Financial services regulation
Changing the guard

Summary

This briefing provides an overview of the regulatory structure and the objectives, powers and approach of the regulators of the UK financial services sector from 1 April 2013.

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1 April 2013 marked day one of the restructured regulatory regime for the UK financial services sector into a ‘twin peaks’ model separating prudential and conduct regulation. This is accompanied by a new regulatory competition objective, supervisory approach, intervention powers, and scope of disciplinary powers.

The need for change

Since the Financial Services and Markets Act 2000 came into force in 2001, the Financial Services Authority (FSA) had been responsible for both prudential and conduct regulation for all types of financial firm. It was also responsible for the market abuse regime and, as the UK Listing Authority, for the rules relating to public listing of securities.

The Bank of England (the Bank) and the Treasury were the other two elements in the so-called tripartite system. The Bank was responsible for payment systems and, more widely, for the financial stability of the UK financial system, the latter role having finally been formalised in statute in the Banking Act 2009. The Treasury was responsible for the overall regulatory framework, legislation, and decisions on committing public funds in a crisis.

In the wake of the financial crisis of 2007–9, the incoming coalition government took the view that the tripartite system had failed. In particular, the FSA’s responsibility was thought to be too wide, ranging from prudential regulation of the largest banks to conduct regulation of the smallest investment adviser. In addition, the Bank had responsibility for financial stability but no tools to carry out that role. Crucially, there was a ‘regulatory underlap’ between the roles of the FSA and the Bank to turn concerns about the stability of the system as a whole into concrete action.

And finally, it was not clear who was in charge in a crisis. These are the problems that the new regulatory system is intended to address.

In the last few months there has been a flurry of consultation papers and draft statements of policy to indicate how the new regulators will exercise their powers.

The new regime is created by the Financial Services Act 2012, which amends the Financial Services and Markets Act 2000 (FSMA), the Bank of England Act 1998 and other relevant legislation. FSMA as amended therefore remains the primary legislation governing financial services in the UK.

This briefing highlights key changes in powers and regulatory ethos and their implications, rather than attempting a detailed analysis of the legislation.

New structure

The main changes are the separation of prudential responsibility from conduct regulation, and the giving of new powers to the Bank of England in respect of ‘macro-prudential supervision’ (that is, supervision of the stability of the financial system as a whole).

The three new bodies that are responsible for the various elements of the new regime are as follows (see box ‘New UK regulatory structure’):

Prudential Regulation Authority

The Prudential Regulation Authority (PRA) is established as a subsidiary of the bank. It is responsible for prudential regulation of all deposit-takers, including banks, building societies and credit unions, as well as insurers and a small number of major investment firms that could present significant risks to financial stability.

The PRA’s objective is to promote the safety and soundness of dual-regulated firms. In particular, it seeks to ensure that the business of these firms does not have an adverse effect on UK financial stability, and to minimise the adverse effect that the failure of a firm is expected to have on financial stability. However, it is explicitly not the PRA’s role to ensure that no firm fails.

As regards insurers, the PRA has the additional objective of contributing to the securing of an appropriate degree of protection for those who are or may become policyholders.

Financial Conduct Authority

The Financial Conduct Authority (FCA) is responsible for conduct of business regulation of all authorised firms, plus prudential regulation for all non-PRA-authorised firms. It has assumed the functions of the Financial Services Authority (FSA) as the UK Listing Authority (UKLA), and responsibility for the market abuse regime.
The government proposes to transfer responsibility for consumer credit regulation (one of the few exclusions from the FSA’s remit) from the Office of Fair Trading (OFT) to the FCA in April 2014.

The FCA’s strategic objective is to ensure that relevant markets work well. It also has three operational objectives: securing an appropriate degree of protection for consumers (defined extremely widely), protecting and enhancing the integrity of the UK financial system, and promoting effective competition in the interests of consumers (see ‘Approach to competition’ below).

Financial Policy Committee
The third new body is the Financial Policy Committee (FPC) of the bank, tasked with macro-prudential regulation. Its objective is to contribute to UK financial stability, and subject to that, to support the government’s economic policy. The FPC will do that primarily by identifying, monitoring and taking action to reduce systemic risks.

The FPC has important powers, which were not previously available to the Bank, to give the following:

- Directions. These may be given only to the PRA or the FCA (which must comply with them), and only to ensure implementation of a specific macro-prudential measure in relation to a class of regulated persons. These measures are expected to be limited (at least initially) to changes to the counter-cyclical capital buffer, changes to the leverage ratio, and sectoral capital requirements for particular asset classes (for example, real property); and

- Recommendations. These may be made to anyone, including the PRA, FCA, the bank and the Treasury. Compliance with a recommendation is not mandatory, but if the recommendation is made to the FCA or PRA, the FPC may require them to give reasons for any non-compliance.

