

A new perspective on the FCA's focus on market abuse

The FCA's focus on market abuse is nothing new. Frequent references to the FCA's focus on tackling market abuse have featured in every single one of its Business Plans since 2013/14, with similar references also running through FSA's Business Plans beforehand.

So why have I chosen to write about market abuse now? This year has been almost unprecedented in terms of how much focus the FCA has placed on market abuse. For example, the FCA made a total of 44 references to market abuse across almost a quarter of all speeches it

made during 2020, many of which (but not all) were linked to the Covid-19 pandemic. In addition, since September 2020 the FCA has taken or proposed taking enforcement action against two individuals for market manipulation, marking the FCA's first enforcement activity in this area since 2017. The FCA also continues to have an exceptionally high number of open market abuse enforcement investigations, which represent a significant portion of its overall enforcement portfolio.

New and increased market abuse risks in light of Covid-19 pandemic

The Covid-19 pandemic has led to a shift in the relative prevalence of certain market abuse risks, as well as a change to the circumstances in which these risks may arise. As Julia Hoggett, FCA Director, Market Oversight, summarised in a [speech](#) delivered in October 2020: *"whilst the fundamentals of the market abuse offences are constant, the ways in which the risk may manifest are not"*.

Factors that have contributed to this shift include volatile and rapidly changing markets and concerns about appropriate handling of inside information, especially in an environment where the majority of firms' employees continue to work from home and there have been growing reports of employees using personal devices to communicate for work purposes. The FCA has also observed a significant uptick in personal account trading since March 2020, which has given rise to concerns about the extent to which employees may be

misusing inside information that they are privy to as part of their roles and/or whether they are complying with their firms' personal account dealing policies.

The FCA has also warned in another recent [speech](#) that financial pressures on firms caused by Covid-19 could tempt them to "cut corners" when it comes to their systems and controls, thereby increasing the likelihood of market abuse alongside other forms of misconduct.

However, the FCA's commentary in relation to market abuse during 2020 has not focused solely on Covid-19. For example, and as indicated by a [speech](#) made in early March, the FCA has started to consider and discuss the potential market abuse risks associated with the activities of cryptocurrency networks.

Market abuse enforcement activity

As at 31 March 2020, the FCA had 117 open enforcement investigations into suspected market abuse (10% less than it did as at the same date in 2019), 54 (46%) of which were opened during 2019/20. These enforcement investigations accounted for 18% of all open FCA enforcement investigations at that date.

Conor Foley (enforcement action)

In September 2020, the FCA announced that it had taken enforcement action against Conor Foley, the former Chief Executive Officer of WorldSpreads Ltd (WSG), a financial spread-betting company, for committing market abuse. As set out in the [final notice](#), the FCA's findings fell into two categories:

- Some of the FCA's findings related to Mr Foley's role in preparing and approving materially misleading documentation that was used in connection with WSG's flotation on the Alternative Investment Market. The FCA found that Mr Foley had engaged in market abuse contrary to

However, only a very small proportion of FCA enforcement investigations into suspected market abuse have resulted in enforcement action. In the last five years, the FCA has taken enforcement action against 10 firms or individuals for substantive market abuse offences and proposed doing so in relation to one additional individual. Two of these cases were publicised in September 2020.

section 118(7) of the Financial Services and Markets Act 2000 (FSMA) by disseminating information that gave a false and misleading impression of WSG's financial position.

- The FCA also found that Mr Foley had placed large spread bets on WSG shares through the trading accounts of certain WSG clients. These spread bets led to the purchase of a large number of WSG shares from the market, which gave a false and misleading impression as to the demand for WSG shares contrary to sections 118(5) and (6) of FSMA.

Corrado Abbattista (enforcement action)

In December 2020, the FCA took enforcement action against Corrado Abbattista, a portfolio manager, for market abuse.

As set out in the FCA's [final notice](#), between 20 January and 15 May 2017, Mr Abbattista placed large orders for contracts for difference referencing the shares of five listed issuers, which he did not intend to execute. He placed the misleading orders on the opposite side of the order book to existing smaller orders, which he did intend to execute. The FCA found that, by placing the misleading orders, Mr Abbattista falsely represented to the market an intention to buy or sell, when his true intention was the opposite. This, in turn, gave false and misleading signals as to demand/supply because Mr Abbattista did not place the misleading orders with a genuine intention that they would be executed. For example, when Mr Abbattista placed a large misleading buy order, it would likely have created the impression that there was a material buyer in the market when in fact there was not.

