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UK Financial Conduct Authority (FCA) Criminal Prosecution Powers

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SCOPE OF THIS NOTE

The FCA has wide-ranging investigation and enforcement powers. This practice note outlines the FCA's criminal prosecution powers under the Financial Services and Markets Act 2000 (FSMA), the Financial Services Act 2012 (FS Act 2012) and certain other pieces of legislation.

Generally, the FCA uses its criminal prosecution powers much less frequently than its regulatory and civil powers. The FCA's Enforcement Annual Performance Report for 2018/19 (which provides an overview of the FCA's enforcement activities during this period) states that it secured 288 outcomes using its enforcement powers; 276 of which were regulatory and civil, and 12 of which were criminal.

The FCA also notes in the report that:

- Criminal cases can take significantly longer to resolve than regulatory cases; in 2018/19, the average length of all criminal cases was 75.9 months.
- The costs for individual criminal cases can be significantly higher than regulatory cases; in 2018/19, the average cost of all criminal cases was £7.23 million.

These factors, together with the relatively high evidential and public interest test required to bring a criminal prosecution (see *Code for Crown Prosecutors* below) may help to explain why the FCA tends to deal with the vast majority of breaches using its civil and regulatory powers.

However, the concept of "credible deterrence" is still central to the FCA's enforcement work and, as it explains on its *website*, the Enforcement division supports the FCA's statutory objectives by "making it clear that there are real and meaningful consequences for firms and individuals who



don't follow the rules". In this regard, the FCA's criminal prosecution powers remain key, particularly in relation to tackling financial crime and market misconduct (such as insider dealing), unauthorised business, and false claims to be FCA-authorised.

The FCA has some notable recent successes in the criminal courts, including Operation Tidworth (boiler room investment fraud) and Operation Tabernula (insider dealing and subsequent money laundering).

BACKGROUND

In 2000, a single financial regulatory system was established by virtue of FSMA. This was managed and overseen by the Financial Services Authority (FSA).

One of the four statutory objectives of the FSA (at the time) was to tackle and reduce financial crime. To enable it to fulfil its objectives, FSMA gave the FSA both civil and criminal powers. In the wake of the 2007/08 financial crisis, and in recognition of the increasingly complex nature of financial markets and financial crime, the FSA was abolished and replaced by the Financial Conduct Authority (FCA) and the Prudential Regulatory Authority (PRA) in 2013, with the latter sitting within the Bank of England (BoE).

These changes were implemented by virtue of the Financial Services Act 2012 (FS Act 2012), which made a number of other changes to the existing legislation and the FCA's strategic and operational objectives.

Notwithstanding this, FSMA remains the primary legislation regulating the financial markets, and tackling financial crime remains a key area of focus for the FCA.

For an overview of the FCA, see [Practice note, FCA: role, governance and powers](#).

THE FCA'S ROLE IN ENFORCEMENT

The FCA sets out its role in enforcement in Chapter 1 of its [FCA Mission: Our Approach to Enforcement](#) paper (Approach to Enforcement), which was published in April 2019. The overriding principle is to achieve fair and just outcomes in response to misconduct. This is to ensure that market integrity and consumer confidence is robust, by dealing with misconduct quickly and fairly through legal processes.

For a high-level overview of the FCA's enforcement regime, see [Practice note, FCA enforcement regime: overview](#).

OFFENCES THE FCA CAN PROSECUTE

Section 401(3B) of FSMA gives the FCA the power to institute proceedings in England, Wales and Northern Ireland in respect of certain criminal offences. Sections 401 and 402 of FSMA set out the prescribed offences or categories of offences that the FCA can prosecute. These are outlined in the sections below.