Approach to competition
The FCA’s objective to promote effective competition in the interests of consumers is a significant enhancement of the status of competition in the previous regulatory regime, where competition was merely a factor to which the FSA should ‘have regard’ (section 2(3)(f)-(g), FSMA before amendment) (for background, see feature article ‘Financial regulation reform: the role of competition’, www.practicallaw.com/0-511-1842).

More scrutiny
The FCA will not have the same role as the OFT (to be incorporated within the Competition and Markets Authority from 2014) in bringing enforcement action, for example, for cartel activity or abuse of a dominant position. Instead, the FCA’s focus will be on assessing whether financial services markets are operating well, rather like the OFT’s role in a market study, or the Competition Commission’s (CC) role in a market investigation.

This does not mean that the OFT or CC will lose its powers to review the operation of financial services markets; on the contrary, their powers will be retained, meaning that financial services businesses face competition scrutiny both from the mainstream competition regulators and from the FCA.

The FCA’s processes for conducting reviews of competition issues are (at present) rather less well defined than the now well understood market study and market investigation processes run by the OFT and CC. Businesses and practitioners face a period of uncertainty while it becomes clearer how the FCA will operate these processes.

The FCA’s extensive enforcement powers will be available in pursuit of its competition objective (see ‘FCA enforcement’ below). Some of these powers go significantly beyond those that are available to the competition authorities; for example, neither the OFT nor the CC possess powers comparable to the FCA’s powers to put in place temporary intervention rules (see ‘Product intervention’ below).
Similarly, it is only after a full (commonly two-year) investigation by the CC that firms can be mandated to take a particular course of action, and the OFT has no such power in the context of its shorter reviews. By contrast, there is no similar inhibition on the FCA using its mandatory rule-making powers even after a much shorter review.

Pursuing the objective

There are some initial indications of the circumstances in which the FCA is most likely to act in pursuit of its competition objective. General statements of policy from the FSA and the senior FCA team make clear that they intend competition to be central to their activities.

The FSA’s consultation paper Journey to the FCA, which set out the proposed approach of the FCA, explained that ‘Interventions in relation to competition are likely to be market-wide, covering suppliers of competing/substitute products. Our actions will be bold and wide-reaching, involving packages of measures that take account of the full range of problems in a market.’ (www.fsa.gov.uk/pubs/other/journey-to-thefca-standard.pdf).

In addition, an Annex to the FSA’s consultation (CP12/35) on the FCA’s temporary product intervention power sets out details of the range of ‘drivers’ of ‘market failure’; that is, circumstances or features of markets that might contribute to a conclusion that the market was not working well (www.fsa.gov.uk/static/pubs/cp/cp12-35.pdf) (see also ‘Product intervention’ below). The list includes:

- Information asymmetries: for example, circumstances in which the provider is better informed about the product or service than the buyer and is able to exploit this to the buyer’s disadvantage;

- Behavioural biases: behaviour that suggests that consumers are not being wholly rational about their choices of financial services products (for example, underestimating risk, overconfidence about their ability to meet certain conditions, or simple inertia in making choices). This sort of ‘behavioural economics’ thinking has been very prominent in competition policy for some time, and has been particularly significant in the context of reviews of customer behaviour in a personal current account context. We can now expect similar thinking to be deployed across the financial services horizon;

- Market power: for example, where the market structure allows consumers to be exploited or competition to be muted. The FSA cites the example that a firm with market power may be able to persuade or compel customers to take products that they do not really require; and
Conflicts of interest: the FSA expresses concerns that market mechanisms may not be able to correct problems that arise due to a fundamental difference of incentives or conflict of interest. Such a conflict of interest was alleged to exist in the context of advisors remunerated via commission arrangements, leading to the retail distribution review and the shift to a direct remuneration regime.

These areas are described in very general terms by the FSA in CP12/35. Further guidance can be drawn, of course, from the enforcement practice of competition authorities in a financial services context (particularly given that the sector has been, and continues to be, a focus for action by the competition authorities), but only time will tell to what extent the FCA seeks to take a different (and more interventionist) approach to competition in this sector.

