

# Chapter 10

## Injunctions

## 10.1 Introduction

**10.1.1** An exceptionally urgent case in these circumstances is one where the *FCA* staff believe that a decision to begin proceedings

- (1) should be taken before it is possible to follow the procedure described in paragraph ■ 10.1.2; and
- (2) it is necessary to protect the interests of consumers or potential consumers.

**10.1.2** The orders the court may make following an application by the *FCA* under the powers referred to in this chapter are generally known in England and Wales as *injunctions*, and in Scotland as *interdicts*. In the chapter, the word '*injunction*' and the word '*order*' also mean '*interdict*'. The *FCA*'s effective use of these powers will help it work towards its *operational objectives*, in particular, those of securing an appropriate degree of protection for *consumers*, protecting and enhancing the integrity of the *UK financial system* and promoting effective competition in the interests of *consumers* in the markets.

**10.1.3** Decisions about whether to apply to the civil courts for injunctions under the *Act* will be made by the *RDC* Chairman or, in an urgent case and if the Chairman is not available, by an *RDC* Deputy Chairman. In an exceptionally urgent case the matter will be decided by the director of Enforcement or, in his or her absence, another member of the *FCA*'s executive of at least director of division level.

## 10.2 Section 380 (injunctions for breaches of relevant requirement<sup>9</sup>) and section 381 (injunctions in cases of market abuse): the FCA's policy

<sup>9</sup> Under sections 380(6)(a) and (7)(a), a 'relevant requirement' in relation to an application by the appropriate regulator means a requirement: which is imposed by or under the Act or by a qualifying EU provision specified, or of a description specified, for the purpose of subsection 380(6) by the Treasury by order; or which is imposed by or under any other Act and whose contravention constitutes an offence mentioned in section 402(1) of the Act; or which is imposed by the *AIFMD UK regulation*. The definition of "appropriate regulator" is set out in subsections 380(8) to (12) of the Act.

### 10.2.1

The court may make three types of order under these provisions: to restrain a course of conduct, to take steps to remedy a course of conduct and to secure assets. As is explained below, the court may also make an order freezing assets under its inherent jurisdiction. In certain cases, the *FCA* may seek only one type of order, although in others it may seek several.

### 10.2.2

The broad test the *FCA* will apply when it decides whether to seek an *injunction* is whether the application would be the most effective way to deal with the *FCA*'s concerns. In deciding whether an application for an *injunction* is appropriate in a given case, the *FCA* will consider all relevant circumstances and may take into account a wide range of factors. The following list of factors is not exhaustive; not all the factors will be relevant in a particular case and there may be other factors that are relevant.

- (1) The nature and seriousness of a contravention or expected contravention of a relevant requirement. The extent of loss, risk of loss, or other adverse effect on *consumers*, including the extent to which *client* assets may be at risk, may be relevant. The seriousness of a contravention or prospective contravention will include considerations of:
  - (a) whether the losses suffered are substantial;
  - (b) whether the numbers of *consumers* who have suffered loss are significant;
  - (c) whether the assets at risk are substantial; and
  - (d) whether the number of *consumers* at risk is significant.
- (2) In cases of *market abuse*, the nature and seriousness of the misconduct or expected misconduct in question. The following may be relevant:

