

12 Prosecution of Criminal Offences

The FSA's general approach

- 12.1 The FSA has powers under sections 401 and 402 of the *Act* to prosecute a range of criminal offences in England, Wales and Northern Ireland. The FSA may also prosecute criminal offences where to do so would be consistent with meeting any of its statutory objectives.
- 12.2 The FSA's general policy is to pursue through the criminal justice system all those cases where criminal prosecution is appropriate. When it decides whether to bring criminal proceedings in England, Wales or Northern Ireland, or to refer the matter to another prosecuting authority in England, Wales or Northern Ireland (see paragraph 12.11), it will apply the basic principles set out in the Code for Crown Prosecutors.¹ When considering whether to prosecute a breach of the *Money Laundering Regulations*, the FSA will also have regard to whether the person concerned has followed the Guidance for the UK financial sector issued by the Joint Money Laundering Steering Group.
- 12.3 The FSA's approach when deciding whether to commence criminal proceedings for *misleading statements and practices offences* and *insider dealing offences*, where the FSA also has power to impose a sanction for *market abuse*, is discussed further in [paragraphs 12.7 to 12.10](#).
- 12.4 In cases where criminal proceedings have commenced or will be commenced, the FSA may consider whether also to take civil or regulatory action (for example where this is appropriate for the protection of *consumers*) and how such action should be pursued. That action might include: applying to court for an *injunction*; applying to court for a restitution order; variation and/or cancellation of *permission*; and prohibition of individuals. The factors the FSA may take into account when deciding whether to take such action, where criminal proceedings are in contemplation, include, but are not limited to the following:
- (1) whether, in the FSA's opinion, the taking of civil or regulatory action might unfairly prejudice the prosecution, or proposed prosecution, of criminal offences;
 - (2) whether, in the FSA's opinion, the taking of civil or regulatory action might unfairly prejudice the defendants in the criminal proceedings in the conduct of their defence; and
 - (3) whether it is appropriate to take civil or regulatory action, having regard to the scope of the criminal proceedings and the powers available to the criminal courts.
- 12.4A Subject to 12.4C, a decision to commence criminal proceedings 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

¹ http://www.cps.gov.uk/publications/code_for_crown_prosecutors/

matter will be decided by the director of Enforcement or, in his or her absence, another member of the FSA's executive of at least director of division level.

- 12.4B An exceptionally urgent case in these circumstances is one where the FSA staff believe that a decision to begin proceedings
- (1) should be taken before it is possible to follow the procedure described in paragraph 12.4A; and
 - (2) it is necessary to protect the interests of consumers or potential consumers.
- 12.4C Decisions about whether to initiate criminal proceedings under the Building Societies Act 1986, the Friendly Societies Acts 1974 and 1992, the Credit Unions Act 1979, the Industrial and Provident Societies Act 1965 and the Friendly and Industrial and Provident Societies Act 1968 may either be taken by the procedure described in paragraph 12.4A above or under *executive procedures*. The less serious the offence or its impact and the less complex the issues raised, the more likely that the FSA will take the decision to prosecute under *executive procedures*.

FSA cautions

- 12.5 In some cases, the FSA may decide to issue a formal caution rather than to prosecute an offender. In these cases the FSA will follow the Home Office Guidance on the cautioning of offenders, currently contained in the Home Office Circular 16/2008.
- 12.6 Where the FSA decides to administer a formal caution, a record of the caution will be kept by the FSA and on the Police National Computer. The FSA will not publish the caution, but it will be available to parties with access to the Police National Computer. The issue of a caution may influence the FSA and other prosecutors in their decision whether or not to prosecute the offender if he offends again. If the offender is a *firm* or an *approved person*, a caution given by the FSA will form part of the *firm's* or *approved person's* regulatory record for the purposes of DEPP 6.2.1 G (3). If relevant, the FSA will take the caution into account in deciding whether to take disciplinary action for subsequent regulatory misconduct by the *firm* or the *approved person*. The FSA may also take a caution into account when considering a *person's* honesty, integrity and reputation and his fitness or propriety to perform controlled or other functions in relation to *regulated activities* (see FIT 2.1.3G).