Supervisory approach

The broad themes for supervision by the FCA and PRA are as follows:

FCA supervision

The key to the FCA’s supervisory approach can be found in its analysis of past regulatory failures. According to Martin Wheatley, FCA Chief Executive Designate, ‘The regulatory model… failed… in the UK [and] globally. The standard orthodoxy… was that people make rational decisions when given sufficient information; that markets are self-correcting organisms; and… that if you oversee the distribution channels… the right products get to the right people. All three orthodoxies failed.’ (January 2012, www.fsa.gov.uk/portal/site/fsa/menuitem.10673aa85f04624c78853e132e1101ca?vgnextoid=6ee060f62b415310VgnVCM10000044bc10acRCRD&vgnextfmt=default).

This sort of thinking represents a further development of a regulatory philosophy that has already been in evidence in the ‘treating customers fairly’ initiative. The FCA aims to engage with the basic root causes of bad consumer outcomes. For example, the FCA expects to be asking probing questions about a firm’s business model and its future business plans. It will also focus strongly on a firm’s senior management, culture and governance to ensure that these things are based on a foundation of fair treatment of customers. It aims to identify and tackle problems early and to involve senior staff at an earlier stage where appropriate.

To pursue these objectives, more resources will be devoted to thematic work, so fewer supervisors will be allocated to specific firms. But where potential issues are identified there will be more in-depth, structured work with the firms concerned. A belief in the interconnectedness of retail and wholesale markets will see the FCA showing greater interest in wholesale market conduct than has been the case in the past.

Thematic work and monitoring firms

Like the Financial Services Authority, the Financial Conduct Authority will take two main approaches to supervise regulated firms:

- Thematic work involves analysing (and assessing risk in) a particular product, market or practice to see if there are wide-scale issues that need to be acted on; and
- Monitoring involves checking (and assessing risk in) individual firms to see if they are complying with regulatory requirements and taking action as necessary.

PRA supervision

For PRA and prudential supervision, the main change in approach is a new emphasis on the exercise of supervisory judgment. In particular, the PRA will be more willing to make forward-looking judgments based on its assessment of future risks, and not merely on whether a firm complies with prudential rules today.

This suggests that the PRA will place greater reliance on the Principles for Businesses and the Threshold Conditions, and not merely require compliance with (for example) specific capital or liquidity rules. (The Principles will form part of the handbooks of both regulators (see below), and the Threshold Conditions will continue to be set out in Schedule 6 to FSMA.)
More concrete changes include the introduction of a new risk analysis framework to replace the ‘ARROW’ system, and a new ‘proactive intervention framework’ which is intended to ensure that the PRA responds to emerging risks at an early stage.

The handbooks
The FSA Handbook of rules and guidance has been divided up between the PRA and the FCA according to their respective responsibilities. Accordingly, each of the PRA and the FCA has its own handbook setting out the rules for which it is responsible.

For administrative convenience, a complete set of the old FSA rules is also available, marked to show which rules are now applied by each regulator. As regards the substance of the rules, the general approach has been to make only those changes necessary to reflect the new regulatory structure, although other changes have been made in a few areas.

Intervention powers
With the greater focus on pre-emptive action, both the PRA and FCA may make use of their powers of intervention. Important examples of these are the powers of the FCA to make temporary product intervention rules and take action to withdraw or amend financial promotions, and the power of both the PRA and FCA to make directions against certain parent undertakings, obtain information and sanction any failure to comply.

Product intervention
The FSA had the power to make rules about the sale of financial products following a consultation process; the FCA also has the power to make temporary product intervention rules for a period of up to 12 months without the need for consultation, so that any rules can take immediate effect (section 137D, FSMA).

The rule-making powers are potentially wide ranging; the most draconian are a complete ban on the sale of a product and imposing price restrictions, but there are also a range of other options, such as requiring firms to include or exclude a particular feature or contract term when selling a category of products.

The FCA can use these powers if it finds it necessary or expedient to make rules in pursuit of its competition objective, consumer protection objective, or, only if the Treasury makes an order to permit it, its market integrity objective.

CP12/35 sets out the following examples of when product intervention rules may be used.

- The FCA views a product as acceptable but particular features need to be included or excluded.
- There is a risk that firms may target consumers inappropriately or indiscriminately, or detriment is likely to occur if they are inappropriately targeted (for example, in the case of complex or niche products).
- Firms are restricting their product range or access to products to increase profitability by restricting consumer choice, reducing competition or restricting the ability to switch products.
- The FCA views the product as inherently flawed; that is, a product has such disadvantageous features that most investors will not benefit.

