THE CITY LIBRARY

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COMPLIANCE OFFICER BULLETIN

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Akin Gump's EU/UK Financial Regulatory Practice advises its clients (which include institutional and alternative investment managers, retail and investment banks, brokerages and senior individuals) on all aspects of the UK and EU financial services regulatory framework. The Practice has taken a leading role in advising the global financial services industry on regulatory actions, the impact of EU legislation and on commercial and securities issues that affect it. The Practice is particularly well known for its work acting for financial institutions and senior individuals who find themselves subject to investigation by regulators and exchanges.

ANNUAL REVIEW 2015

1. FCA: Where to next?

2015 has been a turbulent year for the Financial Conduct Authority ("FCA"). Despite it being another record-breaking year in relation to fines imposed for enforcement actions, the conduct regulator has been under pressure for a number of reasons.

The mishandling of the launch of the 2014/2015 Business Plan that resulted in market turbulence was the subject of forceful criticism in the Davis Review. The FCA was forced to apologise for the mistakes that were made and the shortcomings in systems and controls which were highlighted in the review. A number of senior staff subsequently left the organisation. More generally, the FCA has struggled to retain experienced staff, which has resulted in firms expressing frustration at dealing with changes to supervision teams and new FCA staff who do not know or understand their business. The FCA has gone through successive restructuring of its supervision division, and has moved through three directors of supervision in the last year. The FCA also lost its high-profile CEO and, at the time of writing, awaits the appointment of a new CEO.

The FCA has also been the subject of a number of criticisms in recent Tribunal cases in relation to its approach to the handling of third-party rights, publication of notices and submitting late evidence in the course of a hearing. The Tribunal decisions can be seen as a reminder to the FCA that it is expected to follow necessary processes and that it cannot avoid these for its own convenience. It is also a reminder to the FCA and those who refer FCA decisions to the Tribunal for hearing that it should not be taken for granted that the Tribunal will necessarily agree with the FCA's approach.

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These issues have combined with a distinct shift in the financial regulation landscape. In June 2015, the Chancellor referred to reaching a settlement with the banking industry.[1] The FCA commented that:

> "This is a really important inflection point; this is the start of a change"[2] and accepted that escalating fines were by themselves "not having the desired effect", saying: "We need something more. What this is about is trying to get ahead of the cultural change such that we shouldn't need those big stick fines in the future."

Despite having led the FCA through its first two years, in which heavy fines were imposed on firms in relation to LIBOR and FX, and the benchmark review undertaken, Martin Wheatley's contract as CEO of the FCA was not renewed by the Chancellor, resulting in Mr Wheatley's resignation. Mr Wheatley (who was infamous for stating that the FCA would "shoot first and ask questions later"[3]) acknowledged that he was leaving the FCA with a sense that there was "unfinished business".[4]

News reports[5] have suggested that Mr Osborne recognised that a tight regulatory burden since 2008 may have been part of the reason for Britain's poor productivity, as banks have been discouraged from taking risks by lending to expanding companies, and further that UK regulators have been told by the government to go easier on banks. This was denied by the Treasury, but nonetheless it is clear we are seeing a change in direction. The FCA has itself referred to needing a "recalibration of the regulatory approach"[6] in order to achieve a sustainable approach to regulation. Much will depend on the appointment of the CEO to replace Martin Wheatley as to what position the regulator will take.

The implementation of MiFID II and MAR, together with the Senior Managers and Certification Regime that is to be extended across the industry, will increase the regulatory burden on firms and there will be considerable time needed for both the FCA and the PRA to achieve the reform agenda. Time will also be required to see the effect of changes brought about by the Bank of England and Financial Services Bill, which proposes that the Prudential Regulation Authority move from being a subsidiary of the Bank of England and be replaced by a new "Prudential Regulation Committee" which would be brought fully within the Bank and chaired by the Governor, Mark Carney. This is seen as part of Mark Carney's "One Mission, One Bank" strategy to bring all parts of the Bank's responsibilities under one shared vision and culture.[7] The Bank of England has been described as making "an increasingly open bid" to become significantly involved in supervising wholesale market behaviour.[8]

It does seem that the government sees it as time to move on from the crisis, expecting the regulators to pull back and allow businesses to do business and London to continue as a primary financial centre. It will be interesting to see how the regulators balance this position with the promises made following the banking crisis that regulation will fundamentally change to avoid such events occurring again. The FCA's strategic objective is to ensure that the relevant markets for financial services function well. It would appear that the government wants the regulator to achieve this by backing down.

In this issue we discuss the FCA's focus on culture for firms, the extension of the Senior Managers and Certification Regime to non-PRA authorised firms and provide a round-up of the key enforcement cases over the last year. We also provide an update on MiFID II and REMIT, and an outline of changes in relation to public disclosure of beneficial ownership for UK companies.