OFFENCES UNDER SECTION 401(1) OF FSMA

Offences within the scope of section 401(1) of FSMA are:

- Offences under FSMA.
- Offences under subordinate legislation made under FSMA.
- Offences under Part 7 of the FS Act 2012 (for more information, see [Practice note, False or misleading statements and impressions: criminal offences and FCA powers](#))).
- Offences falling within those categories include:

FSMA provision	Offence(s)
Section 23	Contravention of the general prohibition set out in section 19 of FSMA (that is, carrying on a regulated activity in the UK, or purporting to do so, when one is not an authorised or exempt person).
Section 24	Making false claims to be authorised or exempt.
Section 25	Contravention of section 21 of FSMA relating to restrictions on financial promotions.
Part 4A, section 55P	Contravention of section 55P(7) of FSMA (that is, release of assets by a trustee without permission of the regulator)
Section 56(4)	Performing functions in contravention of a prohibition order (unless the prohibition order was made by the PRA, in which case the PRA is the “appropriate regulator” to initiate proceedings).
Section 85(3)	Prohibition on dealing etc. in transferable securities without an approved prospectus.
Section 177	Various offences relating to the falsification, destruction, disposal or concealment of documents relevant to an investigation or otherwise providing misleading information or material (the PRA may also initiate proceedings under this section of FSMA).
Section 191(F)	Various offences concerning the failure to comply with other statutory requirements relating to the control of authorised persons (unless the failure relates to statutory requirements owed to the PRA or the Bank of England, in which case either the PRA or the BoE is the “appropriate regulator” to initiate proceedings, depending on the provision in question).
Section 333	False claims to be a person to whom the general prohibition does not apply, or behaving or holding oneself out to be a person to whom the general prohibition does not apply.
Section 346	The provision of false or misleading information to an auditor or actuary.

Section 352	Various offences pertaining to the disclosure of information in contravention of sections 348 and 350(5) of FSMA.
Section 366	Failure by an insurer to notify the PRA of a proposed resolution for voluntary winding up (unless the activity of effecting or carrying out long-term contracts of insurance is not to any extent a PRA-regulated activity).
Section 398	Offence of misleading the FCA (or the PRA) not covered by section 177 of FSMA.
Paragraph 6, Schedule 4	Contravention of paragraph 5(2) of Schedule 4 to FSMA concerning the exercise of Treaty Rights.

FS Act 2012 provision	Offence(s)
Section 89	Making a false or misleading statement, or concealing fact with the intention of inducing, or recklessly doing so, that may induce another person into entering into or refraining from entering into a relevant agreement or exercising rights conferred by a relevant investment.
Section 90	Creating a false or misleading impression about the market, or the price or value of relevant investments.
Section 91	Making a false or misleading statement in relation to setting a relevant benchmark.

OFFENCES UNDER SECTION 402 OF FSMA

Offences within the scope of section 402 of FSMA are:

- Part V of the Criminal Justice Act 1993, that is, insider dealing (encompassing the dealing offence, the encouraging offence and the disclosing offence). For more information, see [Practice note, Insider dealing: overview](#).
- Prescribed regulations relating to money laundering, that is, the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017/692) (MLRs 2017) (Chapter 3 contains the various criminal offences). For more information, see [Practice note, Money Laundering Regulations 2017: FCA supervision and enforcement: Criminal offences, penalties and proceedings](#).
- Schedule 7 of the Counter-Terrorism Act 2008, that is, various offences of failing to comply with a direction, circumventing requirements and offences in connection with licences. For more information, see [Practice note, Counter-Terrorism Act 2008: HM Treasury's Schedule 7 regime](#)

OTHER OFFENCES

The FCA's power to prosecute criminal offences is not limited to the offences contained within sections 401(1) and 402 of FSMA. This was confirmed by the Supreme Court in *R v Rollins [2010] UKSC 39*. In these proceedings, the court found that the prescribed offences set out in FSMA were not intended to be exhaustive and that, subject to any statutory restrictions, the FSA was able to bring any prosecution that was permitted by virtue of its memorandum and articles of association. This includes the section 327 and section 328 money laundering offences under the Proceeds of Crime Act 2002 (POCA).

For more information, see [Legal updates, Supreme Court holds that the FSA has power to prosecute for offences outside FSMA](#) and [Supreme Court decides on extent of FSA's prosecution powers](#).

In [Chapter 12](#) of its Enforcement Guide (EG), the FCA describes the scope of its powers to prosecute offences other than those in sections 401 and 402 of FSMA as the power to "prosecute criminal offences where to do so would be consistent with meeting any of its statutory objectives" (EG 12.1.1).