Criminal prosecutions in cases of market abuse

- 12.7 In some cases there will be instances of market misconduct that may arguably involve a breach of the criminal law as well as *market abuse* as defined in section 118 of the *Act*. When the FSA decides whether to commence criminal proceedings rather than impose a sanction for *market abuse* in relation to that misconduct, it will apply the basic principles set out

in the Code for Crown Prosecutors. When deciding whether to prosecute market misconduct which also falls within the definition of *market abuse*, application of these basic principles may involve consideration of some of the factors set out in paragraph 12.8.

- 12.8 The factors which the FSA may consider when deciding whether to commence a criminal prosecution for market misconduct rather than impose a sanction for *market abuse* include, but are not limited to, the following:
- (1) the seriousness of the misconduct: if the misconduct is serious and prosecution is likely to result in a significant sentence, criminal prosecution may be more likely to be appropriate;
 - (2) whether there are victims who have suffered loss as a result of the misconduct: where there are no victims a criminal prosecution is less likely to be appropriate;
 - (3) the extent and nature of the loss suffered: where the misconduct has resulted in substantial loss and/or loss has been suffered by a substantial number of victims, criminal prosecution may be more likely to be appropriate;
 - (4) the effect of the misconduct on the market: where the misconduct has resulted in significant distortion or disruption to the market and/or has significantly damaged market confidence, a criminal prosecution may be more likely to be appropriate;
 - (5) the extent of any profits accrued or loss avoided as a result of the misconduct: where substantial profits have accrued or loss avoided as a result of the misconduct, criminal prosecution may be more likely to be appropriate;
 - (6) whether there are grounds for believing that the misconduct is likely to be continued or repeated: if it appears that the misconduct may be continued or repeated and the imposition of a financial penalty is unlikely to deter further misconduct, a criminal prosecution may be more appropriate than a financial penalty;
 - (7) whether the person has previously been cautioned or convicted in relation to market misconduct or has been subject to civil or regulatory action in respect of market misconduct;
 - (8) the extent to which redress has been provided to those who have suffered loss as a result of the misconduct and/or whether steps have been taken to remedy any failures in systems or controls which gave rise to the misconduct: where such steps are taken promptly and voluntarily, criminal prosecution may not be appropriate; however, potential defendants will not avoid prosecution simply because they are able to pay compensation;

- (9) the effect that a criminal prosecution may have on the prospects of securing redress for those who have suffered loss: where a criminal prosecution will have adverse effects on the solvency of a *firm* or individual in circumstances where loss has been suffered by *consumers*, the FSA may decide that criminal proceedings are not appropriate;
- (10) whether the *person* is being or has been voluntarily cooperative with the FSA in taking corrective measures; however, potential defendants will not avoid prosecution merely by fulfilling a statutory duty to take those measures;
- (11) whether an individual's misconduct involves dishonesty or an abuse of a position of authority or trust;
- (12) where the misconduct in question was carried out by a group, and a particular individual has played a leading role in the commission of the misconduct: in these circumstances, criminal prosecution may be appropriate in relation to that individual;
- (12A) 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 FSA's prosecution of the other(s), the FSA will take this co-operation into account when deciding whether to prosecute the individual who has assisted the FSA or bring market abuse proceedings against him;
- (13) the personal circumstances of an individual may be relevant to a decision whether to commence a criminal prosecution.

12.9 The importance attached by the FSA to these factors will vary from case to case and the factors are not necessarily cumulative or exhaustive.

12.10 It is the FSA's policy not to impose a sanction for *market abuse* where a *person* is being prosecuted for market misconduct or has been finally convicted or acquitted of market misconduct (following the exhaustion of all appeal processes) in a criminal prosecution arising from substantially the same allegations. Similarly, it is the FSA's policy not to commence a prosecution for market misconduct where the FSA has brought or is seeking to bring disciplinary proceedings for *market abuse* arising from substantially the same allegations.

Liaison with other prosecuting authorities

12.11 The FSA has agreed guidelines that establish a framework for liaison and cooperation in cases where one or more other authority (such as the Crown Prosecution Service or Serious Fraud Office) has an interest in prosecuting any aspect of a matter that the FSA is considering for investigation, investigating or considering prosecuting. These guidelines are set out in [annex](#)

[2](#) to this guide. The FSA is also a signatory to the Prosecutors' Convention and the Investigators' Convention.