The FCA will not always use its rulemaking powers though; it may choose to issue warnings or use its supervisory powers instead (see ‘FCA supervision’ above).

Product intervention powers are more likely to be used if the number of consumers is large, the potential detriment for each consumer is high or affects a class of vulnerable consumers disproportionately, and the benefit of such rules outweighs any potential detriment for existing consumers holding the products.
So when will the FCA seek to use temporary rather than permanent rules? There is very little guidance on this point. CP12/35 indicates that the temporary rules would be used in ‘urgent’ cases when significant detriment would be caused to consumers from the delay for the consultation process or when ‘urgent and significant’ problems are faced by consumers that will not be resolved by market forces.

The FCA may include in its temporary rules a provision that makes unenforceable any contracts in breach of those temporary product intervention rules, but this will not affect contracts entered into before the temporary rules come into effect. It is unclear whether or to what extent a firm would be required to make redress to existing customers if a temporary rule is subsequently lifted without an equivalent permanent rule taking its place.

Financial promotions
The FCA will use its power to withdraw or amend financial promotions that mislead customers or prevent them from making informed decisions (section 137S, FSMA). This is a supervisory rather than a disciplinary process.

The FCA will issue a first supervisory notice to a firm requiring the firm to withdraw or amend the financial promotion. The firm will have to comply with the directions and publish an explanation for the withdrawal or amendment to the promotional material. It will have the opportunity to make written and oral representations to challenge the content of the supervisory notice but the FCA will require changes to the financial promotion with immediate effect, so the firm will suffer any reputational damage before it can challenge the FCA’s decision.

If the FCA upholds its initial decision after the firm has made representations, the firm can refer the matter to the Upper Tribunal. The firm could be successful in challenging the initial decision but the promotional material will have been withdrawn or amended and an explanation published by this stage. If unsuccessful in a challenge, the FCA will publish a supervisory notice confirming its decision.

Directions to parent undertakings
In recognition that many UK financial institutions operate within a larger group and that the parent undertaking or holding company can exert an influence on its subsidiary, both the FCA and PRA have new powers over holding companies of UK regulated firms (Part XIA, FSMA). The PRA and FCA can make directions for the holding company to take or refrain from action, and make rules to require a holding company to provide information to them.

If the holding company fails to comply with a direction or information requirement, the relevant regulator can impose a public censure or financial penalty for breach. These disciplinary powers are subject to the usual procedural requirements starting with the requirement for a regulator to provide a warning notice, allowing the subjects the opportunity to make representations and the ability to refer the subsequent decision to the Upper Tribunal.

These provisions do not apply to all holding companies for authorised firms, and do not apply at all if the holding company is an authorised person itself. They are limited to holding companies incorporated in the UK or with a place of business in the UK.

The PRA and FCA may use these powers to pursue their regulatory objectives, although their use must be proportionate; that is, they should consider whether it is more appropriate to take action against the authorised firm itself rather than the parent company. Two examples of when a direction to a holding company may be used are to:

- require remedial action to bring the authorised firm subsidiary into compliance with its regulatory obligations; and
- take action to avoid a disorderly insolvency.
Application process

Firms that are FSA authorised do not need to re-apply to either the FCA or the PRA. Their authorisation has automatically been ‘grandfathered’ into the new regime. Investment firms that deal as principal may or may not be subject to PRA prudential regulation; those that are most likely to be PRA regulated have been notified of that fact.

New applications for authorisation need to be made to the relevant regulator. For firms that will be regulated by both the PRA and the FCA, the PRA will lead and manage a single administrative process, co-ordinating as necessary with the FCA. For these firms, the PRA will seek the FCA’s consent before granting a permission to carry on a regulated activity as each regulator must assess compliance with the particular threshold conditions for which it is responsible.

Approved persons

An approved person is a person who has been approved by either or both of the FCA or the PRA to perform certain functions for or on behalf of an authorised firm. Like the FSA, the PRA and the FCA will each have powers to specify significant influence functions (SIFs) and controlled functions (CFs) for approved persons (Regulatory reform: the PRA and FCA regimes for Approved Persons (CP12/26), www.fsa.gov.uk/ static/pubs/cp/cp12-26.pdf).

Regulation of the existing functions will be split between the PRA and the FCA (see table ‘Proposed split of controlled functions’).

Applying for approval

The Online Notifications and Applications system will be retained and existing forms will continue to be available, at least in the short term.

