Global Investigations Review

The Guide to International Enforcement of the Securities Laws

Editors
John D Buretta, David M Stuart and Lindsay J Timlin

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Publisher's Note

Global Investigations Review is delighted to publish *The Guide to International Enforcement of the Securities Laws*. For those who don't yet know, Global Investigations Review is the online home for everyone who specialises in investigating and resolving suspected corporate wrongdoing. We tell them all they need to know about everything that matters.

GIR is famous for its daily news, but we also create more in-depth content. It includes a technical library, a volume of which you're now reading; full reporting of the liveliest conference series in the white-collar world, GIR Live (our motto: 'less talk, more conversation'); and unique data sets and related workflow tools to make daily life easier. And much else besides.

Being at the heart of the corporate investigations world, we often become aware of gaps in the literature before others – topics that are crying out for in-depth but practical treatment. Recently, the enforcement of securities laws emerged as one such fertile area.

Capital these days knows no borders, but securities-law enforcement regimes very much do. In that juxtaposition lie all sorts of questions. The book you are holding aims to provide some of the answers. It is a practical, know-how text for investigations whose consequences may ring in securities law. Part I addresses overarching themes and Part II tackles specifics.

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We hope you find it an enjoyable and useful book. If you have comments or suggestions please write to us at insight@globalinvestigationsreview.com. We are always keen to hear how we could make the guides series better.

David Samuels
Publisher, GIR
November 2021

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Ewan Brown, Gayathri Kamalanathan and Anna Lambourn[1]

What are the relevant statutes and which government authorities are responsible for investigating and enforcing them?

Applicable laws and regulations

The laws of England and Wales are derived from two sources: legislation, which is created and passed by Parliament, and case law, in which decisions issued by courts become binding precedents. The framework for securities enforcement in England and Wales is derived from statute and is split into a civil and regulatory regime and a criminal regime, which run alongside one another.

The civil and regulatory regime is primarily governed by the Financial Services and Markets Act 2000 (FSMA).[2] The FSMA created a regulatory framework for the provision and supervision of financial services and the operation and oversight of securities markets. It also established the legal basis for the creation and operation of a regulatory agency with responsibility for the oversight of financial markets and enforcement of securities offences. From 1 December 2001, when the FSMA took effect, this agency was the Financial Services Agency, which became the Financial Conduct Authority (FCA) in April 2013.

The FCA maintains a detailed handbook (the FCA Handbook), containing extensive rules and guidelines applicable to financial services providers and securities issuers.[3] The FCA Handbook is broken down into a number of sections, and includes the FCA's High Level Standards, comprising primarily the Principles for Businesses, and Senior Management Arrangements, Systems and Controls (SYSC), and Business Standards, which include the

1 Ewan Brown and Gayathri Kamalanathan are partners and Anna Lambourn is a senior professional support lawyer at Slaughter and May.

2 https://www.legislation.gov.uk/ukpga/2000/8/contents.

3 FCA Handbook, available at https://www.handbook.fca.org.uk/handbook.

FCA's rules against market abuse.[4] The Handbook also details how the FCA conducts its regulatory and enforcement processes (supervision, and decisions procedure and penalties).

The United Kingdom's exit from the European Union meant that EU securities enforcement laws and regulations once having direct effect ceased to do so. The most relevant EU Regulation was the Market Abuse Regulation (the EU MAR), which came into force in July 2016.[5] The EU MAR was onshored into UK law via the European Union (Withdrawal) Act 2018 (as amended), as supplemented by the Market Abuse (Amendment) (EU Exit) Regulations 2019 (the UK MAR), effective from 1 January 2021.[6] The UK MAR creates both civil and criminal offences.

The Financial Services Act 2021 (FSA 2021),[7] which received Royal Assent on 29 April 2021, amended the UK MAR in several ways, including the requirements related to keeping insider lists and regulations relating to managers' transactions. When Section 31 of the FSA 2021 comes into force, it will increase the maximum sentence for criminal market abuse from seven years to 10 years.[8]

The primary criminal market abuse offences are contained within the Criminal Justice Act 1993 (CJA 1993)[9] and the Financial Services Act 2012 (FSA 2012).[10]

Enforcement authorities

The FCA is the UK's securities regulator. It has wide-ranging powers relating to oversight, inspection and information gathering, and has powerful enforcement capabilities. The FCA can bring both civil and criminal actions to enforce applicable law and regulation, and can use the court system to seek redress (such as injunctions) as required. The FCA can also enforce breaches of the rules contained in its Handbook through administrative action, including the ability to impose significant financial penalties and place restrictions on the ability of firms or individuals to carry out regulated business activities or functions.