Prosecution of Friendly Societies

- 12.12 The FSA's power to prosecute friendly societies is discussed in *EG* 19.3 to 19.9 and in an article on the FSA web-site entitled 'Prosecuting Friendly Societies'.²

² <http://www.fsa.gov.uk/Pages/doing/regulated/law/focus/friendly.shtml>

Annex 1 – [deleted]

Annex 2 - Guidelines on investigation of cases of interest or concern to the Financial Services Authority and other prosecuting and investigating agencies

Purpose, status and application of the guidelines

1. These guidelines have been agreed by the following bodies (the agencies):

- the Financial Services Authority (the FSA);
- the Serious Fraud Office (the SFO);
- the Department for Business, Innovation and Skills (BIS);
- the Crown Prosecution Service (the CPS);
- the Association of Chief Police Officers in England, Wales and Northern Ireland (ACPO);
- the Crown Office and Procurator Fiscal Service (COPFS);
- the Public Prosecution Service for Northern Ireland (the PPS);
- the Association of Chief Police Officers in Scotland (ACPO).

2. The guidelines are intended to assist the agencies when considering cases concerning financial crime and/or regulatory misconduct that are, or may be, of mutual interest to the FSA and one or more of the other agencies. Their implementation and wider points arising from them will be kept under review by the agencies who will liaise regularly.

3. The purpose of the guidelines is to set out some broad principles which the agencies agree should be applied by them in order to assist them to:

- (a) decide which of them should investigate such cases;
- (b) co-operate with each other, particularly in cases where more than one agency is investigating;
- (c) prevent undue duplication of effort by reason of involvement of more than one agency;
- (d) prevent the subjects of proceedings being treated

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unfairly by reason of the unwarranted involvement of more than one agency.

4. The guidelines are intended to apply to the relationships between the FSA and the other agencies. They are not intended to apply to the relationships between those other agencies themselves where there is no FSA interest. They are not legally binding.
5. The guidelines are subject to the restrictions on disclosure of information held by the agencies. They are not intended to override them.
6. The guidelines are relevant to ACPO and ACPO(S) only in so far as they relate to investigations. Similarly, they are relevant to the CPS, COPFS and the PPS only in so far as they relate to prosecutions.

Commencing Investigations

7. The agencies recognise that there are areas in which they have an overlapping remit in terms of their functions and powers (the powers and functions of the agencies are set out in the Appendix to this document). The agencies will therefore endeavour to ensure that only the agency or agencies with the most appropriate functions and powers will commence investigations.
8. The agencies further recognise that in certain cases concurrent investigations may be the most quick, effective and efficient way for some cases to be dealt with. However, if an agency is considering commencing an investigation and another agency is already carrying on a related investigation or proceedings or is otherwise likely to have an interest in that investigation, best practice is for the agencies concerned to liaise and discuss which agency or agencies should take action, i.e. investigate, bring proceedings or otherwise deal with the matter.

Indicators for deciding which agency should take action

9. The following are indicators of whether action by the FSA or one of the other agencies is more appropriate. They are not listed in any particular order or ranked according to priority. No single feature of the case should be considered in isolation, but rather the whole case should be considered in the round.

(a) Tending towards action by the FSA

- Where the suspected conduct in question gives rise to concerns regarding market confidence or protection of consumers of services regulated by the FSA.
- Where the suspected conduct in question would be best

dealt with by:

