FCA Procedural Officer Decision 2018/1

Application by Hargreave Hale Limited for disclosure of certain documents in relation to the FCA's investigation into alleged anti-competitive conduct in the asset management sector

The Application

1. The FCA is currently investigating alleged anti-competitive conduct in the asset management sector (the Investigation). Hargreave Hale Limited (HH/the Applicant) has requested that the FCA's decision not to disclose certain documents in its possession, although not on the FCA's case file for the Investigation, should be overturned (the Application).

2. HH is a main party to the Investigation. The Application seeks the disclosure of two documents: a warning notice and an enforcement submission document (the Documents) which were both prepared in the context of a parallel investigation under the Financial Services and Markets Act 2000 (the FSMA case) and issued by the FCA to one of the (now ex) employees (the Individual) of another asset management firm involved in the Investigation. The Application was made on 3 October 2018.

The FCA's decision

3. Letters were sent on 7 and 21 September 2018 by the FCA to HH's legal advisers setting out the FCA's reasons for refusing to disclose the Documents.

The Procedural Officer's process

4. The Application was received by me on 3 October. I met the case team on 9 October, and HH's legal advisers on 10 October. I have considered the representations and information provided in, and following, these meetings together with the information in the Application.

Scope for the Procedural Officer to consider the Application

5. The Application relates to the disclosure of documents. The FCA's guide to its powers and procedures under the Competition Act 1998 (FG15/8) in paragraph 2.4 sets out the scope of procedural complaints that I may consider. This includes requests for disclosure or non-disclosure of certain documents on the FCA's case file, and other significant procedural issues that may arise during the course of an investigation. In relation to this Application, the FCA case team argue that the Documents are not on the FCA's case file as they arise from the FSMA case. I nevertheless consider that the Application falls clearly within the "other significant procedural issues" section of the guide, and is therefore one that I can consider (which is not disputed by the FCA case team).

Background to the Application

6. The FCA has an ongoing investigation under the Competition Act 1998 (CA98) into the conduct of four asset management firms, including HH. A Statement of

Objections was issued on 29 November 2017 (the SO). The FCA is also conducting a parallel but separate investigation (the FSMA case) into the conduct of the Individual, to consider whether he breached FSMA principles in relation to the same or similar conduct as that considered in the CA98 investigation.

7. On 28 August 2018, as part of the Investigation, the FCA sent HH's legal advisers a Second Letter of Facts noting that the FCA had received a submission from the Individual (the Written Representations) responding to a warning notice issued on 18 May 2018 as part of the FSMA case, and that the FCA considered that parts of the Written Representations supported the objections set out in the SO and so might be relied upon to establish an infringement, should the FCA reach an infringement decision. The Written Representations were attached (in redacted form) to the FCA's letter.

8. On 31 August, HH's legal advisers wrote to the FCA, inter alia requesting disclosure of the Documents, which are referred to a number of times in the Written Representations. This request was refused by the FCA in its letter of 7 September. HH's legal advisers pursued their request to see the Documents in a second letter on 12 September, which the FCA again refused in its letter of 21 September. HH then appealed to me.

Summary of the Application and the issues raised

9. The Application seeks disclosure of the Documents. It suggests that the FCA accepts that its FSMA case and the SO are based on the same facts, and that it is clear that HH is entitled to see materials which relate to the Investigation that may be material to the defence case, regardless of whether the documents relate to another, linked, investigation. In this case, it notes that the Written Representations, that the FCA is seeking to rely on in the Investigation, are a response to the Documents, and refer to the Documents frequently. It suggests that HH is entitled properly to understand the accusations, assertions or findings to which the Individual is responding and to be able to put those responses in context. It also suggests that the Documents contain the FCA's findings of fact in relation to the evidence, not merely an interpretation or presentation of the evidence.