Although the FCA is the primary enforcement agency for securities and markets offences, other authorities – including the Serious Fraud Office (SFO), the Department for Business, Energy and Industrial Strategy (BEIS) and the Crown Prosecution Service (CPS) – are empowered to investigate and prosecute certain securities laws as well. The FCA Handbook contains guidance on which agency might lead a particular investigation in cases of overlapping jurisdiction. While the default position is that regulatory misconduct is the normal purview of the FCA, the SFO may instead lead where serious or complex fraud is the predominant issue in the alleged misconduct, and BEIS or the CPS might lead where the FCA is not the statutory prosecutor.[11]

A company may face investigations from multiple agencies arising from the same securities or markets-related misconduct. For example, Tesco Stores Limited (Tesco Ltd), a

4 FCA Handbook, MAR 1.1.

5 2014/596/EU, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0596.

6 Statutory Instrument 2019 No. 310, https://www.legislation.gov.uk/uksi/2019/310/contents/2019-02-19.

7 https://www.legislation.gov.uk/ukpga/2021/22/pdfs/ukpga_20210022_en.pdf.

8 At the time of writing, no date for this has been designated.

9 Section 52 Criminal Justice Act 1993, https://www.legislation.gov.uk/ukpga/1993/36.

10 Sections 89-91 Financial Services Act 2012, https://www.legislation.gov.uk/ukpga/2012/21/contents.

11 FCA Handbook EG Appendix 2, App 2.1.1 and App 2.1.9.

subsidiary of Tesco PLC, faced dual investigations from the FCA and the SFO after Tesco PLC discovered accounting anomalies, causing it to have overstated its 2013–2014 accounts by £250 million, later raised to £284 million after forensic investigation. According to the authorities, this overstatement resulted in the creation of a false market.[12] The SFO investigation resulted in Tesco Ltd entering into a deferred prosecution agreement with the SFO in April 2017, whereupon it accepted responsibility for dishonest falsification of accounts and false reporting of its financial position.[13] The FCA investigation resulted in a civil settlement with Tesco PLC and Tesco Ltd for market abuse, in which it was agreed that the entities 'gave a false or misleading impression about the value of publicly traded Tesco shares and bonds'.[14] The Tesco companies involved paid a fine of £129 million to the SFO, and agreed, with the FCA, to pay restitution to affected investors, which the FCA estimated to cost £85 million.

FCA investigatory powers

To commence an investigation using its investigatory powers, the FCA will appoint investigators, and must generally provide a written notice of their appointment using a memorandum of appointment.[15] Unless the matter is a criminal investigation, or doing so would prejudice the conduct of its investigation, the FCA will then hold scoping discussions with the party under investigation, to inform them of: the reasons and scope for the investigation; how the process will unfold; the likely timings involved and the next steps in the investigation; the individuals and teams the FCA will need access to; and more, as applicable. The FCA Handbook states that there may be a limit on the detail of information the FCA may provide to parties under investigation, to preserve its integrity.[16] There will generally be ongoing dialogue between the FCA and the entity under investigation as the matter progresses.

The FCA has various statutory powers to gather information and documents,[17] and has set out its investigations and enforcement process in its Handbook.[18] It is standard practice for the FCA to use its statutory powers to compel the production of documents and information, or the answering of questions in an interview.[19] An individual who does not comply with these powers may be held in contempt of court, punishable by a fine or imprisonment, or both. If a regulated entity fails to cooperate with the FCA during the course of the investigation, it would risk sanction for breach of Principle 11 (the requirement to 'be open and cooperative' with the FCA).[20]

Although it is typical for the FCA to use its statutory powers of information gathering during an investigation to compel the production of documents and information, or

12 *Serious Fraud Office v. Tesco Stores Limited* [2017] 4 WLUK 558, Para. 1.