- criminal prosecution of offences which the FSA has powers to prosecute by virtue of the Financial Services and Markets Act 2000 ("the 2000 Act") (See Appendix paragraph 1.4) and other incidental offences;
 - civil proceedings under the 2000 Act (including applications for injunctions, restitution and to wind up firms carrying on regulated activities);
 - regulatory action which can be referred to the *Tribunal* (including proceedings for market abuse); and
 - proceedings for breaches of Part VI of the Act, of *Part 6 rules* or the *Prospectus Rules* or a provision otherwise made in accordance with the *Prospectus Directive* .
- Where the likely defendants are FSA authorised or approved persons.
 - Where the likely defendants are issuers or sponsors of a security admitted to the official list or in relation to which an application for listing has been made.
 - Where there is likely to be a case for the use of FSA powers which may take immediate effect (e.g. powers to vary the permission of an authorised firm or to suspend listing of securities).
 - Where it is likely that the investigator will be seeking assistance from overseas regulatory authorities with functions equivalent to those of the FSA.
 - Where any possible criminal offences are technical or in a grey area whereas regulatory contraventions are clearly indicated.
 - Where the balance of public interest is in achieving reparation for victims and prosecution is likely to damage the prospects of this.
 - Where there are distinct parts of the case which are best investigated with regulatory expertise.

(b) Tending towards action by one of the other agencies

- Where serious or complex fraud is the predominant issue in the conduct in question (normally appropriate for the SFO).
- Where the suspected conduct in question would be best dealt with by:
 - criminal proceedings for which the FSA is not the statutory prosecutor;
 - proceedings for disqualification of directors under the Company Directors Disqualification Act 1986 (normally appropriate for BIS action);
 - winding up proceedings which the FSA does not have statutory powers to bring (normally appropriate for BIS action); or
 - criminal proceedings in Scotland.
- Where the conduct in question concerns the abuse of limited liability status under the Companies Acts (normally appropriate for BERR action).
- Where powers of arrest are likely to be necessary.
- Where it is likely that the investigator will rely on overseas organisations (such as law enforcement agencies) with which the other agencies have liaison.
- Where action by the FSA is likely to prejudice the public interest in the prosecution of offences for which the FSA is not a statutory prosecutor.
- Where the case falls only partly within the regulated area (or criminal offences for which FSA is a statutory prosecutor) and the prospects of splitting the investigation are not good.

10. It is also best practice for the agencies involved or interested in an investigation to continue to liaise as appropriate throughout in order to keep under review the decisions as to who should investigate or bring proceedings. This is particularly so where there are material developments in the investigation that might cause the agencies to reconsider its general purpose or scope and whether additional

investigation by others is called for.

Conduct of concurrent investigations

11. The agencies recognise that where concurrent investigations are taking place, action taken by one agency can prejudice the investigation or subsequent proceedings brought by another agency. Consequently, it is best practice for the agencies involved in concurrent investigations to notify each other of significant developments in their investigations and of any significant steps they propose to take in the case, such as:
 - interviewing a key witness;
 - requiring provision of significant volumes of documents;
 - executing a search warrant; or
 - instituting proceedings or otherwise disposing of a matter.
12. If the agencies identify that particular action by one party might prejudice an investigation or future proceedings by another, it is desirable for the parties concerned to discuss and decide what action should be taken and by whom. In reaching these decisions, they will bear in mind how the public interest is best served overall. The examples provided in paragraph 9 above may also be used as indicators of where the overall balance of interest lies.

Deciding to bring proceedings

13. The agencies will consider, as necessary, and keep under review whether an investigation has reached the point where it is appropriate to commence proceedings. Where agencies are deciding whether to institute criminal proceedings, they will have regard to the usual codes or guidance relevant to that decision. For example, agencies other than the PPS or COPFS will have regard to the Code for Crown Prosecutors (Note: Different guidance applies to the PPS and COPFS. All criminal proceedings in Scotland are the responsibility of the Lord Advocate. Separate arrangements have been agreed between the FSA and the Crown Office for the prosecution of offences in Scotland arising out of FSA investigations). Where they are considering whether to bring non-criminal proceedings, they will take into account whatever factors they consider relevant (for example, in the case of market abuse proceedings brought by the FSA, these are set out in paragraph 6.2 of the FSA Decision and Procedure and Penalties manual).
14. The agencies recognise that in taking a decision whether to commence proceedings, relevant factors will include:
 - whether commencement of proceedings might prejudice

ongoing or potential investigations or proceedings brought by other agencies; and

- whether, in the light of any proceedings being brought by another party, it is appropriate to commence separate proceedings against the person under investigation.

