountability, which is compounded by the fact that the jurisdiction of the Upper Tribunal in non-disciplinary cases is more limited than in an enforcement case. For non-enforcement cases, the Upper Tribunal assesses the case based upon the

reasonableness of the FCA's action, rather than a merits-based assessment. This is significant since it means that the only opportunity for a firm or individual to obtain a merits-based decision in an authorisation or supervision case is before the RDC. Under the proposals, that merits-based assessment and review will be before an executive decision-maker.

However, over the years the RDC has shown a willingness to act independently from the Case Team. In a number of cases the RDC has chosen to authorise the firm or approve the individual contrary to the previous assessment of the Case Team and the FCA's own internal Regulatory Transactions Committee. In each of these cases the FCA's internal process can be said to have failed, requiring a reference to the RDC to achieve what the CP accepts was the appropriate result. Can the FCA say that the proposed new process would have reached the same decision as the RDC? If the answer is "no", then the need to retain the RDC and the independent scrutiny that it provides in this function is plain.

A reform of decision-making which sorts the routine from the non-routine is not controversial, but the role of the RDC should be preserved for cases where there is proper challenge and engagement from the firm or individual. Any reform to proceed by way of executive decision alone should be restricted to those cases where there is no such challenge. This hybrid approach to decision-making is already enshrined in FCA rules and used in, for example, anti-money laundering registration cases where a Decision Notice can be issued by executive decision or the RDC. There is no good reason why the model could not be extended further.

It is also perhaps significant that the CP contains no indication as to the number of contested authorisation and OIREQ cases that are heard by the RDC each year. In fact, many authorisation cases are withdrawn once the FCA has indicated that it is minded to refuse the applicant and most firms voluntarily vary their regulatory permissions when under supervisory pressure to do so. The number of contested authorisation and supervision cases before the RDC is likely to be very low.

A suspicion therefore exists that, in the guise of speed and efficiency, the real driver behind these proposals may in fact be a degree of internal senior management frustration at the independence of the RDC's decision-making. If delay and efficiency are truly the concerns, the FCA should look a little closer to home at its own internal inter-departmental casework systems and processes before it starts removing important rights and safeguards from those who want to challenge what they feel are, and may well be, unjust and unfair executive decisions.

It is important for the FCA's decision-making systems and processes to have the trust and confidence of those it regulates. That includes the right properly to challenge decisions whether they be authorisation, supervisory or enforcement in nature. The proposals in their current form

risk substituting a system that has worked well for almost the last 20 years, with one that risks being less transparent and less fair to the persons affected by it.

Moreover, if the RDC is taken out of the decision-making process for certain types of cases, these proposals have the potential to become a Trojan Horse that may eventually bring about the disbanding of the RDC altogether and the devolving of all its current casework decisions to the executive. To those regulated firms and approved persons that look to the RDC for a fair and objective determination of their regulatory issue, that would lead to a profound sense of injustice which ultimately could undermine trust and confidence in the system.

This article was produced by Jason Mansell a Barrister at QEB Hollis Whiteman Chambers specialising in FCA litigation. It should not be taken as constituting formal legal advice. To obtain expert legal advice on any particular situation arising from the issues discussed in this article, please contact our clerking team at barristers@qebhw.co.uk. For more information on the expertise of our specialist barristers in criminal and regulatory law please see our website at https://www.qebholliswhiteman.co.uk/.

QEB Hollis Whiteman
1-2 Laurence Pountney Hill, London EC4R 0EU
DX: 858 London City Telephone 020 7933 8855 Fax 020 7929 3732
barristers@qebhw.co.uk www.qebholliswhiteman.co.uk