13 Tesco Ltd deferred prosecution agreement judgment of the Rt. Hon. Sir Brian Leveson is available at the SFO website: https://www.sfo.gov.uk/cases/tesco-plc/.

14 Tesco PLC and Tesco Stores Limited FCA settlement announcement and Final Notice, available at the FCA website: https://www.fca.org.uk/news/press-releases/tesco-pay-redress-market-abuse.

15 Sections 167–169 Financial Services and Markets Act 2000 and FCA Handbook EG 4.1.1 01/03/2016.

16 FCA Handbook, EG 4.8.1 31/01/2017.

17 Sections 97, 122, 131, 165–169, and 284 Financial Services and Markets Act 2000.

18 See the Supervision (SUP), Decisions Procedure and Penalties (DEPP), and Enforcement Guide (EG) contained within the FCA Handbook.

19 FCA Handbook, EG 4.7.1 01/01.2021.

20 FCA Handbook, EG 4.7.4 01/01/2016.

attendance at an interview, there may be circumstances where it makes informal requests for documents or information. If the FCA suspects criminal activity, it will typically request a voluntary interview or, if the interviewee is a suspect, will perform the interview under caution pursuant to the Police and Criminal Evidence Act 1984, because criminally incriminating evidence that is obtained under a compelled interview is not admissible in subsequent proceedings.[21] Additionally, if the investigation is criminal in nature, the FCA may obtain a search warrant to enter and search premises (accompanied by a police officer) and seize relevant documents.[22] Occasionally, the FCA may agree to a proposal by the entity under investigation that it conduct an internal review, or commission an independent investigation, and will postpone conducting its own investigation until receipt of a report of such review or investigation. In all cases, the FCA is empowered to decide what method of information gathering is appropriate in the circumstances.[23]

What conduct is most commonly the subject of securities enforcement?

The framework for securities enforcement in England and Wales encompasses a civil and regulatory regime and a criminal regime. The FCA can investigate and bring enforcement actions against misconduct arising under either regime.

Civil regime

The civil and regulatory regime aimed at detecting, deterring and preventing securities misconduct exists under the FSMA and the UK MAR.

This regime prohibits a wide range of misconduct, including: civil market abuse offences; insider dealing; breaches of the UK MAR relating to the disclosure and transparency of price-sensitive information and to the content of publications; failures to advise properly on investments where a duty to do so exists; failures of a firm's systems, controls and governance; failures to comply with conduct of business or financial promotion rules; and failures relating to a firm's senior managers (who are called 'persons discharging managerial responsibilities') to ensure timely disclosure of transactions involving the issuer's securities.

Criminal regime

The civil regime sits alongside the primary criminal offences of insider dealing contrary to Section 52 of the CJA 1993,[24] and market abuse contrary to Sections 89 to 91 of the FSA 2012.[25]

The elements of the criminal offence of insider dealing require a person to be in possession of insider information and to:

- deal (or act as or rely on a professional intermediary) in price-affected securities on a regulated market when in possession of that information;

21 FCA Handbook, Principles for Business (PRIN) 2.1.1R, Principle 11 and Section 174 Financial Services and Markets Act 2000.

22 Sections 122D (for market abuse offences) and 176 Financial Services and Markets Act 2000 (more generally).

23 FCA Handbook, EG 4.11.1 01/03/2016.

24 Section 52 Criminal Justice Act 1993, https://www.legislation.gov.uk/ukpga/1993/36.

25 Sections 89–91 Financial Services Act 2012, https://www.legislation.gov.uk/ukpga/2012/21/contents.

- encourage another to deal in securities in relation to that information, while knowing or having reasonable cause to believe this will take place; or
- disclose that information other than in the proper performance of employment or profession.

The three offences comprising the criminal market abuse regime include:
- making a false or misleading statement, or concealing a material fact that is known to be false or misleading, to induce a person to engage in market activity;[26]
- creating a false or misleading impression as to the market price or value of relevant markets or securities;[27] and
- making a false or misleading statement, or creating a false or misleading impression, in relation to benchmarks.[28]

The FSMA also creates a number of criminal offences, including:
- carrying on (or purporting to carry on) a regulated activity without authorisation;[29]
- communicating an invitation or inducement to engage in investment activity in breach of the financial promotion restriction;[30] and
- offering to the public, or requesting the admission onto a regulated market of, transferrable securities before an approved prospectus is available.[31]

Insider dealing and market abuse can be dealt with under either the civil or the criminal enforcement regimes.[32] It is up to the FCA to choose which track – civil or criminal – to follow in any investigation and enforcement action. It is common for the FCA to open parallel civil and criminal investigations, and to close one when more information about the misconduct has come to light.