15. Best practice in these circumstances, therefore, is for the parties concerned to liaise before a decision is taken.

Closing Cases

16. It is best practice for the agencies, at the conclusion of any investigation where it is decided that no further action need be taken, or at the conclusion of proceedings, to notify any other agencies concerned of the outcome of the investigation and/or proceedings and to provide any other helpful feedback.

APPENDIX TO THE GUIDELINES ON INVESTIGATION OF CASES OF INTEREST OR CONCERN TO THE FINANCIAL SERVICES AUTHORITY AND OTHER PROSECUTING AND INVESTIGATING AGENCIES

1. The FSA

1.1 The FSA is the single statutory regulator for all financial business in the UK. Its regulatory objectives under the Financial Services and Markets Act 2000 (the 2000 Act) are:

- market confidence;
- financial stability;
- the protection of consumers; and
- the reduction of financial crime.

(**Note:** The 2000 Act repealed and replaced various enactments which conferred powers and functions on the FSA and other regulators whose functions are now carried out by the FSA. Most notable in this context are the Financial Services Act 1986 and the Banking Act 1987. Transitional provisions under the 2000 Act permit the FSA to continue to investigate and bring proceedings for offences under the old legislation. Details of these transitional provisions are not set out in these guidelines)

1.2 The *FSA's regulatory objectives* as the competent authority under Part VI of the *Act* are:

- the protection of investors;
- access to capital; and
- investor confidence.

1.3 Under the 2000 Act the FSA has powers to investigate concerns including:

- regulatory concerns about authorised *firms* and individuals employed by them;
- suspected *market abuse* under s.118 of the 2000 Act;
- suspected misleading statements and practices under s.397 of the 2000 Act;
- suspected *insider dealing* under of Part V of the Criminal Justice Act 1993;
- suspected contraventions of the general prohibition under

s.19 of the 2000 Act and related offences;

- suspected offences under various other provisions of the 2000 Act (see below);
- suspected breaches of Part VI of the Act, of *Part 6 rules* or the *prospectus rules* or a provision otherwise made in accordance with the *Prospectus Directive*.

The FSA's powers of information gathering and investigation are set out in Part XI of the 2000 Act and in s.97 in relation to its Part VI functions.

1.4 The FSA has the power to take the following enforcement action:

- discipline authorised firms under Part XIV of the 2000 Act and approved persons under s.66 of the 2000 Act;
- impose penalties on persons that perform controlled functions without approval under s.63A of the 2000 Act;
- impose civil penalties in cases of market abuse under s.123 of the 2000 Act;
- prohibit an individual from being employed in connection with a *regulated activity*, under s.56 of the 2000 Act;
- apply to Court for *injunctions* (or interdicts) and other orders against persons contravening relevant requirements (under s.380 of the 2000 Act) or engaging in *market abuse* (under s.381 of the 2000 Act);
- petition the court for the winding up or administration of companies, and the bankruptcy of individuals, carrying on *regulated activities*;
- apply to the court under ss.382 and 383 of the 2000 Act for restitution orders against persons contravening relevant requirements or persons engaged in *market abuse*;
- require restitution under s.384 of the 2000 Act of profits which have accrued to authorised persons contravening relevant requirements or persons engaged in *market abuse*, or of losses which have been suffered by others as a result of those *breaches*;
- (except in Scotland) prosecute certain offences, including under the Money Laundering Regulations 2007, the Transfer of Funds (Information on the Payer) Regulations 2007, Part V Criminal Justice Act 1993 (insider dealing)

and various offences under the 2000 Act including
(**Note:** The FSA may also prosecute any other offences where to do so would be consistent with meeting any of its statutory objectives):

- carrying on *regulated activity* without authorisation or exemption, under s.23;
 - making false claims to be authorised or exempt, under s.24;
 - promoting investment activity without authorisation, under s.25;
 - breaching a prohibition order, under s.56;
 - failing to co-operate with or giving false information to FSA appointed investigators, under s.177;
 - failing to comply with provisions about influence over authorised persons, under s.191;
 - making misleading statements and engaging in misleading practices, under s.397;
 - misleading the FSA, under s.398;
 - various offences in relation to the *FSA's* Part VI function;
- Fine, issue public censures, suspend or cancel listing for breaches of the Listing Rules by an issuer; and
 - Issue public censures or cancel a sponsor's approval.