- (a) the impact or potential impact on the *financial system* of the conduct in question. This would include the extent to which it has resulted in distortion or disruption of the markets, or would be likely to do so if it was allowed to take place or to continue;
  - (b) the extent and nature of any losses or other costs imposed, or likely to be imposed, on other users of the *financial system*, as a result of the misconduct.
- (3) Whether the conduct in question has stopped or is likely to stop and whether steps have been taken or will be taken by the *person* concerned to ensure that the interests of *consumers* are adequately protected. For example, an application for an *injunction* may be appropriate where the *FCA* has grounds for believing that a contravention of a relevant requirement, *market abuse* or both may continue or be repeated. It is likely to have grounds to believe this where, for example, the *Takeover Panel* has requested that a *person* stop a particular course of conduct and that *person* has not done so.
- (4) Whether there are steps a *person* could take to remedy a contravention of a relevant requirement or *market abuse*. The steps the *FCA* may require a *person* to take will vary according to the circumstances but may include the withdrawal of a misleading *financial promotion* or publishing a correction, writing to *clients* or investors to notify them of *FCA* action, providing financial redress and repatriating funds from an overseas jurisdiction. An application by the *FCA* to the court under section 380(2) or 381(2) for an order requiring a *person* to take such steps may not be appropriate if, for example, that *person* has already taken or proposes to take appropriate remedial steps at his own initiative or under a ruling imposed by another regulatory authority (such as the *Takeover Panel* or a *recognised investment exchange*). If another authority has identified the relevant steps and the *person* concerned has failed to take them, the *FCA* will take this into account and (subject to all other relevant factors and circumstances) may consider it is appropriate to apply for an *injunction*. In those cases the *FCA* may consult with the relevant regulatory authority before applying for an *injunction*.
- (5) Whether there is a danger of assets being dissipated. The main purpose of an application under section 380(3), sections 381(3) and (4) or pursuant to the court's inherent jurisdiction, is likely to be to safeguard funds containing *client* assets (e.g. *client* accounts) and/or funds and other assets from which restitution may be made. The *FCA* may seek an *injunction* to secure assets while a suspected contravention is being investigated or where it has information suggesting that a contravention is about to take place.
- (6) The costs the *FCA* would incur in applying for and enforcing an *injunction* and the benefits that would result. There may be other cases which require the *FCA*'s attention and take a higher priority, due to the nature and seriousness of the breaches concerned. There may, therefore, be occasions on which the *FCA* considers that time and resources should not be diverted from other cases in order to make an application for an *injunction*. These factors reflect the *FCA*'s duty under the *Act* to have regard to the need to use its resources in the most efficient and economic way.

- (7) The disciplinary record and general compliance history of the *person* who is the subject of the possible application. This includes whether the *FCA* (or a *previous regulator*) has taken any previous disciplinary, remedial or protective action against the *person*. It may also be relevant, for example, whether the *person* has previously given any undertakings to the *FCA* (or any *previous regulator*) not to do a particular act or engage in particular behaviour and is in breach of those undertakings.
- (8) Whether the conduct in question can be adequately addressed by other disciplinary powers, for example *public censure* or financial penalties.
- (9) The extent to which another regulatory authority can adequately address the matter. Certain circumstances may give rise not only to possible enforcement action by the *FCA*, but also to action by other regulatory authorities. The *FCA* will examine the circumstances of each case, and consider whether it is appropriate for the *FCA* to take action to address the relevant concern. In most cases the *FCA* will consult with other relevant regulatory authorities before making an application for an order.
- (10) Whether there is information to suggest that the *person* who is the subject of the possible application is involved in *financial crime*.
- (11) In any case where the *FCA* is of the opinion that any potential exercise of its powers under section 381 may affect the timetable or the outcome of a *takeover bid*, the *FCA* will consult the *Takeover Panel* before taking any steps to exercise these powers and will give due weight to its views.



## 10.3 Asset-freezing injunctions

- 10.3.1** Where the *FCA* applies to the court under section 380(3) or sections 381(3) and (4) of the *Act*, the *FCA* may ask the court to exercise its inherent jurisdiction to make orders on an interim basis, restraining a *person* from disposing of, or otherwise dealing with, assets. To succeed in an application for such interim relief, the *FCA* will have to show a good arguable case for the granting of the *injunction*. The *FCA* will not have to show that a contravention has already occurred or may have already occurred.
- 10.3.2** The *FCA* may request the court to exercise its inherent jurisdiction in cases, for example, where it has evidence showing that there is a reasonable likelihood that a *person* will contravene a requirement of the *Act* and that the contravention will result in the dissipation of assets belonging to investors.