Although the FCA is not a prosecutor under the Bribery Act 2010, firms subject to its regulation are under a separate obligation to establish and maintain effective systems and controls to mitigate financial crime risk.[33]

In January 2020, the FCA was designated the anti-money laundering and counter-terrorist financing supervisor for the carrying on of certain cryptoasset activity. Though it does not regulate cryptocurrencies themselves, it regulates certain cryptoasset derivatives (such as futures contracts, contracts for difference and options), as well as those cryptoassets that are considered securities.[34] In June 2021, Binance Markets Limited, a global cryptocurrency

26 Section 89 Financial Services Act 2012.
27 Section 90 Financial Services Act 2012.
28 Section 91 Financial Services Act 2012.
29 Section 19 Financial Services and Markets Act 2000.
30 Section 21 Financial Services and Markets Act 2000.
31 Section 85(3) Financial Services and Markets Act 2000.
32 Article 14 The Market Abuse (Amendment) (EU Exit) Regulations 2019 and Section 62 Criminal Justice Act 1993, and Article 15 The Market Abuse (Amendment) (EU Exit) Regulations 2019 and Sections 89–91 Financial Services and Markets Act 2000 respectively.
33 FCA Handbook, FCG 6.1.2 13/12/2018.
34 FCA Guidance on Cryptoassets, available at https://www.fca.org.uk/publication/policy/ps19-22.pdf.

exchange, was issued a supervisory notice by the FCA that it must not undertake any regulated activity in the UK.[35]

What legal issues commonly arise in enforcement investigations?

Jurisdiction

The supervisory and conduct jurisdiction of the FCA covers all firms undertaking specified regulated activities in the UK, and to specified conduct that occurs in the UK. The criminal jurisdiction of the FCA extends to conduct occurring within England, Wales and Northern Ireland.[36] Criminal proceedings brought in Scotland are the responsibility of the Lord Advocate, with arrangements agreed between the FCA and the Crown Office for prosecution of offences arising from an FCA investigation.[37]

In relation to the prevention and detection of financial crime, including fraud and market misconduct offences, the FCA has a duty to cooperate and share information with other authorities in the UK and overseas.[38] The FCA may use its investigatory powers to assist overseas regulators if other misconduct is suspected.[39]

The FCA enforces the UK MAR domestically, but also in respect of certain actions carried out overseas as they relate to financial instruments:

- admitted to a UK-regulated market or for which a request for admission to trade on these markets has been made;
- traded on a UK multilateral trading facility (MTF), admitted to trading on a UK MTF or for which a request for admission to a trading on a UK MTF has been made;
- traded on a UK organised trading facility; or
- whose price or value depends on, or has an effect on, the price or value of financial instruments listed in the three above points (such as credit default swaps).

Privilege

The doctrine of legal professional privilege exists in England and Wales under two headings: legal advice privilege and litigation privilege. Legal advice privilege protects confidential communications between lawyers and their clients, made for the dominant purpose of seeking or providing legal advice. Litigation privilege protects confidential communications between lawyers and their clients, or between lawyers or their clients and third parties, made for the purpose of obtaining information, evidence or advice in relation to proceedings that are in progress or in reasonable contemplation, provided that (1) the dominant purpose of the communications is the conduct of those proceedings and (2) the proceedings are adversarial (rather than inquisitorial) in nature.[40] Privilege, once properly engaged, absolutely protects documents and other communications from disclosure to third parties.

35 https://www.fca.org.uk/publication/supervisory-notices/first-supervisory-notice-binance-markets-limited.pdf.

36 FCA Handbook, EG 12.1.1.

37 FCA Handbook, EG App 2.1.13.

38 Section 354A Financial Services and Markets Act 2000.

39 Section 169 Financial Services and Markets Act 2000.

40 The case of *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation* [2018] EWCA Civ 2006 confirmed that 'adversarial proceedings' can include regulatory investigations, provided that the investigation is adversarial and not merely inquisitorial in nature.

