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UK FCA Annual Report 2019/20 – Key Takeaways

26 October 2020

Litigation and Investigations

Recent press coverage reports that 2020 has seen a significant drop-off in enforcement activity by the UK's financial services regulator, the Financial Conduct Authority (the "**FCA**") with new enforcement cases against companies down 76 percent[1] and a number of open cases now closed.[2] However, this will likely be a temporary shift only as the FCA pivots to meet the uncertainty and twin-challenges presented by the Covid-19 lockdowns and Brexit.

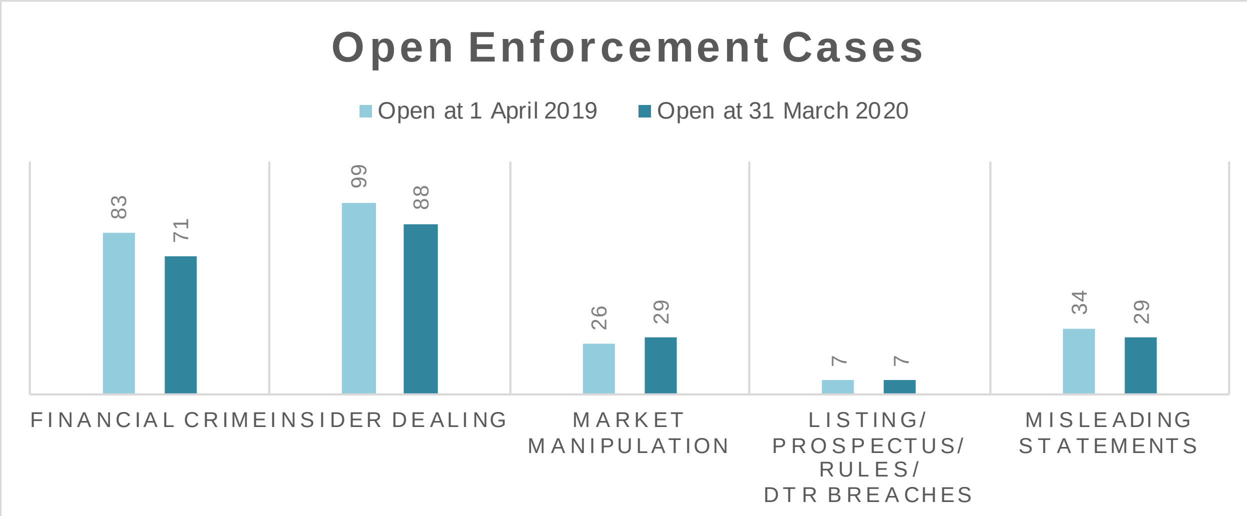
In this update, we look at the FCA's Annual Report and Accounts for the year 2019/20 (the "**Report**"), pre-Covid-19, and set out key takeaways of what we can expect as the regulator and its enforcement teams adapt to new modes of working, and its new leadership.[3]

Enforcement

In recent years, the FCA's work in enforcement has been steady: 15 financial penalties totaling £224 million were issued in the 2019/2020 period, compared to 16 penalties totaling £227.3 million in the prior period. The number of open cases in key enforcement areas remains largely unchanged[4] (see table below for statistics on open cases in key areas, financial crime; insider dealing; market manipulation; listing prospectus, DTR and rules breaches; and misleading statements, for example). Market abuse, too, remains a focus - having received 5,336 Suspicious Transaction and Order Reports from industry, and 788 external notifications, the FCA opened 415 preliminary market abuse reviews and commenced 53 enforcement investigations during the period, and reports 102 non-enforcement actions.

What is more notable though is that the average spend on investigations has doubled (£103,400 spent in 2018/19 against £229,000 in 2019/20), and cases took longer to resolve - the average time to close regulatory and civil cases increasing by 36 percent.[5] While the 2020/21 period might buck this trend, these figures will no doubt have received close attention within the FCA.

[1] "*FCA action against companies dropped at start of pandemic*", Financial Times, 11 October 2020.
[2] "*FCA's reputation is at risk if it fails to defend a market ripe for abuse*", The Times, 13 October 2020.
[3] Alongside the addition of several new non-executive directors, on 1 October 2020 the FCA welcomed a new Chief Executive, Nikhil Rathi, previously of the London Stock Exchange.
[4] FCA's Enforcement data - Annual Report 2019/20.
[5] An average of 17.5 months in 2018/19 against 23.9 months in 2019/20.



Priorities

The FCA remains focused on issues which cut across sectors, including financial crime, governance, operational resilience, and EU withdrawal, and is acutely aware of the unprecedented challenges which Covid-19 presents. But the message is clear - notwithstanding remote working and the disruption of Covid-19, firms must be vigilant in detecting market abuse; continue to test and identify weaknesses in their operational resilience including their cyber capabilities; address vulnerabilities in processes; and, importantly, be prepared to make prompt and clear announcements to the market when disruptions occur. The FCA wants firms to take responsibility for addressing heightened volatility and disruption caused by the pandemic and to be aware that the pandemic cannot be used a defence.