For example, the FCA may prosecute an offence under section 36 of the Financial Services (Banking Reform) Act 2013, in relation to any senior manager of a financial institution who takes, or agrees to take, a decision that causes the failure of the financial institution or any entity within its group. The FCA may also prosecute offences under the Fraud Act 2006.

Clearly, the FCA has a very wide remit to prosecute offences relating to financial crime. However, despite this, the number of FCA criminal prosecutions remains low and the FCA primarily tends to focus on its role as a regulator. For more information, see [Practice note, FCA: role, governance and powers: Roles of the FCA](#).

WHO CAN THE FCA PROSECUTE?

The FCA can bring prosecutions in respect of individuals and commercial entities defined as partnerships, unincorporated associations and bodies corporate. It is, however, important to note that certain offences can only be committed by individuals (unless a prosecutor can satisfy the "identification doctrine" in order to prosecute the entity; for more information, see [Country Q&A, Financial crime in the UK \(England and Wales\): overview: Corporate liability](#)). In addition, sections 400(1)-(3) and (6) of FSMA provide that, if an offence committed by a body corporate, partnership or unincorporated association is shown to have been committed with the consent or connivance of an officer or partner, or is attributable to neglect on the part of the officer or partner, both the officer or partner and the commercial entity are guilty of an offence and liable to be proceeded against and punished.

The definitions of "officer" and "partner" are set out in sections 400(4) and (5) of FSMA. These definitions include anyone purporting to be either an officer or partner.

DECISIONS TO PROSECUTE

In [EG 12.1.2](#), the FCA states that its general policy is to "pursue through the criminal justice system all those cases where criminal prosecution is appropriate."

"DUAL TRACK" FCA INVESTIGATIONS IN MARKET ABUSE AND MONEY LAUNDERING CASES

In Chapter 3 of its [Approach to Enforcement](#), the FCA states that, if it is investigating a breach that might be the subject of criminal or civil proceedings, it will not decide straight away whether the investigation seeks to determine a criminal or civil breach. For example, in money laundering and market abuse cases an investigation might lead to either regulatory or criminal proceedings. The FCA's stated approach in these circumstances is to make sure it fully understands what kslaw.com



may have happened and then make a decision on which route to pursue, based on the best admissible evidence available.

To illustrate this, in an April 2019 *speech*, Mark Steward, FCA Director of Enforcement and Market Oversight, considered anti-money laundering (AML) investigations. He noted that the FCA was investigating suspected breaches of the MLRs 2017 that might give rise to either criminal or civil proceedings. He referred to these AML investigations as "dual track" and explained that, in his view, taking this approach ought not to be controversial on the basis that:

- It would be inconsistent with the investigative mindset to narrow the scope of potential outcomes provided for by the law before any inquiries have been made or an assessment carried out of the nature of the matter under investigation.
- This practice brings AML investigations into line with the FCA's practice in market abuse investigations, which have been conducted on a dual track basis for many years.
- It is time to give effect to the full intention of the MLRs 2017, which provide for criminal prosecutions.

However, Mr. Steward went on to say:

This does not mean every investigation where we think there is a case to answer will or should be prosecuted in this way. I suspect criminal prosecutions, as opposed to civil or regulatory action, will be exceptional. However, we need to enliven the jurisdiction if we want to ensure it is not a white elephant and that is what we intend to do where we find strong evidence of egregiously poor systems and controls and what looks like actual money-laundering."

To date, the FCA has not yet brought a criminal prosecution under the MLRs 2017.

CODE FOR CROWN PROSECUTORS

When considering whether to commence criminal proceedings, the FCA will apply the basic principles set out in the *Code for Crown Prosecutors* (CCP) as well as its own guidance.

The CCP is a two-stage test, also known as the Full Code Test, and consists of the evidential and the public interest tests.

- For the **evidential test** to be met, there must be a realistic prospect of conviction in respect of each suspect and in respect of each charge. The prosecutor should make their assessment objectively and in doing so consider the impact of any possible defence.
- Examples of the issues a prosecutor should consider are admissibility, credibility and accuracy of the evidence as well as the importance of the evidence to the case.
- Assuming the evidential test is satisfied, the prosecutor should then consider whether prosecution is in the **public interest**. The CCP provides a lengthy and non-exhaustive list as to what those issues might be.
- Examples include how serious the offence is, the level of involvement or culpability of the suspect, the impact on the victim and community, the age or mental capabilities of the suspect and whether the prosecution is proportionate in all the circumstances.

