The FSA and Requests for Assistance from Overseas Regulators

2012-02-13

Scope of this note

This note deals with the extent to which the UK's Financial Services Authority ("the FSA") can require the disclosure of information and documents pursuant to a request for assistance from an overseas regulator. In particular, it advises on the potential for narrowing the scope of such a request through negotiation or other means.

In this note, we have set out the relevant bilateral agreements between UK and US regulators and the FSA's statutory powers to require information at the request of an overseas regulator. In light of a recent Court of Appeal ruling which is directly relevant to this issue, we have concluded that the scope for challenging any such requests by the FSA on behalf of overseas regulators is likely to be very limited. In so far as they are relevant, we have also touched briefly upon issues of legal privilege and data protection.

Agreements in relation to cooperation and information-sharing between regulators

There are a number of memoranda of understanding ("MoU") in existence between UK and US regulators concerning cooperation and information-sharing in relation to both their enforcement and supervisory functions. Whilst these agreements do not create any legally binding obligations, confer any rights or supersede domestic laws, to the extent that they constitute statements of intent they may be of use when entering into negotiations with the FSA as to the scope of a particular request (although see the case of *FSA v Amro International* SA below).

The most relevant agreements are as follows:

1. A MoU between the FSA and the Securities and Exchange Commission/Commodity Futures Trading Commission, primarily covering information-sharing in the context of enforcement investigations.[1] It envisages that each authority will provide the fullest possible measure of mutual assistance to the other, subject to domestic law, and that such assistance may include obtaining specified information or documents. It also sets out the

requirements that any request for assistance must satisfy.

2. A MoU between the FSA and the SEC/CFTC covering cooperation and information-sharing in the context of regulatory oversight.[2]It provides that the SEC and the CFTC may request the FSA to obtain and provide it with information in the possession of a "Relevant Firm" in the UK.
3. A multilateral MoU, to which the SEC and the FSA are signatories, covering mutual assistance and information-sharing for the purpose of enforcing and securing compliance.[3] It envisages that assistance will extend to the obtaining of information and documents and the taking or compelling of statements. It also sets out the requirements that any request for assistance must satisfy.
4. A MoU between the FSA and the SEC relating to the regulators' supervisory rather than enforcement functions, which envisages the exchange of information already in the hands of the FSA.[4] A MoU in similar terms exists between the FSA and the CFTC.[5]

Each of the MoUs covered above contains a section dealing with confidentiality and the uses to which the information obtained can be put. Broadly speaking, the regulators must keep the information confidential to the extent permitted by law, and must only use it for the purpose of fulfilling their regulatory functions.

The Financial Services and Markets Act 2000 ("FSMA")

The relevant sections of FSMA have been in force since September 2001.

Section 354 imposes a duty on the FSA to take such steps as it considers appropriate to cooperate with overseas regulators, such as the SEC, which have similar functions to the FSA.

Under section 165, the FSA may, by notice in writing, require an authorised person[6] to provide specified information (or information of a specified description) or produce specified documents (or documents of a specified description). The information or documents must be reasonably required in connection with the exercise by the FSA of its functions.

Section 169 of FSMA provides that the FSA may, at the request of an overseas regulator, exercise its powers under section 165 or appoint investigators to investigate any matter. Investigators appointed under section 169 have extremely broad powers to require the disclosure of information and documents, and not only in relation to authorised persons. Those specific powers in the context of investigations are beyond the scope of this note, but further advice can be provided if required.

Section 169(4) lists a number of factors that the FSA may take into account when deciding whether or not to exercise these powers at the request of an overseas regulator.

***FSA v Amro International* [2010]**

This recent Court of Appeal judgment suggests that the scope for challenging the FSA's exercise of

its powers pursuant to requests by overseas regulators is extremely limited. Although the case concerned the FSA's appointment of investigators at the SEC's request under section 169(1)(b) of FSMA, the principles emerging from the decision would also apply to the FSA's power under section 169(1)(a) to require an authorised person to provide information and documents at the request of an overseas regulator.

Facts

In 2009 the SEC sought assistance from the FSA, pursuant to the 1991 and IOSCO MoUs set out above, in obtaining documents from a London-based accountancy firm. In a broadly drafted request, the SEC sought to obtain all documents relating to specified parties between 2000 and 2009, in order "to assist the SEC with its ongoing civil action."

Pursuant to the SEC's request, the FSA exercised its discretion to appoint investigators under section 169 of FSMA. In August 2009 the FSA sent a formal notice to the accountancy firm requiring the production of the documents sought by the SEC.

The respondents challenged the FSA's appointment of investigators as unlawful on the basis that the SEC had failed to comply with the relevant memoranda of understanding. They also claimed that the SEC's request for documents (and therefore the FSA's notice) was too vague and wide to satisfy the statutory requirement to request "documents of a specified description."

