

# Overseas Banks Legal and Compliance (OBLC) Forum

Welcome

**6 April 2017**



## Responding to Information/Document Production requests from criminal enforcement agencies and regulators

**6 April 2017**

Emma Gordon

*Corporate Crime & Investigations Group*



## The next 20 minutes...

Responding to Information/Document Production requests from criminal enforcement agencies and regulators:

- The scope of enforcement agencies' and regulators' powers and typical forms of request;
- Pitfalls to be aware of;
- Practical tips on responding.

# The scope of enforcement agencies' and regulators' powers and typical forms of request

- Law enforcement agencies and regulators are able to require banks/financial institutions to provide documents where an innocent bystander or where the subject of inquiry
- Main types of enforcement agencies/regulators in UK – SFO (s. 2 CJA), FCA (s.165 and s. 173 FSMA), NCA (s.7 CCA)
- Types of information requested
- Triggers for requests
- Failure to comply (or to comply entirely) can have serious repercussions

## Pitfalls to be aware of

- Document request overly broad and onerous in terms of time and cost of compliance
- Production could amount to:
  - Breach of domestic and/or possibly foreign laws including banking secrecy laws, data protection and client confidentiality
- Not understanding what is required
- Partially complying only or not complying within time
- Not understanding extent of any culpability of bank/financial institution

## Practical tips on responding

- Is there any actual obligation?
- Scope down, reasonable and proportionate
- Staged disclosure, agreeing deadlines
- How disclose documents
- Consideration to bringing documents from overseas into the jurisdiction
- What is the context?
- What steps to take as a result?

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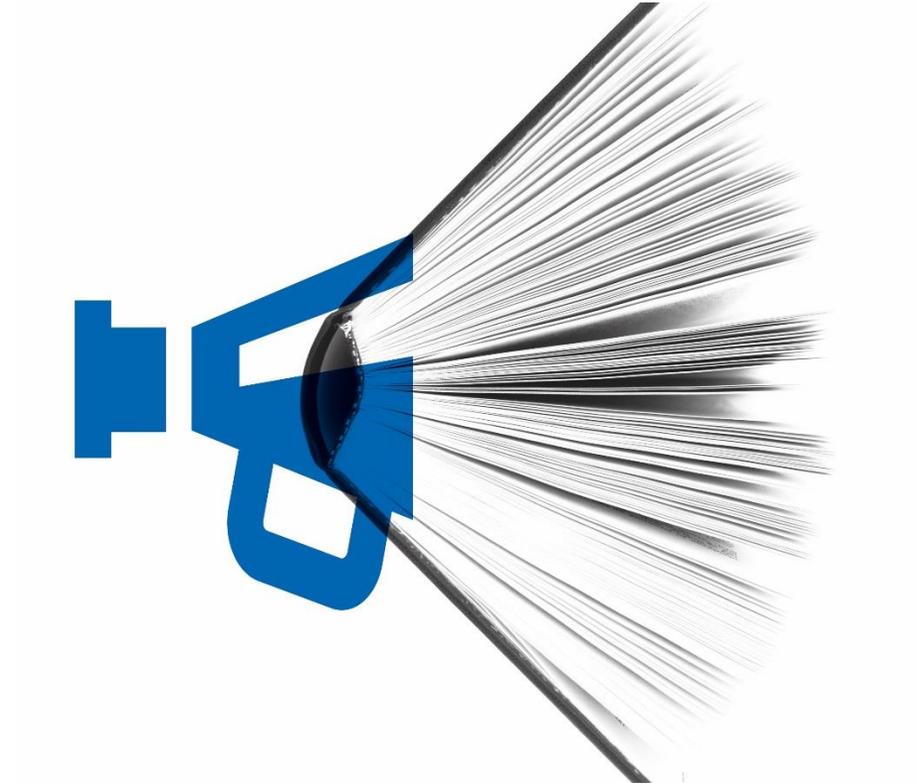
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## Recent changes to the FCA enforcement process

