

Chapter 19

Non-FSMA powers



19.10 Enterprise Act 2002

19.10.1 The *FCA*, together with several other UK authorities, has powers under Part 8 of the Enterprise Act to enforce breaches of consumer protection law. Where a breach has been committed, the *FCA* will liaise with other authorities, particularly the Competition and Markets Authority (the *CMA*), to determine which authority is best placed to take enforcement action. The *FCA* would generally expect to be the most appropriate authority to deal with breaches by authorised firms in relation to regulated activities.

19.10.2 The Enterprise Act identifies two types of breach which trigger the Part 8 enforcement powers. These are referred to as:

- (1) “domestic infringements”, which are breaches of particular UK enactments or of contractual or tortious duties, in each case if they occur in the course of a business and in relation to goods or services supplied or sought to be supplied:
 - (a) to or for a person in the UK; or
 - (b) by a person with a place of business in the UK; and
- (2) “Community infringements”, which are breaches of the EU legislation listed in Schedule 13 to the Enterprise Act, if directly effective, or of national laws, whether of the UK or not, giving effect to that EU legislation, even where it is directly effective, including provisions of those national laws that provide additional protections, beyond but permitted by that EU legislation.

In both cases the breach must, to trigger those powers, harm the collective interests of *consumers*.

19.10.3 The Community legislation falling within the *FCA*'s scope under the Enterprise Act is:

the Unfair Terms in Consumer Contracts Directive;¹⁷
the Comparative and Misleading Advertising Directive;¹⁸
the E-Commerce Directive;¹⁹
the Distance Marketing Directive;²⁰
the Unfair Commercial Practices Directive;²¹ and
the Consumer Credit Directive.²²

¹⁷ Directive 93/13/EEC

¹⁸ Directive 97/55/EC

¹⁹ Directive 2000/31/EC

²⁰ Directive 2002/65/EC

²¹ Directive 2005/29/EC

²² Directive 2008/48/EC

19.10.4

The *FCA* has powers under Part 8 of the Enterprise Act both as a “designated enforcer” in relation to domestic and Community infringements and as a “CPC enforcer” which gives the *FCA* and other CPC enforcers additional powers in relation to Community infringements so that they can meet their obligations as “competent authorities” under Regulation (EC) No.2006/2004 on co-operation between national authorities responsible for enforcement of consumer protection laws (the CPC Regulation).

The *FCA*’s powers as a designated enforcer

19.10.5

As a designated enforcer, the *FCA* has the power to apply to the courts for an enforcement order which requires a *person* who has committed a domestic or Community infringement or, as to the latter, is likely to commit such an infringement:

- (1) not to engage, including through a company and, as to a domestic infringement, whether or not in the course of business, in the conduct which constituted, or is likely to constitute, the infringement;
- (2) to publish the order and/or a corrective statement;
- (3) to offer compensation or other redress, including the right to terminate relevant contracts, to affected *consumers*;
- (4) where such *consumers* cannot be practically identified, to take measures in the collective interests of *consumers*;
- (5) to take measures intended to prevent or reduce the risk of the relevant conduct occurring or being repeated; and/or
- (6) to take measures intended to enable *consumers* to choose more effectively between *persons* supplying or seeking to supply goods or services;

although it should be noted that the remedies listed under (3) to (6) inclusive are only applicable to conduct taking place or likely to occur after the relevant provisions of the *CRA* came into force.

19.10.6

The *FCA* may also apply, if necessary without notice, for interim enforcement orders where immediate temporary prohibition of the relevant conduct is expedient pending full consideration by the court. Such interim orders can also be sought pre-emptively in relation to Community infringements, but again only preventing conduct in the course of business.

19.10.7

The *FCA*’s investigative powers in support of its Enterprise Act enforcement powers are set out in Schedule 5 to the *CRA*. The *FCA* can, under Schedule 5, require any *person* to provide it with information which will enable it to (i) exercise or consider exercising its functions as an enforcer; or (ii) determine whether a *person* is complying with an enforcement order, an interim

enforcement order or an undertaking given as described below. If the *FCA* requires a *person* to provide it with information, it must give him a notice setting out the information that it requires and specifying the relevant enforcement function and/or any such purpose.

19.10.8

Before the *FCA* may apply for an enforcement order, including an interim enforcement order, it must:

- (1) give notice to the CMA of its intention to apply for an enforcement order; and
- (2) unless the application relates to breach of an undertaking given to the court (other than one to provide information), consult the *person* against whom the enforcement order would be made.