The FCA will have an ongoing duty to minimise the likelihood of duplication between the FCA and the PRA regarding the approval of SIFs. As a result, under the proposed rules, if approval needs to be sought for an individual to carry out both a PRA and an FCA function in a dual-regulated firm, application need only be made to the PRA.

However, where a person changes his role or takes on additional roles (including by moving from CF2 (PRA) to CF2 (FCA) or vice versa), he will have to apply to the PRA or FCA (as appropriate) for the relevant function.

The PRA must have the FCA’s consent before determining an application. Both regulators may ask for additional information when considering an application for a PRA controlled function. This will ‘stop the clock’ on the statutory time limit, but there will only be one ‘clock’ operating per application.

The general approach will be to conduct one joint interview to help both regulators assess suitability, but both regulators reserve the right to conduct separate interviews.

On approval by the PRA, the individual’s PRA controlled function will include any FCA role. In that case, only the PRA function will be shown on the public register.

Statements of principles

Each regulator will issue Statements of Principles for Approved Persons (APERs). SIFs at dual-regulated firms will need to comply with both sets of APER. Either regulator may discipline or withdraw approval from a SIF of a dual-regulated firm.

It is proposed that the APERs will be substantially the same as the current APER with the most significant change being that approved persons will need to meet the standards in APER for conduct outside their controlled function.

Future review

The PRA is expected to undertake a fundamental review of the regime for approved persons and the FCA will also consider in due course the need for longer term changes.
Controllers
The inevitable result of the ‘twin peaks’ structure is that the process of seeking approval to become a controller of a firm (broadly, a direct or indirect holder of 10 per cent or more of its capital or voting rights) is more complicated.

The good news is that the application forms remain the same and the changes to the relevant parts of the Supervision Manual are largely to accommodate the fact that some applications will have to be made to the PRA and some to the FCA. The bad news is that it is necessary to identify to which regulator the application should be made. Applications for firms prudentially regulated by the PRA need to be made to the PRA. Applications for all other firms need to be made to the FCA. There are extensive mutual consultation requirements for the regulators, but, as the timetable is set by statute, this should not lengthen the process much in practice.

The formal transitional provisions dealing with applications in process on 1 April 2013 treat information supplied to the FSA and steps taken by the FSA before 1 April in relation to a firm which is prudentially regulated by the PRA, as supplied to, and carried out by, the PRA, thus maintaining the statutory timetable.

Skilled person reports
Under section 166 of FSMA, the FSA had the power to require authorised persons to provide skilled persons reports so long as the report was reasonably required in connection with the FSA’s exercise of its functions under FSMA. Skilled person reports are likely to become increasingly important in future with increasing thematic work and consumer redress exercises.

Unlike the FSA, the PRA and FCA are able to contract with a skilled person directly rather than requiring a firm to do so. The firm will still bear the cost of the report and will have to reimburse the regulator. This change will give the regulator more direct control over the skilled person. However, as the FSA had to approve the appointment of a skilled person appointed by the firm and agree the terms of reference, this change is unlikely to be dramatic.

The scope of the power to require a skilled person report is extended to encompass recognised investment exchanges and connected persons. In addition, a skilled person can be commissioned to collect or update information (for example, to supply the regulator with updated information as a follow-up to thematic work or enforcement action to see whether remedial action has been taken by the firm in question).

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**Proposed split of controlled functions**

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<td>CF6 Small friendly society</td>
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Other information-gathering powers remain broadly the same, so the PRA and FCA can require a firm regulated by them to provide information and documents, and ask individuals to answer questions.

**Enforcement**

The key legislative changes that affect the enforcement process were published with the first version of the Financial Services Bill and have been discussed widely.

**General changes**

The following three changes apply both to PRA and FCA enforcement actions:

- **Earlier publicity of enforcement actions.** The relevant regulator will be able to publish information from a warning notice, publicising the fact that disciplinary proceedings have been commenced against a firm or individual. The relevant regulator will not publish this information if one of the statutory exceptions applies. These include when the publication would be ‘unfair’ to the subject, but this is likely to be interpreted as more than the usual reputational damage or embarrassment from enforcement action (section 391, FSMA).

  The FCA will use its new power to publicise the issue of a warning notice whenever possible, although it is likely that the PRA will take a more cautious approach if dealing with prudential matters that could undermine confidence in the safety or soundness of a UK financial institution.

- **Reduced period to respond to a warning notice.** The period for a subject to respond to a warning notice is reduced from ‘at least 28 days’ to at least 14 days (section 387(2), FSMA).