2. Senior managers and certification regime

On 15 October 2015, the Treasury announced that the government intends to extend the Senior Managers and Certification Regime ("SMCR") to all FSMA authorised persons (with an anticipated implementation date of 2018).[9] The intention is to replace the now-discredited Approved Persons Regime ("APR") that was subject to significant criticism following the financial crisis. It is hoped that the extension of the SMCR will enhance personal responsibility for senior managers as well as providing a more effective and proportionate means to raise the standards of conduct of key staff more broadly.

The key features of the extended SMCR are:

- an approval regime focused on senior management with requirements on firms to submit robust documentation and the scope of these individuals' responsibilities;
- a statutory requirement for senior managers to take reasonable steps to prevent regulatory breaches in their areas of responsibility (which has replaced the reverse burden of proof for senior managers in relation to regulatory breaches in their areas of responsibility);
- a requirement on firms to certify as fit and proper any individual who performs a function that could cause significant harm to the firm or its customers both on recruitment and annually thereafter; and
- a power for the regulators to apply enforceable rules of conduct to any individual who can impact their respective statutory objectives.

The intention of the expansion of the SMCR across the industry is said to be "to enhance personal responsibility for senior managers, as well as providing a more effective and proportionate means to raise standards of conduct of key staff more broadly, with robust enforcement powers to the regulators".[10] It will also be significantly simpler for the regulators to administer one regime rather than two.

The proposed reforms follow the recommendations made in the Fair and Effective Markets Review[11] which suggested that elements of the SMCR should be extended to cover firms active in fixed income, commodities and currency markets. Part of the reasoning given for extending the regime beyond the banking sector is to avoid regulatory arbitrage by ensuring that the same standards apply across banking as well as other financial services.[12]

For more senior people, there will still be prior regulatory approval required for individual appointments, but for less senior but nonetheless important positions, firms will have to take responsibility for ensuring that an individual is fit and proper on a regular basis, and formally confirm this at least once a year. This moves the administration of the regime from the regulator to the firm.

A significant issue in extending the regime beyond banking is the question of proportionality. Proposals which have been designed to fit banking firms will need to be applied to the diverse business models in the UK market. We can expect further consultation papers to be issued on the regulators' proposals.

The main impact for new firms being brought into the regime are expected to be:

- a substantial reduction in the number of appointments that are subject to prior regulatory approval (although firms will be required to undertake new tasks in terms of preparing statements of responsibility and other required information);
- most current approved persons below senior management level are expected to become certified persons. In some roles, prior regulatory approval may not have been required but these will still now become certified person roles; and
- firms are likely to incur additional costs from putting in place systems to ensure employees are notified about and receive suitable training in the rules of conduct that apply to them.

The SMCR will come into operation for banks, building societies, credit unions and PRA-regulated investment firms on 7 March 2016. These firms have been given until 7 March 2017 to complete the certification of existing staff. The government intends that the implementation of the newly extended regime should come into operation for financial services firms that are not banks during 2018.

While it was always anticipated that the SMCR would be extended, it is notable to see the speed with which this has moved through. While the regulators have emphasised that this new regime will increase accountability and their ability to enforce against individuals, given the amount of responsibility that lies on the firm to approve and monitor, one cannot help but question what will really change. The regulator will be less involved in the process and will have a more limited gate-keeper function. The question will be whether the new regime will cure the ills of the APR, or whether it will simply present them in a different form.

3. Culture for firms

The FCA has spent a considerable amount of time since its inception emphasising the importance of culture as a driving behaviour for firms and its 2015/2016 Business Plan states that this continues to be an area of focus and scrutiny. The FCA has said that it will consider culture as part of its assessment of a firm in terms of its approach and behaviour. As such, it is important for firms to consider their existing firm culture and be prepared to articulate how they achieve and demonstrate a "top down"[13] positive culture that meets regulatory expectations. The FCA sees embedding cultural change as important for firms in order to regain the trust of consumers, as well as achieving FCA objectives.

The focus on culture arose following the financial crisis in the LIBOR and FX scandals. Clive Adamson, the then Director of Supervision at the FCA, said "We accept that the FSA has not been as effective a conduct regulator as it could have been",[14] but then referred to the fact that it was felt that when things went wrong (e.g. the mis-selling of PPI, or manipulation of LIBOR), the cultural issue was at the heart of the problem.

The FCA has refused to expressly articulate what it means by culture, stating "You should not ... need a rule book to determine right from wrong. Indeed, it would be impossible and frankly undesirable for any regulator to attempt to codify the limits of what is or is not morally acceptable".[15] The FCA has warned that "Culture is notoriously difficult to measure and assess—let alone change".[16] However, it has sought to try and communicate its expectations in this area to firms with references to getting firms to "do the right thing",[17] emphasising compliance with the "spirit" of the rules as well as the technical requirements. It has talked about firms putting customers "at the heart of the business". It has also made particular reference to examples of poor culture within firms in final notices.