The FSMA lists a number of 'protected items' that may be withheld from the FCA without incurring a penalty.[41] Although the scope of 'protected items' differs in certain respects to the scope of the two heads of privilege described above, English courts and the FCA have generally accepted that privileged documents may be withheld when information is provided pursuant to the FCA's statutory powers.

Notwithstanding that a valid claim to privilege may apply, many firms will wish to prove that they are cooperating with the FCA's investigation by providing a voluntary or limited wavier of privilege over the requested materials. A voluntary or limited waiver would normally ensure that those materials still retain their privileged status against other third parties (including potential claimants in a civil litigation action) provided that the regulator treats the materials as confidential and does not share them with third parties.[42]

There are a number of issues concerning privilege commonly encountered in an investigations context. The first is that, under the legal advice privilege heading, the definition of 'client' is narrow, and comprises individuals at the organisation tasked with giving or receiving legal advice. This group can be challenging to define in large organisations with decentralised management structures or in-house legal teams. It can also be challenging in an investigations context where documents may be generated by parties outside this narrow group during fact gathering.

The second issue is establishing when adversarial proceedings commence in an investigations context, for litigation privilege to apply to documents generated during an investigation (such as notes of interviews between external counsel and company employees). The case of *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation* (the *ENRC* decision) sheds some light on this point. By way of high-level summary, the case concerned whether documents produced during the course of a criminal investigation could be protected by litigation privilege. On the facts of the *ENRC* decision, the Court of Appeal considered a number of factors that would indicate that adversarial proceedings were in the contemplation of the party seeking to rely on privilege. These included the nature of the allegations, the publicity surrounding the matter, internal corporate correspondence, statements and decision-making (including by senior legal and compliance team members), and early instruction of legal counsel. Although it did not establish any set principles, the case confirmed that litigation privilege could apply to materials generated in an internal investigation, but that this question requires a very fact-specific analysis.[43]

Cooperation

An early consideration for parties that are facing the FCA's enforcement process is whether they should proactively cooperate with the investigation, and, if so, the extent of such cooperation. A company could, for example, consider providing relevant material on a voluntary basis before it is compelled to do so, offer to conduct interviews and report back on what interviewees have said, or offer to produce documents that the FCA might not be able to

41 Section 175(5) Financial Services and Markets Act 2000.

42 *British Coal Corp v. Dennis Rye* (No. 2) [1988 1 W.L.R. 1113] and *Property Alliance Group Limited v. The Royal Bank of Scotland Plc* [2015] EWHC 1557 (Ch). See also the FCA Handbook EG 3.11.12-3.11.14 01/03/2016 for the FCA's position on limited waiver of privilege.

43 [2018] EWCA Civ 2006.

obtain through statutory processes, such as documents held by an affiliate in a foreign jurisdiction. Alternatively, the firm might choose to respond to statutory requests only. In determining the best approach for any given investigation, it should be borne in mind that, on the one hand, Principle 11 of the FCA Handbook requires approved firms and persons to deal with the FCA in an open and cooperative way, and to disclose anything to the FCA of which it might reasonably expect notice.[44] On the other hand, the obligation to cooperate does not mean that the entity must abandon all rights and legal strategy to defend an enforcement action, or put itself in jeopardy of breaching legal obligations.[45]

Civil litigation

Companies must consider that there could be separate consequences for securities-related offences, aside from regulatory enforcement or prosecution. By way of example, it is becoming increasingly common for private litigants, in particular groups of investors, to bring an action against listed entities for losses suffered as a result of allegedly misleading market announcements.[46] Two of the more powerful laws available to investors are contained within Sections 90 and 90A of the FSMA.

Section 90 of the FSMA applies to prospectuses. Where an investor has acquired securities to which a prospectus applies and they suffer loss as a result of any untrue or misleading statement in, or relevant omission from, the prospectus, they are entitled to compensation from those responsible for its production – most notably the company and its directors. Importantly, there is no need for an investor to show that it relied upon the relevant statement or omission in the prospectus when deciding to buy shares. If an investor can show there was something wrong with the prospectus, the defendants will only avoid liability if they can satisfy the court that they were not negligent in its preparation.