In cases relating to alleged breaches of the MLRs 2017, EG 12.1.2 confirms that the FCA will also consider whether the person has followed the guidance on the prevention of money laundering/combating terrorist financing issued by the Joint Money Laundering Steering Group (JMLSG guidance).

This is consistent with provisions in the MLRs 2017 (as well as in POCA and the Terrorism Act 2000) that require a court to take into account industry guidance that has been approved by a Treasury minister when considering whether a person within the regulated sector has failed to comply with relevant regulations or has committed specified offences. The JMLSG guidance has been approved for these purposes. For more information, see Practice note, JMLSG AML and CTF guidance for the financial services sector.

The FCA also provides (in EG 12.3) further general guidance in relation to criminal prosecutions in cases relating to market abuse. This is considered in the Specific FCA considerations in market abuse cases section below.

ADDITIONAL FCA CIVIL OR REGULATORY ACTION?

EG 12.1.4 sets out the factors the FCA may take into account when considering whether to pursue additional civil or regulatory action after criminal proceedings have commenced or will be commenced. These factors are whether:

- The action might unfairly prejudice the prosecution or proposed prosecution.
- The action might unfairly prejudice the defendant in the conduct of their defence.
- It is appropriate to take that action having regard to the scope of the criminal proceedings and the powers available to the criminal courts.

Such civil or regulatory action might include, injunctions, restitution orders, variation and/or cancellation of permission, and prohibition of individuals.

Even if regulatory action has taken place, in certain circumstances the FCA may also commence criminal proceedings, as happened in *R v Lewis [2013]*. In that case, the failure to comply with a prohibition order was the primary reason for the FCA's decision to also commence criminal proceedings.

For more information, see [Legal update, Former mortgage broker sentenced to two years for fraud and breach of prohibition order](#).

In relation to mediation, the FCA makes clear in its [Enforcement Information Guide](#) (dated April 2017) that mediation is unlikely to be appropriate in cases where it is contemplating bringing a criminal prosecution or where it needs to take urgent action.

MARKET ABUSE CASES: CIVIL/REGULATORY VS CRIMINAL

Before the Market Abuse Regulation (596/2014) (MAR) came into effect on 3 July 2016, market manipulation cases were pursued under section 118 of FSMA, which contained (amongst other things) civil offences in relation to six types of market abuse (see [Practice note, Market abuse: the types of behaviour \(pre-MAR regime\)](#) for background).

The relevant sections of FSMA were repealed with effect from 3 July 2016 and, for UK purposes:

- The civil and regulatory market abuse regime is now contained in MAR, see:
 - [Practice note, MAR: insider dealing](#).
 - [Practice note, MAR: market manipulation](#).
 - [Practice note, MAR: unlawful disclosure of inside information](#).
- The FCA will pursue criminal prosecutions for market abuse under:
 - Sections 89 - 91 of the FS Act 2012, see [Practice note, False or misleading statements and impressions: criminal offences and FCA powers](#); or

- The Fraud Act 2006, see *Practice note, Fraud: compliance and enforcement issues for financial institutions: Offences*.

For an overview of the application and enforcement of the US and UK legal and regulatory regimes in relation to the manipulative trading behaviour known as “spoofing”, see *Practice note, “Spoofing” the market: a comparison of US and UK law and enforcement*. (See also)

SPECIFIC FCA CONSIDERATIONS IN MARKET ABUSE CASES

In *EG 12.3.2*, the FCA sets out the factors it may consider when deciding whether to pursue a criminal prosecution for market misconduct or simply impose a regulatory sanction for market abuse. The non-exhaustive list of factors includes:

- The seriousness of the misconduct.
- Whether there are victims and, if so, how many.
- Whether there has been a loss or profit and the extent of it.
- The effect of the misconduct on the market.
- Whether there are grounds for believing that the misconduct is likely to be continued or repeated.
- Previous convictions and likelihood of repeated offences.
- Redress and whether a criminal prosecution may impact on that redress.
- Any voluntary co-operation with the FCA including providing evidence against others.
- Whether the conduct involved was dishonest or an abuse of position.
- Where the misconduct was carried out by a group, the particular role played by the individual in question.
- Other personal circumstances that may be relevant.