**6 April 2017**

Adam Berry

*Senior Associate*



## **FCA and PRA joint policy statement (FCA PS17/1 / PRA PS2/17)**

- On 1 February 2017, FCA and PRA published joint policy statement on implementation of HM Treasury's review of enforcement decision making at financial services regulators and Andrew Green QC's report into FSA's enforcement actions following failure of HBOS plc (FCA PS17/1 / PRA PS2/17).
- Joint policy statement sets out:
  - FCA and PRA feedback to comments received on their joint consultation on FCA and PRA's proposals to implement enforcement decision making review and Green Report (FCA CP16/10 / PRA CP14/16).
  - Amendments that will be made to FCA and PRA's enforcement policies and processes. A Handbook instrument, containing final rules amending FCA Handbook and materials outside FCA Handbook, is included in Appendix 1 to joint policy statement.
  - Next steps to be taken by FCA and PRA in relation to enforcement.

## Focused resolution agreements (1)

- A number of key changes to procedures of FCA's RDC are being made to introduce a process for partly contested cases.
- Previously, a firm or individual who was unable to settle an enforcement case by agreement with the FCA (e.g. because they disagreed with the penalty or scope of FCA's findings), in practice had to continue to defend the case in its entirety through RDC process.
- A new focused resolution agreement ("FRA") procedure was introduced from 1 March 2017 which allows the subjects of investigations to agree a partial settlement with the FCA whilst still contesting certain aspects before the RDC (or the Tribunal, if subject opts for expedited route).

## Focused resolution agreements (2)

- The FRA will be available in broadly three circumstances:
  1. Where the dispute is over penalty only (that is, where subject of investigation agrees all relevant facts but wishes to contest FCA's proposed penalty in front of RDC). In this case, the 30% early settlement discount will still apply.
  2. Where the dispute is over the existence of a breach (that is, where the subject of the investigation agrees all facts relevant to proposed enforcement action, but wishes to make submissions and contest whether breaches alleged by FCA arise from those facts). In these cases, a settlement discount of between 15-30% will apply.
  3. Where the dispute is narrowed to particular issues (that is, where the subject agrees one or more issues relevant to proposed enforcement action, but not all, and wishes to contest a narrowed down list of facts). A settlement discount in a range of between 0-30% will be available in this case.

## Changes to FCA settlement procedures

- The FCA will now aim to give subjects 28 days' notice of the start of stage 1 settlement negotiations.
- Enforcement teams will hold a preliminary “without prejudice” meeting to explain the FCA’s view of the misconduct, including the key legal and factual bases for its view.

## Faster access to Upper Tribunal

- The Treasury Review recommended that regulators put in place a “*clearly signposted, expedited procedure*” allowing subject to proceed directly to the Upper Tribunal, without making representations to the RDC, should they wish to contest the case within a tribunal environment.
- The FCA’s response to this was to point out that, to some degree, this possibility already exists, because subject can already elect not to make representations to the RDC and any decision notice may still be referred to the Upper Tribunal.
- However, the FCA has amended its procedures from 1 March 2017 to provide a right to subject of enforcement action to bypass the RDC, either before or after warning notice has been given, and make expedited reference to the Upper Tribunal.

## Referrals to Enforcement

- Joint policy statement includes some further details about internal process that FCA will follow when deciding whether it should open an enforcement investigation.
- FCA also confirms that it has two teams dedicated to liaising between Enforcement and other areas of FCA which make referrals.
- No further substantive changes are being made to referral criteria which will remain broadly drafted allowing FCA maximum discretion.
- The FCA does cross-refer to its separate consultation on its future mission and states its intention to consider separately in light of responses to that whether existing enforcement referral criteria need further amendment.

## Co-operation between FCA and PRA in enforcement matters

- The Treasury Review recommended a series of measures to improve co-operation between the FCA and PRA in joint investigations, such as:
  - regular update meetings between representatives from the enforcement and supervisory teams of both regulators;
  - providing more guidance about the conduct of joint investigations;
  - information requests being clear as to which investigation they relate; and
  - on how they will approach decision-making in contested cases following joint investigations.
- These recommendations have generally been accepted and many have already been implemented.

