

Chapter 12

Prosecution of Criminal Offences



12.1 The FCA's general approach

12.1.1 The *FCA* has powers under sections 401 and 402 of the *Act* to prosecute a range of criminal offences in England, Wales and Northern Ireland. The *FCA* may also prosecute criminal offences where to do so would be consistent with meeting any of its statutory objectives.

12.1.2 The *FCA'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 12.4.1), it will apply the basic principles set out in the Code for Crown Prosecutors.¹⁴ When considering whether to prosecute a breach of the *Money Laundering Regulations*, the *FCA* 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.

¹⁴ http://www.cps.gov.uk/publications/code_for_crown_prosecutors/

12.1.3 The *FCA's* approach when deciding whether to commence criminal proceedings for *misleading statements and practices offences* and *insider dealing offences*, where the *FCA* also has power to impose a sanction for *market abuse*, is discussed further in paragraphs ■ 12.3.1 to ■ 12.3.4.

Commencing criminal proceedings

12.1.4 In cases where criminal proceedings have commenced or will be commenced, the *FCA* 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 *FCA* 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 *FCA's* opinion, the taking of civil or regulatory action might unfairly prejudice the prosecution, or proposed prosecution, of criminal offences;
- (2) whether, in the *FCA'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.

12.1.5 Subject to 12.4C, a decision to commence criminal proceedings will be made by the executive director of Enforcement or, in his or her absence, the acting executive director of Enforcement.

12.1.6 [deleted]

12.1.7 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 and the Co-operative and Community Benefit Societies Act 2014 will be taken by the executive director of Enforcement or, in his or her absence, the acting executive director of Enforcement.

12.2 FCA cautions

12.2.1 In some cases, the *FCA* may decide to issue a formal caution rather than to prosecute an offender. In these cases the *FCA* will follow the Home Office Guidance on the cautioning of offenders, currently contained in the Home Office Circular 16/2008.

12.2.2 Where the *FCA* decides to administer a formal caution, a record of the caution will be kept by the *FCA* and on the Police National Computer. The *FCA* 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 *FCA* and other prosecutors in their decision whether or not to prosecute the offender if they offend again. A caution given by the *FCA* will form part of the *person's* regulatory record for the purposes of ■ DEPP 6.2.1 G (3). If relevant, the *FCA* will take the caution into account in deciding whether to take action for subsequent misconduct by the *person*. The *FCA* may also take a caution into account when considering a *person's* honesty, integrity and reputation and their fitness or propriety to perform controlled or other functions in relation to *regulated activities* (see ■ FIT 2.1.3G).

12.3 Criminal prosecutions in cases of market abuse

12.3.1

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*. When the *FCA* 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 ■ EG 12.3.2.

12.3.2

The factors which the *FCA* 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 *FCA* may decide that criminal proceedings are not appropriate;
- (10) whether the *person* is being or has been voluntarily cooperative with the *FCA* 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 *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 him;
- (13) the personal circumstances of an individual may be relevant to a decision whether to commence a criminal prosecution.

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

12.3.4 It is the *FCA*'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 *FCA*'s policy not to commence a prosecution for market misconduct where the *FCA* has brought or is seeking to bring disciplinary proceedings for *market abuse* arising from substantially the same allegations.



12.4 Liaison with other prosecuting authorities

12.4.1

The *FCA* 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 *FCA* is considering for investigation, investigating or considering prosecuting. These guidelines are set out in ■ annex 2 to this guide. The *FCA* is also a signatory to the Prosecutors' Convention and the Investigators' Convention.

12.5 Prosecution of Friendly Societies

12.5.1

The *FCA's* power to prosecute friendly societies is discussed in ■ EG 19.2.1 to ■ 19.2.7 and in an article on the *FCA* web-site entitled 'Prosecuting Friendly Societies'.¹⁵

¹⁵ <http://www.fca.org.uk/firms/being-regulated/enforcement/how-we-enforce-the-law/courts/friendly-societies>