Court of Appeal ruling[7]

Reversing the previous decision of the High Court,[8] a unanimous Court of Appeal held that:

- Whilst the FSA was not bound to comply with the SEC's request, there was nothing in the statute that required the FSA to second-guess a foreign regulator as to its own laws and procedures, or as to the genuineness or validity of its requirement for information or documents.
- The FSA was not required to satisfy itself of the correctness of what it was being asked to investigate or the basis on which the investigation was asked for.
- The requirements to be met by the FSA when deciding whether to act in support of an overseas regulator were those contained in the statute and not elsewhere. It followed that it was immaterial whether the SEC's request complied with either of the MoUs.
- In relation to the scope of the request, it was not for the English courts to assess whether the SEC's assertions as to the relevance of the documents it sought were well-founded as a matter of New York law. The High Court judge had incorrectly approached the case as if the FSA had sought disclosure of documents in domestic litigation. The FSA had been exercising an investigatory power rather than a power of discovery and this was not limited to requiring documents relating to the allegations then pleaded in the New York proceedings.
- The investigators did not seek specified documents but the request was for documents of

a specified description. Investigations would be unnecessarily and inappropriately hindered if investigators were restricted to obtaining specified documents, which is no doubt why Parliament conferred power to obtain specified classes of documents. What was important was that the person on whom the requirement was made could identify the documents he had to produce.

Legal professional privilege (LPP)

Disclosure to the FSA or any other regulator can be withheld on grounds of LPP. Where a party wishes voluntarily to disclose privileged documents to a regulator, there are steps that can be taken to reduce the risk of such a disclosure being interpreted as a general waiver of privilege.

Data protection

In broad terms the Data Protection Act 1998 ("the DPA") imposes legal obligations on the holders of personal data and sets out the conditions under which personal data may be shared. However, where the FSA exercises its statutory powers to require the provision of information or documentation, there is no scope for challenging such a request on the basis of data protection obligations. This is because, under section 35 of the DPA, personal data are exempt from the non-disclosure provisions where the disclosure is "required by or under any enactment, by any rule of law or by the order of a court."

The scope for resisting a notice

The overriding interest in maintaining a good relationship with the FSA means that negotiated cooperation will almost always be preferable to actual or threatened legal challenge. This approach is reinforced by the very limited scope for challenge permitted by the Amro decision. Whilst the requirements contained in the MoUs may be of some assistance in negotiations in so far as they can be said to represent the parties' intentions, they are unlikely to hold any weight with the courts and their value is therefore limited.

Although the terms of a notice will reflect the underlying investigation, the following are examples of issues that can arise and in respect of which discussions as to scope, relevance and proportionality may be appropriate:

- the volume of material to be reviewed and any search terms that are to be applied;
- the number and identity of the email custodians included in any review;
- the breadth of the description of documentary material to be disclosed (for example, "all material relating to dealings with X");
- the adequacy of such description (for example, "documents relating to X and Y deals");
- the length of time periods applied to the request;
- the identification of any telephone transcripts, given the inevitable difficulty in tracing particular calls (for example, "all calls between A and B"); and

- private material included in and not separable from requested material (for example, diaries or notebooks).

An attempt to negotiate in respect of such issues is most likely to succeed when done in a general spirit of cooperation. The FSA is more likely to respond positively to a debate designed to achieve the provision of material that will appropriately meet the reasonable needs of the requesting authority, than one that obstructs the process and effectively challenges the FSA's right to seek the material. Such discussions should always be conducted with care given the FSA's power to appoint investigators, a more intrusive and threatening process than the service of a notice requiring the provision of specified material. An overly aggressive approach can have the effect of increasing, not reducing, the threat.

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[1] Memorandum of Understanding on Mutual Assistance and the Exchange of Information between the United States Securities and Exchange Commission and Commodity Futures Trading Commission and the United Kingdom Department of Trade and Industry and Securities and Investments Board [responsibility transferred to the FSA] (September 1991)

[2] Memorandum of Understanding between the United States Securities and Exchange Commission and Commodity Futures Trading Commission and the Bank of England [responsibility transferred to the FSA] (October 1997)

[3] IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (May 2002)

[4] Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to Market Oversight and the Supervision of Financial Services Firms between the United States Securities and Exchange Commission and the United Kingdom Financial Services Authority (March 2006)

[5] Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to Market Oversight (November 2006)

[6] A person, including a body corporate, authorised by the FSA to carry out activities in relation to investments that are regulated under FSMA

[7] *Financial Services Authority v Amro International SA* [2010] EWCA Civ 123

[8] R (on the application of Amro International SA) v Financial Services Authority [2009] EWCH 2242 (Admin)

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