2. BIS

- 2.1 The Secretary of State for Business, Innovation and Skills exercises concurrently with the FSA those powers and functions marked with an asterisk in paragraphs 1.3 above. The investigation functions are undertaken by Companies Investigation Branch (CIB) and the prosecution functions by the Legal Services Directorate.
- 2.2 The principal activities of CIB are, however, the investigations into the conduct of companies under the Companies Acts. These are fact-finding investigations but may lead to follow-up action by CIB such as petitioning for the winding up of a company, disqualification of directors of the company or referring the matter to the Solicitors Office for prosecution. CIB may also disclose information to other prosecution or regulatory authorities to enable them to take appropriate action under

their own powers and functions. Such disclosure is, however, strictly controlled under a gateway disclosure regime.

- 2.3 The Solicitors Office advises on investigation work carried out by CIB and undertakes criminal investigations and prosecutions in respect of matters referred to it by CIB, the Insolvency Service or other directorates of BIS or its agencies.

3. SFO

- 3.1 The aim of the SFO is to contribute to:

- reducing fraud and the cost of fraud;
- the delivery of justice and the rule of law;
- maintaining confidence in the UK's business and financial institutions.

- 3.2 Under the Criminal Justice Act 1987 the Director of the SFO may investigate any suspected offence which appears on reasonable grounds to involve serious or complex fraud and may also conduct, or take over the conduct of, the prosecution of any such offence. The SFO may investigate in conjunction with any other person with whom the Director thinks it is proper to do so; that includes a police force (or the FSA or any other regulator). The criteria used by the SFO for deciding whether a case is suitable for it to deal with are set out in paragraph 3.3.

- 3.3 The key criterion should be that the suspected fraud is such that the direction of the investigation should be in the hands of those who would be responsible for any prosecution.

The factors that are taken into account include:

- whether the amount involved is at least £1 million (this is simply an objective and recognisable signpost of seriousness and likely public concern rather than the main indicator of suitability);
- whether the case is likely to give rise to national publicity and widespread public concern. That includes those involving government bodies, public bodies, the governments of other countries and commercial cases of public interest;
- whether the case requires highly specialist knowledge of, for example, stock exchange practices or regulated markets;

- whether there is a significant international dimension;
- whether legal, accountancy and investigative skills need to be brought together; and
- whether the case appears to be complex and one in which the use of Section 2 powers might be appropriate.

4. CPS

- 4.1 The CPS has responsibility for taking over the conduct of all criminal proceedings instituted by the police in England and Wales. The CPS may advise the police in respect of criminal offences. The CPS prosecutes all kinds of criminal offences, including fraud. Fraud cases may be prosecuted by local CPS offices but the most serious and complex fraud cases will be prosecuted centrally.

5. ACPO and ACPO(S)

- 5.1 ACPO represents the police forces of England, Wales, and Northern Ireland. ACPO represents the police forces of Scotland.

6. COPFS

- 6.1 The investigation and prosecution of crime in Scotland is the responsibility of the Lord Advocate, who is the head of the COPFS, which comprises Procurators Fiscal and their Deputies, who are answerable to the Lord Advocate. The Procurator Fiscal is the sole public prosecutor in Scotland, prosecuting cases reported not only by the police but all regulatory departments and agencies. All prosecutions before a jury, both in the High Court of Justiciary and in the Sheriff Court, run in the name of the Lord Advocate; all other prosecutions run in the name of the local Procurator Fiscal. The Head Office of the Procurator Fiscal Service is the Crown Office and the Unit within the Crown Office which deals with serious and complex fraud cases and with the investigation of cases of interest or concern to the Financial Services Authority is the National Casework Division: the remit of this Unit is directly comparable to that of the Serious Fraud Office.

7. The PPS

- 7.1 The PPS is responsible for the prosecution of all offences on indictment in Northern Ireland, other than offences prosecuted by the Serious Fraud Office. The PPS is also responsible for the prosecution of certain summary offences, including offences reported to it by any government department.

