

Upper Tribunal addresses the question of the effect of a Decision Notice rejecting an application for full authorisation under Part 4A of the Financial Services Markets Act 2000 where interim permission is held

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Background

Prior to April 2014, the Applicant, a debt management firm, was authorised and regulated by the Office of Fair Trading ("OFT") and thus on the transfer of regulatory responsibility to the FCA, the firm obtained interim permission to continue to operate until the FCA directed that it required a full application for permission under Part 4A of the Financial Services Markets Act 2000 ("the Act").

Subsequently, the Applicant received a warning notice pursuant to S.387 of the Act advising that the FCA proposed to refuse the application for permission under Part 4A, and this provided the Applicant with an opportunity to make representations to the Regulatory Decisions Committee ("the RDC"). However, notwithstanding those representations, the RDC decided to issue the Decision Notice.

Both in the case of a decision to cancel a Part 4A permission and a decision to refuse an application for such permission, the subject of the notice has the right to refer the matter to a the Upper Tribunal within 28 days. If the matter is not referred to the Tribunal, the FCA must provide the firm with a final notice, and if the matter is referred to the Tribunal then the Tribunal determines the appropriate action to take.

On 16 December 2015, the FCA issued a Decision Notice ("the Decision") to the Applicant, refusing its application for permission under Part 4A of the Act to carry on the regulated activities of debt adjusting and debt counselling, without which, the Applicant is unable to trade.

The Applicant, referred the Decision to the Upper Tribunal claiming that contrary to the view of the FCA, the Decision did not have the effect of terminating the interim permission held by the Applicant as a consequence of the operation of article 56 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013 ("the Order").

If the Applicant was correct in its assertion about the effect of the Decision, then it follows that the Applicant may continue to conduct business until the reference to the Tribunal is determined. However, if the FCA's interpretation was correct, the Applicant's business would have to cease. The only route by which the firm could continue to carry on business would be if the Tribunal directed the suspension of the effect of the Decision pending determination of the reference pursuant to Rule 5 (5) of the Tribunal procedure (Upper Tribunal) Rules 2008. The Applicant made such an application for that protection in the event its application regarding the interpretation of the Order was unsuccessful, and the FCA issued such a direction on the basis that the Applicant agreed to voluntarily vary its permission so as to carry on no regulated activity whilst the direction remained in force.

Issue

The issue to be determined by the Tribunal was whether a decision notice given by the FCA refusing an application for Part 4A permission to a firm holding interim permission by virtue of article 56 of the Order, had the effect of terminating the provision or whether, where the matter to which the notice relates is referred to the Tribunal, it does not have that effect, and the reference is determined which, if dismissed, results in a final notice being issued.

Decision

The Upper Tribunal decided as a matter of law, that the firm loses its interim permission at the point at which Part 4A permission is refused and a Decision Notice is issued.

In consequence, if the firm's interim permission ceases immediately upon the firm having been given a Decision Notice, any firm seeking to extend interim permission must apply to the Tribunal for an Order suspending the effect of the Decision Notice. In reaching its Decision, the Tribunal recommended that where the FCA proposes to refuse an application for Part 4A

permission made by a firm which has interim permission, the warning notice and any decision notice should make reference to the Rule 5(5) process so that the firm can take steps to preserve the effect of the interim permission, pending any application to the Tribunal under Rule 5 (5).

Comment

This appears to be the first case in which the question has arisen on whether or not such interim permission ceases automatically upon the FCA giving a Decision Notice rejecting the application, or whether it remains in effect pending any reference from the rejection to the Upper Tribunal and will be of considerable significance for those firms carrying on consumer credit activities, which were authorised and regulated by the OFT before April 2014.

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