19.10.9

The periods for notification and consultation is (both of which can be waived by the CMA) are:

- (1) 14 days before an application for an enforcement order is made unless, just as to consultation, the *person* to be consulted is a member of or represented by a body operating an approved consumer code, in which case the period is 28 days; or
- (2) 7 days in the case of an application for an interim enforcement order, unless the application relates to breach of an undertaking given to the court, in which case the CMA must be notified but not necessarily in advance.

19.10.10

The aim of consultation is to ensure that any action taken is necessary and proportionate, and to ensure that businesses are given a reasonable opportunity to put things right before the courts become involved. The consultation period starts when the *person* receives the *FCA*'s request for consultation and runs whether or not that *person* agrees to be consulted and/or is available for consultation.

19.10.11

The Enterprise Act also makes provision for enforcers and courts to accept undertakings from *persons* who have committed breaches or, in respect of Community infringements, are considered likely to do so. The undertaking confirms that the *person* will not, amongst other things, commence, continue or repeat the conduct which constituted or, as to a Community infringement, would constitute the breach, although, as above, such a pre-emptive prohibition will only apply to conduct in the course of business. The undertaking may also confirm that the *person* will compensate consumers and/or take the other measures described in ■ paragraph 19.10.5, above. There is a general expectation that, if a breach of applicable legislation or of a relevant duty is committed, or if a Community infringement is likely to be committed, enforcers will seek an undertaking from the *person* in question before applying to court for an enforcement order.

19.10.12

The *FCA* may take steps to publish the undertakings it receives, and may apply to the court for an enforcement order if a person fails to comply with an undertaking that he has given.

The FCA's powers as a CPC enforcer

- 19.10.13** In addition to its powers as a designated enforcer under the Enterprise Act, the *FCA* also has powers, in its capacity as a "CPC enforcer" and, therefore, only in respect of Community infringements, to enter commercial premises with or without a warrant. The *FCA* must give at least two working days' notice of its intention to enter such premises without a warrant unless that is not reasonably practicable. If the *FCA* cannot give a notice in advance, it must produce the notice on the day the premises are entered.

Use of enforcement powers under Enterprise Act

- 19.10.14** The *FCA* anticipates that its powers under the *Act* will be adequate to address the majority of breaches which it would also be able to enforce under the Enterprise Act and that there will therefore be limited cases in which it would seek to use its powers as an Enterprise Act enforcer. Where the *FCA* does use its powers under the Enterprise Act, it will have regard to the enforcement guidelines which are published on the CMA's website.²³

²³ www.gov.uk/governmentorganisations

- 19.10.15** Further information about the *FCA's* powers under the CPC Regulations is provided at ■ paragraphs 19.13.1 to ■ 19.13.5 below.

Proceeds of Crime Act 2002 (POCA)

- 19.10.16** POCA provides the legislative framework for the confiscation from criminals of the proceeds of their crime. Under POCA, the *FCA* can apply to the Crown Court for a restraint order when it is investigating or prosecuting criminal cases. A restraint order prevents the person(s) named in the order from dealing with the assets it covers for the duration of the order.
- 19.10.17** The *FCA* may apply for such an order where a criminal investigation has been started or where proceedings have started but not concluded; in either case there must be reasonable cause to believe that the defendant has benefited from criminal conduct. In this context, a person benefits from criminal conduct if he obtains property or a pecuniary advantage as a result of or in connection with conduct that would be an offence if it took place in England or Wales, regardless of whether he also obtains it in some other connection. The court is required to exercise its powers with a view to securing that the value of realisable assets is not diminished.
- 19.10.18** Once an order is made, the applicant or anyone affected by the order can apply to the court for it to be varied or discharged. The court must discharge the order if the condition for granting it is no longer satisfied, that is, if the criminal investigation has not led to criminal proceedings being started within a reasonable time or the criminal proceedings have concluded.
- 19.10.19** A restraint order may apply to any realisable property held by the specified person whether or not described in the order, or to any such property transferred to him after the order is made. The order may contain exceptions for reasonable living and business expenses, but not for legal expenses relating to the offences from which he is suspected to have benefited for the order to be made.

19.10.20 The order can apply to assets wherever they are held, and anyone breaching the order would be guilty of contempt of court in this country. The *FCA* may request that the court make ancillary orders requiring the person to disclose his assets and/or to repatriate assets held overseas.

19.10.21 POCA also contains various powers of investigation which the *FCA* may use in specified circumstances. However, where these powers overlap with powers under the *Act*, the *FCA* will in most cases consider it more appropriate to rely on its investigation powers under the *Act*.

**Credit Institutions (reorganisation and Winding Up)
Regulations 2004**
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