EG 12.3.4 makes clear that it is the FCA’s policy not to impose sanctions for market abuse in respect of a person who has been or is being prosecuted for market misconduct arising from the same facts. This includes where a person has been acquitted.

FCA ANCILLARY POWERS

STATUTORY POWER TO OBTAIN DOCUMENTS

Section 165 of FSMA allows the FCA to request an authorised person, or a person connected with the authorised person, to provide specified information or documentation.

An inspector appointed under section 167 or 168 of FSMA has the power to require the production of information under sections 171 and 172 of FSMA, which includes requiring a person to attend an interview and answer questions. Failure to comply with such requirements amounts to contempt of court.

Significantly, statements given under compulsion by a person subsequently charged in criminal proceedings cannot be used in evidence against that person in those proceedings under section 174(2) of FSMA. However, this does not apply to cases brought under section 177 or 398 of FSMA (where the allegation is that the person has given misleading or false information), nor does it apply to documents obtained under compulsion (*Attorney General’s Reference (No 7 of 2000) [2001] EWCA Crim 888*).

SEARCH AND SEIZURE

Section 176 of FSMA gives the FCA the power to apply to the magistrates' court for a warrant to search and seize documents or information. To grant such a warrant, the court must be satisfied that the requirements in subsections (2), (3) or (4) are met.

POWER TO VARY PERMISSIONS, IMPOSE REQUIREMENTS OR CHANGE INDIVIDUALS' APPROVALS

Part 4A of FSMA gives the FCA the power to vary permissions, impose requirements or change individuals' approvals under FSMA. These powers can be used to prevent harm from becoming serious and compel firms to examine their conduct and address harm.

These powers are often used where serious misconduct is suspected and harm needs to be prevented immediately, and are therefore a useful part of the FCA's enforcement and supervisory toolkit.

In many cases, the FCA will request that a firm voluntarily accepts a variation or requirement (VREQ). However, it also has the power to impose any variation or requirement under its own initiative powers (OIREQ); for example, if a firm refuses to voluntarily accept. (See Chapter 2 of the *Approach to Enforcement* for more information.)

UNEXPLAINED WEALTH ORDERS

Section 362A (7)(d) of POCA, inserted by way of the Criminal Finances Act 2017, gives the FCA authority to apply to the High Court for an unexplained wealth order (UWO).

An UWO can only be sought against a politically exposed person, or where there are grounds for suspecting that the respondent (or a person connected with the respondent) is or has been involved in serious crime (*sections 362B(4)(a)-(b), POCA*). There must also be reasonable grounds to believe that the respondent holds the property in question and that the value of the property is greater than £50,000 (*section 362B(1)-(2), POCA*).

If granted, the UWO will require the respondent to provide a statement setting out how the property was obtained and the nature and extent of the respondent's interest in the property. Failure to respond or provide an adequate response results in a presumption that the property is recoverable under Part 5 of POCA. Once an UWO has been granted, the FCA can also apply for an interim freezing order under Section 362J of POCA.

For more information on UWOs, see *Practice note, Unexplained wealth orders*.

IMMUNITY AGREEMENTS UNDER SOCPA

In 2010, the FCA was given the power to enter into immunity agreements with suspects pursuant to section 71 of the Serious Organised Crime and Police Act 2005 (SOCPA).

EG 12.3.2(12A) supplements this in the context of criminal prosecutions in cases of market abuse, stating:

"Where the misconduct in question was carried out by two or more individuals acting together and one of the individuals provides information and gives full assistance in the FCA's prosecution of the other(s), the FCA will take this co-operation into account when deciding whether to prosecute the individual who has assisted the FCA or bring market abuse proceedings against [that individual]."

To date, immunity agreements under SOCPA have not been widely used by the FCA.