Section 90A applies to other market announcements, but only applies where the relevant misleading statement or omission was made knowingly or recklessly, and was actually relied on by the investor in making a decision to buy, sell or hold their shares. Also, liability attaches to the company, not its directors or other associated persons.

Despite the power granted to investors under these laws, which have now been on the statute book for some 20 years, they were little used until recently. That may, in part, be attributed to a lack of certainty as to the true scope and effect of Sections 90 and 90A, as well as to the absence of procedural mechanisms in English law akin to US-style class actions. In recent years, the growth of the litigation funding market and the development of law firms specialised in devising and bringing group litigation have underpinned a rise in securities law group litigation. The potential quantum of such litigation and the perceived deep pockets of potential defendants are likely to drive continued growth in this area.

44 FCA Handbook, PRIN 2.1.1R, Principle 11.

45 Such as foreign banking secrecy laws, or obligations under domestic or international data protection legislation.

46 See, for example, the *RBS Rights Issue Litigation*, brought under Section 90 Financial Services and Markets Act 2000 (which settled before trial in 2017); the *Tesco Shareholder Litigation*, brought under Section 90A Financial Services and Markets Act 2000 (which settled before trial in 2020); and the *Lloyds/HBOS Litigation*, brought under various common law causes of action (and which failed at trial in a judgment handed down in 2019, reported as *Sharp v. Blank* [2019] EWHC 3078 (Ch)).

Whistleblowers

The UK's legal framework to protect whistleblowers is contained in the Employment Rights Act 1996, as amended by the Public Interest Disclosure Act 1998. These laws provide protections to employees reporting serious wrongdoing by protecting them from retaliatory treatment, including dismissal. Within the financial services sector, the FCA expects firms and regulated entities to implement and maintain effective whistleblowing policies, and persons wishing to make a report can do so either to their employer or to the FCA directly.[47] The FCA's requirements as they relate to whistleblowers are contained in its Handbook, at SYSC 18: 'A firm must establish, implement and maintain appropriate and effective arrangements for the disclosure of reportable concerns by whistleblowers.'[48]

Separately, the UK MAR requires firms carrying out regulated financial services activities to have whistleblowing policies in place, and envisages that whistleblowers could help authorities detect and impose sanctions in cases of suspected insider dealing and market manipulation.[49]

For entities outside the financial services sector, the UK Corporate Governance Code requires listed companies to ensure that their employees can raise concerns in confidence (including anonymously if desired).[50] A listed company's audit committee is responsible for keeping these policies under review.

What remedies and sanctions are available to government authorities?

The FCA is able to impose an extensive range of regulatory and criminal sanctions against individuals and companies engaged in misconduct.

Disciplinary process

For civil or administrative actions, once an investigation has been undertaken and the FCA concludes that it has a sufficient understanding of the nature and gravity of the suspected misconduct to assess the appropriate outcome, the FCA will issue a confidential draft annotated warning notice that contains details of the misconduct it believes to have occurred and the proposed sanction. The party under investigation will then generally be afforded 28 days to reach an agreement with the FCA on the terms of a warning notice, and, if agreement is reached, the terms will be reproduced in a decision notice and then a final notice, which will be published.

If the recipient of the draft warning notice agrees to some, but not all, of the terms, it may seek to agree a focused resolution agreement (FRA) with the FCA, whereby elements of the draft notice will be agreed (e.g., the facts, or the facts and the breaches, but not the penalty) and others contested. If this route is taken, the warning notice, once issued, will be referred to the Regulatory Decisions Committee (RDC) (a committee of the Board of the FCA), which will hear submissions and then make a ruling on the issues in dispute. The outcome of that process will then be reflected in a decision notice. The party under investigation can

47 The FCA's dedicated Whistleblowing webpage is located at https://www.fca.org.uk/firms/whistleblowing.

48 FCA Handbook, SYSC 18.3.1 R 07/09/2016.

49 Regulation (74).

50 UK Corporate Governance Code (2018), Para. 6.

either accept the findings, in which case the decision will be published as a final notice, or refer the matter to the Upper Tribunal, an independent, appellate body that will hear the matter afresh.