The FCA is continuing to prioritise the expansion of the Senior Managers and Certification Regime ("**SM&CR**") to all FSMA-authorised firms, although the deadline for solo-regulated firms to have completed the first assessments of the fitness and propriety of their Certified Persons has been extended to 31 March 2021. This is consistent with the FCA's pursuit of holding individuals accountable in an effort to drive change within organisations. Even absent the SM&CR rules, the FCA reports it has been taking action against individuals in relation to market disclosures and failures to maintain adequate systems and controls, including imposing financial penalties against senior individuals for being knowingly concerned in breaches by their company.

It is also notable that the FCA continues to press forward with initiatives around climate change and green finance, aiming to improve climate-related disclosures, ensure firms consider material climate-related financial risks when making market disclosures and to improve consumer access to green financial products and services.

Financial Crime

The FCA currently has 65 active AML investigations, which represents a slight increase from the previous year.[6] However, there are doubts as to whether the FCA is making full use of its criminal enforcement powers in tackling money laundering. Figures released under a recent freedom of information request show that, so far in 2020, the FCA has discontinued seven out of fourteen of its criminal investigations into violations of the money laundering regulations ("**MLRs**"). Five of the discontinued inquiries were solely criminal probes; the other two could have resulted in either criminal or civil proceedings. Although the FCA will no doubt be eager to secure its first prosecution under the MLRs, these figures suggest that the authority will continue its approach of reserving criminal action for only the most egregious violations.

Reported authorised push payment fraud ("**APP fraud**")[7] increased to £455 million in 2019, up from £354 million in 2018. A sharp spike in these scams has been clear during the pandemic. The FCA reports it has improved protections for consumers in the last year, including via the Contingent Reimbursement Model Code, which requires signatory banks to take steps to prevent APP scams, and notes that reimbursements to victims of APP fraud increased by 40 percent in 2019. However, consumer protection in this area is still fairly weak, with some victims having to resort to civil litigation against the banks to recover their losses. With APP fraud on the rise, implementing more robust protections for consumers may become a priority for the FCA in the coming years.

The FCA has increased its collaboration with government bodies and international partners in efforts to tackle financial crime. In 2019/20, the FCA seconded staff to the National Economic Crime Centre to work on cases relating to money laundering and fraud. It also provided expert assessors to several FATF evaluations and supported an OECD anti-bribery and corruption evaluation. With financial crime schemes increasingly transcending national borders, cooperation with international enforcement bodies is fundamental to successful enforcement action, and we expect the FCA to continue forging close ties with its international partners in the coming years.

The FCA also highlighted the prevalence of fraud in the UK, generally. According to a FCA survey, at least 10 percent of UK adults have encountered an unsolicited approach, which may have been part of a fraudulent scheme, in the past 12 months. A key component of the FCA's efforts to tackle fraud has been to educate consumers through its ScamSmart campaign through which it provides information, knowledge, and tools to prevent consumers falling victim to financial fraud. In 2019, ScamSmart launched a campaign targeted at investment scams carried out via online trading platforms—a campaign that encouraged consumers to be sceptical of 'get rich quick' trading opportunities promoted online, which have proliferated in the last year.

Competition

Building on the FCA's first formal decision under its competition enforcement powers in February 2019, fining two asset management firms, concurrent competition enforcement continues to be a priority for the FCA, with a particular focus on the investment consultancy,

[6] 60 ongoing AML investigations for the year 2018/19 and 65 for 2019/20.
[7] APP fraud occurs when a fraudster deceives a consumer into making a payment to a bank account controlled by the fraudster, usually by masquerading as an existing business partner.

fiduciary management, and digital markets. In December 2019, the FCA published a Call for Input, with the aim of developing a clear framework for open finance, as part of its efforts to ensure consumers receive fair value for their digital investments, as digital markets and open banking platforms continue to proliferate. The FCA worked with the Competition and Markets Authority ("**CMA**") to produce the Investment Consultancy and Fiduciary Management Market Investigation Order, requiring fiduciary managers and investment consultants to provide clearer information about what their customers receive for their money, whilst incentivising pension scheme trustees to shop around for services. The FCA plans to consult on how to transpose these reforms to the sector and will review their effectiveness.

Unfair pricing and/or price discrimination also remains an area of concern for the FCA, as evidenced by the ongoing work undertaken to respond to the CMA's recommendations in response to the Citizens Advice super-complaint on loyalty pricing issues in September 2018. The super-complaint raised issues in several markets across the economy, including three financial services markets: cash savings, insurance and mortgages. The CMA published its response to the super-complaint in December 2019, with a number of recommendations for these relevant markets. In July 2019, the FCA published a Feedback Statement to its Discussion Paper on Fair Pricing in Financial Services, explaining how it intends to determine when pricing practices are unfair using a six-question framework. The first application of the Framework will be in the General Insurance Pricing Practices Market Study (the publication of which is delayed due to the pandemic).

Looking Forward

In the immediate term, beyond the ongoing challenges that Covid-19 is presenting and the associated impact on financial markets, the FCA is working with the Treasury and Bank of England to continue on-shoring EU legislation to accommodate Britain's withdrawal from the EU; and is continuing the transition away from LIBOR, the end of 2021 still the target date.

In welcome news to market participants and their advisors, the FCA has also indicated that its Handbook could be amended following feedback that it is too complex and difficult to navigate, so that will certainly be something to look out for in coming years.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Litigation and Investigations, Competition and Regulatory practices:

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