For more information, see *Practice note, Insider dealing: overview: FCA, PRA and BoE powers under SOCPA to grant immunity from prosecution and other protections to witnesses*.



SURVEILLANCE AND CHIIS

Pursuant to sections 28 and 29 of the Regulation of Investigatory Powers Act 2000 (RIPA 2000), the FCA also has the power to conduct surveillance and use informants (otherwise known as covert human intelligence sources (CHIISs)). This does not extend to the interception of communications.

For more information, see [Practice notes, RIPA: surveillance and RIPA: covert human intelligence sources](#).

DEFERRED PROSECUTION AGREEMENTS

Presently, Schedule 17 of the Crime and Courts Act 2013 (CCA 2013), which introduced the deferred prosecution agreement (DPA) into the UK criminal justice system, does not allow for the FCA to enter into a DPA. This option is currently restricted to the Serious Fraud Office (SFO) and the Director of Public Prosecutions (DPP).

However, DPAs are not entirely irrelevant from consideration in the context of FCA enforcement action. Following the [DPA](#) entered into between Tesco Stores Ltd (TSL) and the SFO in April 2017 (published in full in January 2019), the FCA used section 384 of FSMA for the first time to require a listed company to pay compensation for market abuse.

The FCA issued a [*final notice*](#) to Tesco plc which had published a trading update on 29 August 2014 in which it stated it expected trading profit for the six months ending 23 August 2014 to be in the region of £1.1bn (August Statement). In issuing the August Statement, the Tesco plc Board had relied on information provided to it by TSL that was incorrect. The FCA considered that the behaviour of TSL and Tesco plc constituted market abuse contrary to section 118(7) of FSMA (that is, one of the market abuse behaviours under the pre-MAR market abuse regime).

Under the final notice, the FCA required TSL and Tesco plc to pay restitution to appropriate persons, but it did not pursue additional civil sanctions. The final notice states:

"In the circumstances of this case, the [FCA] does not consider it would be appropriate to impose a penalty. The [FCA] believes that its objectives may appropriately be achieved by means of a public censure and the requirement to pay restitution, given that [TSL] will pay a substantial penalty pursuant to the DPA, and given the exemplary co-operative approach taken by Tesco plc and [TSL] both with the FCA and the SFO."

(TSL's and Tesco plc's exemplary co-operation with the FCA and the SFO, included, in particular, refraining from interviewing individuals and voluntarily disclosing information.)

The FCA also co-ordinated the announcement of its final notice with the announcement by the SFO of the TSL DPA and acknowledged the significant assistance and co-operation provided by the SFO.

For more information on the TSL DPA and the FCA's final notice, see:

- [Legal update, £129m DPA with Tesco Stores Ltd confirmed in principle and compensation scheme agreed for shareholders following a finding of market abuse by the FCA.](#)
- [Legal update, Market abuse: FCA final notice for false or misleading impression.](#)
- [Legal update, SFO agrees DPA with Tesco Stores Ltd.](#)
- [Legal update, Tesco Stores Ltd DPA published.](#)

There is scope under Part 1, section 3(1)(c) of the CCA 2013 for the Secretary of State to designate additional prosecution authorities that may enter into DPAs. It is anticipated that the FCA will be designated at some point.

For more information on DPAs, see [Practice note, Deferred Prosecution Agreements: overview](#).



PENALTIES

In respect of any criminal convictions secured by the FCA, the penalties will be those set out in the respective legislation. This includes imprisonment as well as fines.

In certain circumstances, the FCA may decide to issue a caution instead of pursuing a prosecution, in which case [EG 12.2.1](#) states that the FCA will have regard to the Home Office Guidance on the cautioning of offenders, as contained in the Home Office Circular 16/2008 (although this has since been replaced by the Ministry of Justice's [Guidance on Simple Cautions for Adult Offenders](#), the most recent version of which came into effect on 13 April 2015).

In cases where a formal caution is given, it will not be published, but it will be kept by the FCA and on the Police National Computer (PNC) (where it will be available to parties with PNC access). It will also form part of the relevant individual's or firm's regulatory record. The FCA can therefore take this into account when considering, for example, whether a person is fit and proper under [FIT 2.1.3G](#) ([EG 12.2.2](#)).

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