10. Turning to the legal background, the Application notes that it is well established that competition enforcement proceedings are considered criminal for the purposes of the ECHR, and that common law requirements for fair procedure also afford extensive protection for the rights of defence. It cites the importance that the Competition Appeal Tribunal (the CAT) has attached to disclosure – that it is "of overriding importance that the parties should be able to exercise their rights of defence without having possible relevant material held back or inaccessible."

11. The Applicant notes that S60 of CA98 requires that, so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in EU law in relation to competition within the EU. It also notes that the CAT, in its judgement in *Pernod Ricard v OFT*, held that the interpretation provisions in section 60 apply not only to substantive competition rules (for example, the meaning of the Chapter I and II prohibitions under the CA98) but also to "the procedural principles to be applied in the application and enforcement of the competition rules" (in that case, rules on the rights of complainants to be consulted prior to case closure).

12. The Applicant cites European case law that sets out that parties are entitled to see any documents that, although not treated by the Commission as part of the investigation file, may in their view be relevant for preparing their defence, and that it cannot be for the Commission alone to determine the documents that may be of use in the defence. The case law suggests that the Commission is allowed to preclude evidence that "has no relation to the allegations of fact and of law in the SO and which therefore has no relevance to the investigation." But the Applicant suggests that the FCA cannot argue that the Documents have "no relation to the allegations of fact and of law in the SO" or "no relevance to the investigation", since its allegations in both cases are based on the same facts, (which the FCA accepts), and it is clear from the Written Representations that the Documents contain information that is likely to be relevant to the FCA's allegations of a concerted practice. The Applicant suggests that the case for disclosure is further strengthened by the FCA choosing to rely on the Written Representations in the Investigation.

The FCA's decision and reasoning

13. The FCA's letter of 7 September 2018, in refusing to disclose the Documents, states that no material in the Documents forms part of the FCA's case against HH in the Investigation, and nor are they relevant to HH's defence. The FCA notes that it is committed to running a fair and transparent process, in which the parties' rights of defence are respected. It suggests that this has been done by the issuing of the SO, and giving the parties access to the documents on the FCA's file. It notes that the Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (the CMA rules), which also applies to the FCA, provides (in para 6(2)) that the CMA [FCA] must give a relevant party a reasonable opportunity to inspect the documents in the CMA's [FCA's] file that relate to matters referred to in a notice [the SO] given to that relevant party. The FCA states that the Documents are not in the FCA's file and do not relate to matters referred to in the SO. The Documents were prepared for the purposes of proceedings under a separate legal regime and so any FCA views expressed in them relate to the FSMA case and not to the Investigation.

14. The FCA considers that the disclosure that it has made to HH means that it knows everything that the FCA knows about what happened on the ground, and what the relevant people have said about it (in terms of emails, phone call transcripts, interview transcripts, witness statements etc). It has all the facts and evidence that the FCA has. The Documents contain allegations and analysis that sets out how a different part of the FCA thinks the facts fit with a different area of law. They contain no definitive findings since they are procedural documents, not a final decision. Even so, those provisional views of other FCA officials do not relate to whether or not HH infringed CA98. This means that the documents they are contained in do not "relate to" matters referred to in the SO. In practical terms, this means that if HH had those documents, it would not be able to run any argument that it cannot already run.

Observations on issues raised by the Application

15. The central issue in this appeal is the disagreement between the FCA and the applicant as to whether the Documents "relate to" matters referred to in the SO and so should be regarded as part of the FCA's file, bearing in mind the provisions of para 6(2) of the CMA rules and also in light of the approach to disclosure in EU case law.

16. The FCA notes in its CA98 Guidance that it will: "…allow addressee(s) of the Statement of Objections a reasonable opportunity (typically 6 to 8 weeks), to inspect copies of disclosable documents on the file. These are documents that relate

to matters contained in the Statement of Objections, excluding certain confidential information and FCA internal documents…" The CMA rules also refer to documents in the CMA's file that relate to matters referred to in the SO.