Overall, the FCA found that Mr Abbattista's trading would likely have had a material impact on other market participants, may have caused other market participants to alter their trading strategies and would have created a false and misleading impression regarding the true supply and demand for the shares in question.

The FCA found that Mr Abbattista had recklessly engaged in market manipulation as defined in Article 12(1)(a) of the Market Abuse Regulation (596/2014) (MAR) by placing the misleading orders. The FCA found that the misleading orders gave, or were likely to have given, false or misleading signals as to the supply of, or demand for, shares in the companies, in contravention of Article 15 of MAR.

This is the first case where the FCA has taken enforcement action against a firm or an individual for committing one of the three substantive offences under MAR, namely insider dealing, market manipulation and unlawful disclosure. It also considers some important points about the distinction between being prepared to execute a trade and actually intending to execute a trade. Mr Abbattista attempted to argue that such a distinction did not exist, which was rejected by the FCA.

Although Mr Abbattista originally referred the FCA's decision to the Upper Tribunal, he withdrew his reference in November 2020 which led to the FCA's publication of its final notice.

Identifying potentially suspicious activities

In her October 2020 [speech](#), Julia Hoggett pointed to the Covid-19 pandemic as an example of why firms' approaches to identifying potential market abuse cannot remain static. The FCA observed a reduction in the number of suspicious transaction and order reports (STORs) that firms filed in the early months of the pandemic. However, it did not observe a decrease in the quality of STORs filed during that period or a significant number of "missing" STORs compared with its own surveillance. In any event, the FCA has said that even if exceptional market conditions result in firms' systems generating more suspicious trading alerts and/or make it more difficult for firms to identify unusual market activity, firms should still *"assess the evidence, apply context and make informed decisions"*. The FCA has made it clear that it does not *"expect firms to submit poor quality STORs, simply because they have had more alerts"*.

In recent years the FCA has invested heavily in its internal market abuse surveillance systems. For example, in a [speech](#) delivered in February 2020, Mark Steward, FCA Director of Enforcement and Market Oversight, described how the FCA:

"[M]ade a strategic decision to ingest the equity order book into our Markets Data Processor because it is very difficult, if not impossible, to detect trading manipulation with transaction data alone. Indeed, I cannot imagine how there could be any sensible attack on such manipulation without an ability to surveil the order book in a consolidated way in tandem with transaction reports, which is what we are now able to do."

Now we can look for manipulative trading more easily and the proportion of investigation work is now split 60:40 between insider dealing and manipulation. This is a big change from relatively recent days when our wholesale investigation caseload was almost exclusively based on suspected insider dealing".

The Abbattista case mentioned above is an example of how the FCA has used this additional market information to identify suspected market abuse. In its [press release](#) relating to the Abbattista case, the FCA explained that Mr Abbattista's trading activity was initially identified by the FCA's internal surveillance systems, which, *"[ingest] order book data from the leading UK equity trading venues and then [run] surveillance algorithms, designed to identify potentially abusive behaviours, across that consolidated data set"*.

Investigating suspected market abuse

The FCA has also made clear what its expectations are for firms in relation to investigating suspected market abuse. It chose the September 2020 edition ([issue 65](#)) of its

Market Watch newsletter to highlight the importance of firms observing the confidentiality restrictions in FCA information requirements.

Confidentiality restrictions

Formal information requirements issued by the FCA typically contain some form of wording to make it clear that they are confidential. However, the FCA typically reserves the most stringent confidentiality wording and restrictions for information requirements issued in the context of investigations into suspected market misconduct, including suspected market abuse and insider trading. In these situations, the FCA usually requires the fact of, and contents of, an information requirement to be kept strictly confidential and only discussed with other individuals (that is, outside Legal or Compliance) on a "need to know basis" with the prior agreement of the FCA.

The main driver for these confidentiality restrictions is to avoid *"the inappropriate dissemination of knowledge of [the FCA's] enquiries"*. In particular, the FCA is concerned about the risk that subjects of their investigations may be tipped off, which could prejudice their investigations and/or lead to the destruction of relevant evidence.

The FCA highlighted the importance of firms complying with these confidentiality restrictions in issue 65 of Market Watch, noting that firms that fail to do so *"run the risk of regulatory scrutiny or action" as well as "reputational damage"*.