- **Dilution of independence requirement for decision making.** The requirement for the decision-maker in disciplinary actions to be independent of the staff gathering evidence is diluted so that, if there are at least two people making the decision, one of them needs to be independent of the evidence gathering process (section 395(2), FSMA).

**FCA enforcement**

In other respects, the FCA has adopted the FSA enforcement process. Other than changes to the Decisions Procedure and Penalties sourcebook and the FSA’s Enforcement Guide necessitated by the legislative changes, these materials are adopted wholesale by the FCA. The Regulatory Decisions Committee used by the FSA as a decision-maker with its existing process, and the FSA’s five-stage process for setting financial penalties linked to revenue of the relevant business unit or remuneration of an individual, all remain.

The bigger change is likely to be in the approach to enforcement and the interaction with the FCA’s other powers (for example, intervention powers) that may avoid the need for enforcement action in some cases. A change in focus may also result in enforcement action in different areas.

The FCA will continue with the FSA’s recent enforcement themes of senior management responsibility, consumer redress and financial crime. On the other hand, it will be more likely to take enforcement action in cases of misconduct in the wholesale markets, including where there are links between the wholesale and retail markets, or the relevant conduct may damage trust in the financial markets. The FCA will consider the relative sophistication of counterparties involved in wholesale transactions rather than automatically assuming that no intervention is needed.

It is possible that both the FCA and PRA will be interested in investigating the same incident if it covers both conduct and prudential or systems issues. This can be handled by one regulator investigating and keeping the other informed, conducting a joint investigation, or conducting separate investigations.

Separate simultaneous investigations are expected to be used rarely but, the recent FSA consultation paper on the FCA’s enforcement guide (CP13/6) recognised the consequences for a firm facing separate
investigations (www.fsa.gov.uk/static/pubs/cp/cp13-06.pdf). The FCA enforcement guide acknowledges this and the FCA will attempt to ensure that subjects are not ‘prejudiced or inconvenienced unduly’ when this happens.

UKLA enforcement
The FCA in its role as the UKLA is responsible for enforcement of market misconduct (including prosecutions for insider dealing and market manipulation). The FCA has increased disciplinary powers against sponsors and primary information providers.

In relation to sponsors, the FCA can:

- Under its disciplinary powers, impose financial penalties, impose a public censure, suspend or restrict a sponsor’s business activities for up to 12 months, or suspend a sponsor’s approval for up to 12 months for breaches of the Listing Rules; and
- Under its supervisory powers, suspend a sponsor’s approval, or limit or restrict its business activities if the FCA believes it is necessary in pursuit of its regulatory objectives. The supervisory powers will be used if the FCA finds a lack of competence or experience of a sponsor’s staff or inadequate systems and controls.

The stronger supervisory and disciplinary powers over sponsors complement recent changes to sponsors’ obligations, such as those requiring sponsors to take reasonable care in ensuring that information provided to the UKLA from issuers is accurate and to keep records of all communications. Therefore, there is greater potential liability for breach of regulatory obligations and a wider range of possible sanctions.

The FCA has similar disciplinary powers against primary information providers.

PRA enforcement
In most circumstances, the PRA will prefer informal methods of promoting its objectives and supervisory measures to enforcement action.

The PRA has the power to bring enforcement action on prudential matters falling within the scope of its objectives, and statements on policy for aspects of the enforcement process were published in December 2012 for consultation (CP12/39) (www.fsa.gov.uk/static/pubs/cp/cp12-39.pdf).

Even if the PRA uses its disciplinary powers, the full enforcement process is likely to be used rarely. The PRA’s judgement-led approach makes it difficult for a firm to challenge a disciplinary decision; a firm would have to argue that its own judgment was correct and the PRA staff’s judgment wrong to challenge a decision other than on procedural grounds.

The same legislative provisions apply to statutory notices and decision making by the PRA as the FCA; however, the decision-making process differs. The PRA has four decision-making committees of different seniority. The relevant committee will depend on the category of the firm and the likely impact of the decision on the firm. Disciplinary actions against the largest financial institutions will be considered by the two most senior committees.

Subjects of disciplinary action have the right to make written and oral representations, and to refer a PRA decision to the Upper Tribunal, although this is likely to be rare for the reasons given above.

When setting financial penalties, the PRA will use a five-stage process akin to that of the FCA, but without the fixed percentages of revenue as a starting point for a penalty. The PRA will take account of aggravating factors, mitigating factors, the need to create a credible deterrent, and discounts for early settlement, but the dominant influence on the level of a penalty will be the percentage of total revenue taken as the starting point.