## 10.4 Other relevant powers

- 10.4.1** The *FCA* has a range of powers it can use to take remedial, protective and disciplinary action against a *person* who has contravened a relevant requirement or engaged in *market abuse*, as well as its powers to seek injunctions under sections 380 and 381 of the *Act* and under the courts' inherent jurisdiction. Where appropriate, the *FCA* may exercise these other powers before, at the same time as, or after it applies for an *injunction* against a *person*.
- 10.4.2** When, in relation to *firms*, the *FCA* applies the broad test outlined in paragraph ■ 10.2.2, it will consider the relative effectiveness of the other powers available to it, compared with injunctive relief. For example, where the *FCA* has concerns about whether a *firm* will comply with restrictions that the *FCA* could impose by exercising its *own-initiative powers*, it may decide it would be more appropriate to seek an *injunction*. This is because breaching any requirement imposed by the court could be punishable for contempt. Alternatively, where, for example, the *FCA* has already imposed requirements on a *firm* by exercising its *own-initiative powers* and these requirements have not been met, the *FCA* may seek an *injunction* to enforce those requirements.
- 10.4.3** The *FCA's own-initiative powers* do not apply to unauthorised persons. This means that an application for an *injunction* is the only power by which the *FCA* may seek directly to prevent *unauthorised persons* from actual or threatened breaches or *market abuse*. The *FCA* will decide whether an application against an *unauthorised person* is appropriate, in accordance with the approach discussed in paragraph ■ 10.2.2. The *FCA* may also seek an *injunction* to secure assets where it intends to use its insolvency powers against an *unauthorised person*.
- 10.4.4** In certain cases, conduct that may be the subject of an *injunction* application will also be an offence which the *FCA* has power to prosecute under the *Act*. In those cases, the *FCA* will consider whether it is appropriate to prosecute the offence in question, as well as applying for injunctions under section 380, section 381, or both.
- 10.4.5** Where the *FCA* exercises its powers under section 380, section 381 and/or invokes the court's inherent jurisdiction to obtain an order restraining the disposal of assets, it may also apply to the court for a restitution order for the distribution of those assets.



## 10.5 Section 198: the FCA's policy

### 10.5.1

Under section 198 of the *Act* the *FCA* has power to apply to court on behalf of the *Home State regulator* of certain *incoming EEA firms* for an *injunction* restraining the *incoming EEA firm* from disposing of, or otherwise dealing with, any of its assets. The *FCA* will consider exercising this power only where a request from a *Home State regulator* satisfies the requirements of section 198(1).





## 10.6 Applications for injunctions under regulation 12 of the Unfair Terms Regulations or Schedule 3 to the CRA : the FCA 's policy

- 10.6.1** The *Unfair Terms Regulations* still apply to contracts entered into before 1 October 2015. Please read the pre-1 October 2015 version of this guide for the *FCA's* approach and policy relating to its powers under the *Unfair Terms Regulations*.
- 10.6.2** For a consumer contract term, if the *FCA* decides, after notifying the Competition and Markets Authority (the *CMA*), to the extent required by Schedule 3 to the *CRA*, to address issues using its powers under Schedule 3, if the contract term is within the *CRA's* scope, it will, unless the case is urgent, generally first write to a *person* using or proposing or recommending the use of that term.
- 10.6.3** When writing, the *FCA* will express its concerns about whether the term is or would be unfair within the meaning of sections 62 to 64 of the *CRA*, or non-transparent within the meaning of section 68 of the *CRA*, or purports or would purport to exclude or restrict any liability described in the sections of the *CRA* specified in paragraph 3(2) of Schedule 3 and will invite the *person's* comments on those concerns.
- 10.6.4** If the *FCA*, having considered those comments, remains of the view that the term is or would be unfair or non-transparent or purports, or would purport, to be exclusionary or restrictive, as described above, it will normally ask the person to undertake to stop using, relying on or recommending it or proposing its use. It should be noted that, under paragraphs 2(3), 6(3) and 7(1) of Schedule 3 to the *CRA*, such an undertaking must be notified by the *FCA* to the *CMA* and any relevant complainant and then the *CMA* is under a duty to publish it.
- 10.6.5** In relation to a notice to *consumers* within the *CRA's* scope, the *FCA* will generally, after notifying the *CMA*, request such an undertaking from the relevant *person*, if the notice causes the *FCA* relevant concerns, without first seeking comments. Although the *FCA* will, unless the case is an urgent one and time does not permit, then have regard to any representations responsive to that request.