If no settlement or FRA is agreed in relation to the draft warning notice, the FCA will generally issue a warning notice (although it is entitled to conduct further investigation before doing so), which the party under investigation may refer to the RDC. The RDC will adjudicate on the matter and, if satisfied by the FCA that there has been a breach requiring sanction, issue a decision notice. If dissatisfied with the outcome before the RDC, it is then open to the recipient of the decision notice to refer the matter to the Upper Tribunal.

If no challenge to the decision notice is presented, the FCA will issue a final notice containing details of the relevant offence and any disciplinary sanctions issued. Final notices are publicly available documents and are published on the FCA's website.

Formal regulatory sanctions are wide-ranging and include: issuing a private warning; issuing a public censure; imposing suspensions and restrictions on the relevant firm or individual from conducting regulated business or carrying out regulated functions; suspending the listing or trading of any security or financial instrument; and imposing a financial penalty.[51] Fines (with no upper limit) are the most common penalty applied by the FCA, and usually comprise elements of disgorgement, discipline and deterrence.[52]

Most administrative actions settle at the draft warning notice stage, without the matter being referred to the RDC, with parties under investigation incentivised to do so by seeing a reduction of the financial penalty by up to 30 per cent. In civil actions, a settlement would take the form of a written agreement. In criminal actions, an early guilty plea will amount to a mitigating factor when the court decides what penalty to apply.

Criminal enforcement

The FCA may pursue a criminal track if it has determined that the wrongdoing was sufficiently egregious so as to warrant prosecution and a criminal penalty. The FCA will have regard to Section 12 of the Enforcement Guide of its Handbook, and will apply the Code for Crown Prosecutors in making such a determination.[53]

The available penalties for being found guilty by a court of the insider dealing offence contrary to the CJA 1993, and the market manipulation offences of the FSA 2012, include imprisonment of up to seven years[54] (for individuals) or an unlimited fine (for corporates or individuals).[55]

Recent enforcement activity

In the past two years, the FCA has brought a number of securities-related enforcement actions to a close. In June 2020, the FCA issued a final notice against Redcentric PLC (Redcentric),

51 FCA Handbook, DEPP 6.1.2 G 01/04/2013 and EG 7.1.2 03/07/2016.

52 FCA Handbook, DEPP 6.5.2 G 01/04/2013.

53 FCA Handbook, EG 12.1.1 01/03/2016 and The Crown Prosecution Service Code for Crown Prosecutors, published 26 October 2018, https://www.cps.gov.uk/publication/code-crown-prosecutors.

54 Section 31 of the FSA 2021 will change this to a maximum of 10 years when this provision comes into force.

55 Section 61 Criminal Justice 1993 and Section 92 Financial Services Act 2012. Section 31 FSA 2021 will increase this to 10 years when it comes into force.

having found that the company committed market abuse by publishing false or misleading information about its net debt, and cash and cash equivalent holdings, in November 2015 and June 2016.[56] Redcentric voluntarily implemented a scheme to provide compensation to purchasers of shares who suffered loss as a result of the market abuse. The FCA concluded that, considering the circumstances of the case and weighing the public interest considerations, it would issue a public censure rather than a fine in this case.

In October 2020, the FCA issued a fine of £873,118 against Asia Research and Capital Management Ltd (ARCM) for breaches of Regulation (EU) No. 236/2012 on short settling and certain aspects of credit default swaps. The final notice against ARCM found that it had breached the short selling disclosure rules by failing to notify the FCA when engaging in relevant transactions. The FCA found that these failures had occurred on multiple occasions over a long period of time.[57] Also in October 2020, Aviva Plc received a public censure after the FCA found that it had contravened certain provisions of the Listing Rules and Transparency Rules after making misleading statements in a March 2018 market announcement.[58]

In December 2020, the FCA settled civil proceedings against Corrado Abbattista, a former portfolio manager and chief investment officer of a hedge fund, for market abuse. Mr Abbattista was barred from performing any functions in relation to regulated activity and fined £100,000.[59]

In March 2021, trader Adrian Horn, formerly of Stifel Nicolaus Europe Limited, was fined £52,500 for market abuse and banned from performing any function in relation to a regulated activity.[60]