17. In considering the issues, while para 6(2) of the CMA rules is the applicable UK law, the EU jurisprudence that relates to disclosure in competition law cases is also relevant. The CAT has been clear that it regards s60 of CA98 to apply both to substance and to procedure. The EU cases provide (amongst others) the following principles for considering disclosure:

    (1) The right to access the file in competition proceedings is one of the procedural protections intended to safeguard the undertakings' rights of defence.

    (2) It is necessary that a (judicial) decision is based on facts and documents which the parties have had the opportunity to examine and comment on.

    (3) Undertakings under investigation must have access to the same information as the Commission may use to find an infringement.

    (4) The Commission is obliged to provide the undertakings under investigation with the opportunity to examine all the documents which might be relevant for their defence. Such documents include inculpatory as well as exculpatory evidence.

    (5) It cannot be for the Commission alone to decide which documents are of use for the defence.

    (6) If difficult and complex economic appraisals are to be made, the adviser of the undertakings concerned shall be given the opportunity to examine relevant documents, and thereby assess their probative value for the defence.

    (7) When deciding if the non-disclosure of some documents has infringed the undertaking's rights of defence "it is sufficient for it to be established that the non-disclosure of the documents in question might have influenced the course of the procedure and the content of the decision to the applicant's detriment. The possibility of such an influence can therefore be established if a provisional examination of some of the evidence shows that the documents not disclosed might — in the light of that evidence — have had a significance which ought not to have been disregarded." (*Solvay v Commission*)

18. While the Documents at issue in the Application have been prepared in relation to the FSMA case, not the Investigation, the FCA has disclosed the Written Representations which refer a number of times to the Documents. Therefore, although the Documents are not on the FCA CA98 file, they are nevertheless now related to the FCA's CA98 case. It is accepted that they are based on the same facts.

19. Following the EU jurisprudence, it is not for the FCA alone to decide on the evidential value of documents to the defence, and therefore their disclosure or non-disclosure. It is also the case that the threshold for determining relevance is a low one. Access to the file may be restricted if "a document has no relevance for an addressee of the Statement of Objections because it is objectively unrelated to the objections addressed to it". It seems difficult to argue that the Documents that are the subject of the Application have no relevance for HH since they are based on the

same facts as the Investigation, and mentioned a number of times in the Written Representations.

20. The Applicant cites a number of instances where it suggests that statements in the Written Representations that refer to the Documents are material to some of the key issues that are in dispute between the Applicant and the FCA in the Investigation. The Investigation does, arguably, involve difficult and complex economic appraisals, and a provisional examination of the Documents suggests that it is difficult to conclude with confidence that they do not have "a significance which ought not to have been disregarded."

Conclusion

21. As a starting point, it is plain that the right of access to the file is of essential importance for undertakings' ability to exercise their rights of defence effectively. The rights of defence must be fully respected in administrative proceedings, particularly when the administrative proceedings may result in fines or penalty payments as they might in the Investigation that is the subject of the Application. Outside the categories of internal documents, confidentiality and business secrets (which are not in issue in the present case), where there is any doubt as to what safeguards are needed to protect the rights of the defence in competition proceedings this should be resolved in favour of the undertaking. While the CMA rules provide the starting point for determining access to the file in a CA98 case brought by the FCA, the procedural framework should be informed by EU case law, by application of section 60 of CA98, where possible. Following the EU case law, it is not for the FCA alone to determine the probative value of the relevant documents but for the undertaking and its advisers to do this. The FCA considers that the Written Representations relate to matters referred to in the SO. While the Documents have been prepared in the context of the FSMA case, they are now also related to matters referred to in the SO because the Written Representations respond to the Documents and refer to them a number of times. It is difficult therefore to say that they are "objectively unrelated to the objections" addressed by the FCA to HH.

Decision

22. After careful consideration of the arguments presented by the Applicant and the FCA in this case, I have concluded for the reasons set out above that the Documents should be disclosed.

David Saunders
FCA Procedural Officer

22 October 2018