- 10.6.6** If, whether in relation to such a notice or such a term, the *person* either declines to give such an undertaking, or gives such an undertaking and fails to follow it, the *FCA* will consider the need to apply to court for an *injunction* under Schedule 3 to the *CRA*. The *FCA* will, again, notify the *CMA* appropriately at this stage, as required by Schedule 3.
- 10.6.7** In determining whether to seek an *injunction* under Schedule 3 to the *CRA* against a *person*, after or, in an urgent case, instead of requesting such an undertaking, the *FCA* will consider the full circumstances of each case. A number of factors may be relevant for this purpose. The following list is not exhaustive; not all of the factors may be relevant in a particular case, and there may be other factors that are relevant such as:
- (1) whether the *FCA* is satisfied that the contract term or notice in question may properly be regarded, if it is used, as unfair, non-transparent and/or purportedly exclusionary and/or restrictive within the meaning of the *CRA*;
  - (2) the extent and nature of the detriment to *consumers* resulting from the term or notice, or the potential detriment which could result from the term or notice;
  - (3) whether the *person* has, if asked to do so, fully cooperated with the *FCA* in resolving the *FCA*'s concerns about the particular contract term or notice;
  - (4) the likelihood of success of an application for an *injunction*;
  - (5) the costs the *FCA* would incur in applying for and enforcing an *injunction* and the benefits that would result from that action; the *FCA* is more likely to be satisfied that an application is appropriate where an *injunction* would not only prevent the use of the particular contract term or notice, but would also be likely, as paragraph 5(3)(b) of Schedule 3 to the *CRA* envisages, to prevent the use of similar terms or notices, or terms or notices having a similar effect.
- 10.6.8** In an urgent case, the *FCA* may seek a temporary *injunction*, to prevent the continued or potential use of the term or notice until it can be fully considered by the court. An urgent case is one in which the *FCA* considers that the actual or potential detriment is so serious that urgent action is necessary. In deciding whether to apply for a temporary *injunction*, the *FCA* may take into account a number of factors, including one or more of the factors set out in paragraph ■ 10.6.7. In such an urgent case, the *FCA* may seek a temporary *injunction* without first consulting with the *person* or *persons* using or proposing to use, or recommending the use of, the relevant term or notice.
- 10.6.9** In deciding whether to grant an a final *injunction* under Schedule 3 to the *CRA*, the court will decide whether the term or notice in question is unfair, purportedly restrictive or exclusionary or non-transparent within the meaning of the *CRA*. The court may grant an *injunction* on such terms as it sees fit. For example, it may require the *person* to stop including a term in contracts with *consumers* or issuing, publishing, communicating or announcing a notice to *consumers* from the date of the *injunction* and to stop relying on the term in such contracts which have been concluded or on

the notice to the extent that it has already been issued, published, communicated or announced. If the *person* fails to comply with the *injunction*, the *person* will be in contempt of court.

### 10.6.10

The *CRA* provides that a term or notice that is unfair or a term that excludes or restricts liability in any of the ways specified in the *CRA* is not binding on the *consumer*. This is the case irrespective of whether there has been a decision of a court to that effect. To The *CRA* also provides that, to the extent that it is practicable, the rest of the contract continues in effect.

### 10.6.11

When the *FCA* considers that a case requires enforcement action under the *CRA*, it will take the enforcement action itself, after appropriately notifying the *CMA*, if the *person* against whom such action will be taken is a *firm* or an *appointed representative*.

### 10.6.12

Where that *person* is not a *firm* or an *appointed representative*, the *FCA* will liaise with the *CMA* or (as appropriate) another *CRA* regulator.



## 10.7 FCA costs

### 10.7.1

When it seeks an *injunction* under a power discussed in this chapter, the *FCA* may ask the court to order that the *person* who is the subject of the application should pay the *FCA's* costs.