## Transparency in enforcement investigations

- A number of incremental changes have been introduced from 31 January 2017 with the aim of making enforcement investigations more transparent to those under investigation:
  - The FCA will provide more information at the start of an investigation by explaining and setting out the criteria applied in coming to the decision to refer and giving a summary of the circumstances and the reason for referral at start of investigation.
  - Scoping meetings, which are held at start of an investigation, will include an indication of likely timing of key milestones and next steps in an investigation. In practice, this will mean that scoping meetings are likely to take place later than they have done in past.
  - Periodic ongoing updates will be given to subjects of investigations, on at least a quarterly basis, covering existing and likely future steps in investigation.
  - Strengthened provisions recognise that Supervision will have a role in informing investigation team about firm's business, business model and market practice issues, and that it may be appropriate for supervisor to attend investigation progress meeting.

## A new era?

- Regulators have had to take a long hard look at their enforcement processes and have made some important changes to their processes.
- Remains to be seen how these will play out in practice as the regulators retain a great deal of discretion.
- However, signs are encouraging from the working practices and cultural changes we have seen.
- Hopeful that the introduction of FRAs will rebalance the current settlement process which is weighted heavily towards the investigation team, so that it delivers a fair outcome to firms.

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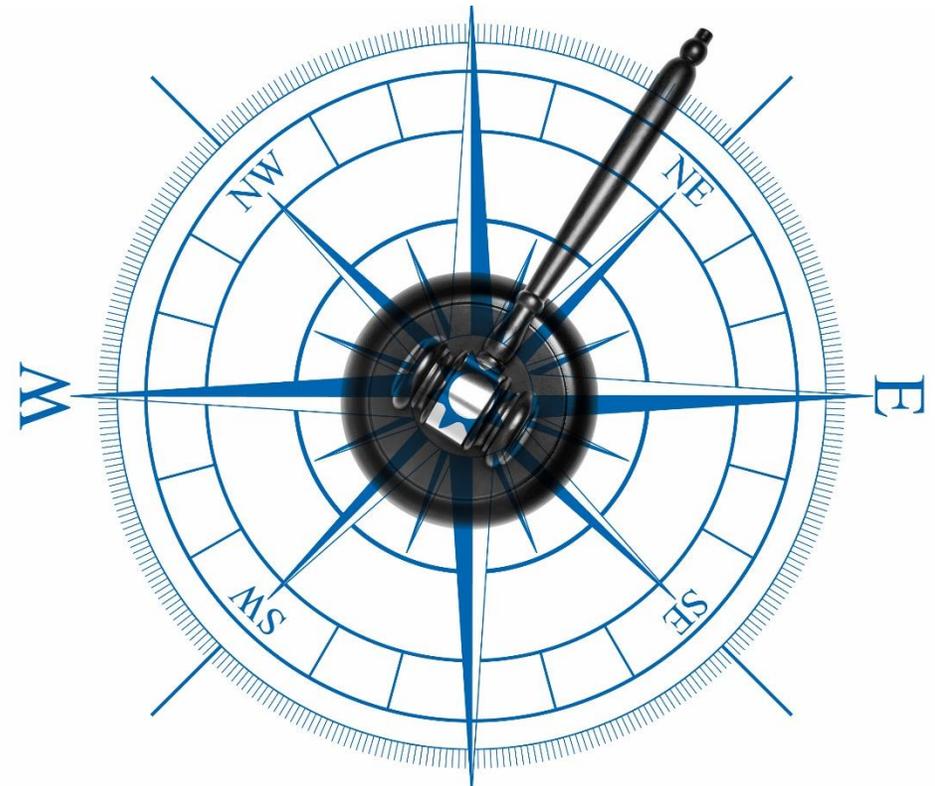
## **Asymmetric Jurisdiction Clauses**

*Commerzbank AG v Liquimar Tankers Management Inc and others*  
*[2017] WLR(D) 78*

**6 April 2017**

Mark Cooper, Principal Associate

*Financial Services Disputes and Investigations*



# Asymmetric Jurisdiction Clauses

*Commerzbank AG v Liquimar Tankers Management Inc and others [2017] WLR(D) 78*

- Jurisdiction before the English courts
- What is an asymmetric jurisdiction clause?
- Why is the Commerzbank case important?
- Recast Brussels Regulation v 2001 Brussels Regulation

# Asymmetric Jurisdiction Clauses

*Commerzbank AG v Liquimar Tankers Management Inc and others [2017] WLR(D) 78*

- Facts of the case
- Liquimar's three grounds of objection
- The Court's decision
- What does it mean?

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