Alongside these civil enforcement proceedings, the FCA has initiated a number of criminal enforcement actions. In February 2021, it brought a case against two individuals charged with insider dealing, and a separate case against two brothers for insider dealing and fraud. In December 2020, convictions of Fabiana Abdel-Malek and Walid Choucair for insider dealing were upheld at the Court of Appeal.[61]

The road ahead

The UK has a robust securities enforcement regime, and the FCA benefits from extensive powers and experience with bringing complex cases against offenders. Macro factors, such as Brexit and the covid-19 pandemic, have impacted recent securities enforcement in different ways. UK lawmakers now have the opportunity, presented by Brexit, to refine the market abuse regime, and ensure that it remains an effective deterrent for potential wrongdoers.

56 https://www.fca.org.uk/publication/final-notices/redcentric-plc-2020.pdf.

57 https://www.fca.org.uk/publication/final-notices/asia-research-and-capital-management-ltd-2020.pdf.

58 Slaughter and May acted for Aviva Plc in relation to this matter. Details of the final notice are available at https://www.fca.org.uk/publication/final-notices/aviva-plc-2020.pdf.

59 https://www.fca.org.uk/publication/final-notices/corrado-abbattista-dec-2020.pdf.

60 https://www.fca.org.uk/publication/final-notices/adrian-horn.pdf.

61 https://www.fca.org.uk/news/press-releases/fca-commences-criminal-proceedings-against-two-insider-dealing; https://www.fca.org.uk/news/press-releases/fca-commences-criminal-proceedings-against-brothers-insider-dealing-and-fraud; and https://www.fca.org.uk/news/press-releases/insider-dealing-convictions-upheld-court-appeal.

In addition, while the FCA has spent much effort over the past 18 months focusing on protecting vulnerable consumers,[62] it remains focused on companies that used this period to raise capital, or the employees and executives now working under a hybrid home and office programme. Indeed, FCA officials have stated that they expect firms' and issuers' compliance programmes to evolve with the new challenges, and have issued periodic guidance on market conduct during this time.[63] Mark Steward, executive director of enforcement and market oversight at the FCA, recently delivered a speech on market abuse that highlighted the advancement of the FCA's market data processing capabilities during this time, including its ability to pick up suspicious transactions in close to real time, and other advancements in the FCA's ability to monitor markets.[64] The FCA's Business Plan for 2021–2022 confirms that the prevention and enforcement of market abuse remain key priorities for the year ahead.[65] It would be reasonable to expect a continued stream of enforcement activity, especially as markets continue to pick up, and companies and individuals return to their usual way of working.

62 FCA Annual Report and Accounts 2020/21, https://www.fca.org.uk/publication/annual-reports/annual-report-2020-21.pdf.

63 See speech by Julia Hoggett, FCA Director of Market Oversight (12 October 2020) https://www.fca.org.uk/news/speeches/market-abuse-coronavirus; speech by Mark Steward, Executive Director of Enforcement and Market Oversight (25 February 2021) https://www.fca.org.uk/news/speeches/locking-down-market-abuse; speech by Mark Steward, Executive Director of Enforcement and Market Oversight (31 March 2021) https://www.fca.org.uk/news/speeches/compliance-culture-and-evolving-regulatory-expectations-mark-steward; FCA publication: Market Watch 63 (May 2020) https://www.fca.org.uk/publication/newsletters/market-watch-63.pdf and Primary Market Bulletin Issue No. 28 coronavirus (Covid-19) update (27 May 2020) https://www.fca.org.uk/publications/newsletters/primary-market-bulletin-issue-no-28-coronavirus-covid-19-update.

64 Speech delivered 25 February 2021, available at https://www.fca.org.uk/news/speeches/locking-down-market-abuse.

65 https://www.fca.org.uk/publication/business-plans/business-plan-2021-22.pdf.

Appendix 1

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Capital these days seems to knows no borders, but securities laws very much do. In that juxtaposition lie all sorts of challenges for those charged with investigating whether any law has been broken.

GIR's *The Guide to International Enforcement of the Securities Laws* aims to make practitioners' lives easier. Written by contributors with a wealth of experience, and edited by lawyers from Cravath, Swaine & Moore, this handy desktop reference guide seeks to address the most pressing questions in securities law enforcement.

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