A real-life example

To underline the importance of firms complying with confidentiality restrictions in information requirements, the FCA referred in issue 65 of Market Watch to a real-life situation involving an unnamed firm. In that case, the FCA stated that it required the firm to provide records of staff access to inside information for a takeover for which the firm was acting as an advisor.

The information requirement sent to the firm explained that it was confidential and should not be shared outside the firm's Compliance team without first consulting the FCA. However, without first consulting the FCA, the firm's Compliance team contacted the deal team working on the takeover in order to help gather the information that was responsive to the FCA's information requirement.

Compliance identified unauthorised and repeated access to files containing information about the takeover by an employee who was not on the deal team and had no reason to access inside information about the takeover. Compliance communicated this information to the deal team. Without consulting Legal or Compliance, a member of the deal team questioned the relevant employee about their access to the inside information relating to the takeover. This employee resigned from their role at the firm and left the country, which according to the FCA "severely" hindered its ability to investigate the situation.

What should firms do?

When firms receive information requirements from the FCA, they should check what confidentiality restrictions they contain. In particular, firms should check if there are any restrictions on the fact or contents of the information requirement being shared outside Legal and/or Compliance.

Even if an FCA information requirement does not contain such restrictions, firms should consider whether sharing the fact or contents of the information requirement more widely could result in tipping off the potential subject of the FCA's investigation. If firms are in any doubt about what confidentiality restrictions apply to an FCA information requirement, they should contact the FCA.

In issue 65 of Market Watch, the FCA acknowledged that firms may need to speak to individuals outside Legal and/or Compliance in order to gather information that is responsive to an information requirement. If firms need to consult the FCA, firms should ensure that they do so before speaking to these individuals. When consulting the FCA, firms should be prepared to provide the FCA with the identities of individuals they need to speak to in order to gather responsive information, as well as any risks that are associated with speaking to those individuals (for example, if they work closely with someone who is the subject or potential subject of the FCA's investigation). If information requested by the FCA can only be obtained from individuals who are the actual or potential subjects of the FCA's investigation, firms should explain this point to the FCA.

If the FCA is consulted and is satisfied for firms to speak to individuals outside Legal and/or Compliance in order to gather information that is responsive to an information requirement, firms should:

- Emphasise the confidential nature of their enquiries when speaking to these individuals and the consequences of confidentiality not being maintained.
- Inform these individuals that they should not speak to anyone else in order to obtain the information sought. These individuals should also be told that, if they think that someone else may be better placed to provide certain information, they should inform Legal and/or Compliance instead of approaching these other individuals directly.

In the same newsletter, the FCA says that individuals may be told (subject to obtaining the FCA's prior consent) that the information they are being asked to provide is "*required to fulfil an FCA information requirement*". In practice, it may not always be necessary to inform an individual that this is the case in order to obtain relevant information from them.

Confidentiality restrictions that are included in FCA information requirements do not prevent the recipients of those requests seeking advice from their legal advisers and information requirements usually expressly state this point. As a result, the contents of issue 65 of Market Watch do not impact firms' abilities to receive specialist legal advice in relation to FCA investigations and information requirements.

Destruction of evidence: a warning from the FCA

Under section 177(3)(a) of FSMA, a person who knows or suspects that an investigation is being or is likely to be conducted under Part XI of FSMA is guilty of an offence if they falsify, conceal, destroy or otherwise dispose of a document which they know or suspect is or would be relevant to such an investigation. This is a criminal offence punishable on conviction by a fine and/or up to two years' imprisonment, unless the individual can show that they did not intend to conceal facts disclosed by the relevant documents from an investigator.

In 2019, the FCA commenced criminal proceedings against an individual in relation to one count of destroying documents, which the FCA alleged that the individual knew

or suspected were or would be relevant to its investigation into them for insider dealing. This was the first prosecution brought by the FCA in relation to destruction of documents under FSMA.

The individual pleaded not guilty and, on 28 September 2020, a jury found them not guilty. The FCA stated in a [press release](#) that it was "*disappointed with the outcome*" in this case. However, it added that it "*will take action whenever evidence we need is tampered with or destroyed*", a point which was no doubt emphasised by its decision to prosecute the individual in relation to this matter in the first place.

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This article first appeared on Practical Law (www.practicallaw.com) and is published with the permission of the publishers.

This article has been updated since it was originally published, to reflect the fact that the FCA has now taken enforcement action against Mr Abbattista.

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