> "We continue to believe that a cultural shift within firms to celebrating good conduct that places consumer interests and market integrity at the heart of the financial sector will benefit all stakeholders. We continue to address conduct issues arising from failures in firm culture and are committed to ensuring this momentum is not lost.
>
> Change in culture will only come when the tone at the top is right. However, it also requires staff throughout a business to understand and accept the values and practices the firm espouses. This means that firms must ensure that all of their processes support and reinforce the culture they want to promote ... We have a range of tools at our disposal to actively combat any poor conduct by firms and individuals."[18]

The new FCA Director of Enforcement, Mark Steward has referred to culture with reference to "an integrated ideal of good governance, regulatory compliance and fair process".[19] To achieve this, he has said that firms need to:[20]

- understand the nature of their business in detail;
- have effective systems and controls to ensure the business is operating effectively and in accordance with conduct standards; and
- undertake risk-focused counterfactual or counterintuitive audits of their systems and controls. Systems and controls cannot be approached on a "set and forget" basis.

He has further noted that one way of knowing when culture has failed is to consider:[21]

- how long it takes for problems to escalate to the right person or group of persons for effective decision making or action;

- how many problems linger in the inbox or the draft box or the bottom drawer beyond their easily fixable date; and
- how difficult it is to fix things once they are detected.

Assessment of firm culture will be undertaken by the FCA observing what the firm does through a range of different measures, such as how it responds to, and deals with regulatory issues, customers' experience interacting with the firm, how the firm runs product approval processes, and considerations around that and the manner in which decisions are made or escalated. Board engagement with these issues will also be scrutinised.

The FCA had indicated that it would commence a thematic review of culture in 2015.[22] However, at the date of writing, the FCA is reported to have decided that such a review would not be conducted, preferring instead to engage individually with firms to encourage their delivery of cultural change.[23]

The FCA's 2015/2016 Business Plan said that the FCA is particularly concerned in relation to the poor culture and controls that threaten market integrity, including conflicts of interest and poor culture and practice in consumer credit affordability assessments that result in unaffordable debt. Firms will need to be prepared to describe the culture that exists and the steps taken to embed a positive regulatory culture within their processes and people.

Fundamentally, firms should seek to achieve compliance with the FCA's regulatory requirements but also take a common-sense view as to their approach and whether it could be perceived as doing the right thing by its customers and will be perceived to be doing the right thing by the FCA. They need to focus on the objective of the regulation as well as technical compliance, looking broadly at their business and considering the key messages being communicated by the regulator in guidance and final notices. It is apparent that technical compliance alone will not be enough.

4. Enforcement round-up

2015 has continued to demonstrate the FCA's commitment to using enforcement action to discipline firms and educate the industry. The size of the fines imposed remains at the higher end of the scale, with the fine of £284,432,000 imposed on Barclays in relation to FX being one of the largest to date. The fine of £75 million (albeit that included a £72.5 million component for disgorgement) on Stuart Ford also signals that the FCA will not refrain from imposing sizable fines on individuals. It is notable that there has not been as much enforcement action taken against senior individuals despite the priority given to this by the FCA. Changes brought about by the Senior Managers and Certification Regime may lead to more cases of this nature in time.

Over the last year the FCA has made firm culture a key regulatory priority.[24] The FCA has articulated its expectations on firm culture in a number of final notices discussed below. Firms should reflect on the FCA's guidance on this subject to ensure they are fostering a culture that aligns with the regulator's expectations.

The FCA is also continuing to take tough action in market abuse cases and is cooperating with overseas regulators in cases where the alleged misconduct relates to markets outside the UK.

2015 has also been notable for the criticism the FCA has received in the course of some of its actions before the Upper Tribunal. The Tribunal has been particularly scathing in relation to the FCA's seeming disregard for its own processes and an approach that has appeared arrogant. The Tribunal has made it clear that it will not allow the FCA leeway in these matters and considers that it is particularly important for the FCA to ensure proper processes are adhered to when dealing with litigants in person. Individuals and firms with complaints about the FCA stepping outside its processes should not shy away from making referrals, as such challenges may well result in a change of approach from the FCA, as can be seen in the Wilkins decision discussed below.

4.1 Firm culture

4.1.1 Barclays Bank Plc

On 20 May 2015, the FCA imposed a £284,432,000 fine on Barclays Bank Plc ("Barclays") for failing to control business practices in its foreign exchange ("FX") business in London in breach of Principle 3 (management and control). This is the largest fine ever imposed by the regulator, or its predecessor the Financial Services Authority ("FSA"). This case also provided an opportunity for the FCA to make helpful comments about its expectations on firm culture.

The FCA's decision follows Barclays' withdrawal from a global settlement in which the US, UK and Swiss regulators fined five banks a total of US$3.2 billion (excluding disgorgement).[25] Although Barclays was part of the settlement discussions, it decided to pull out of these discussions as it was seeking a "more general coordinated settlement".[26]

The FCA found that Barclays' controls over its FX business were inadequate and ineffective over a period of five years. This led to inappropriate behaviour in its FX business, including attempts by traders to manipulate FX rates in collusion with traders from other banks, trigger clients' stop loss orders, and inappropriately share confidential client information. Traders also attempted to manipulate FX rates to improve Barclays' trading positions in FX options to the potential detriment of clients and other market participants.

On the subject of culture, the FCA said it expects firms to "identify, assess and manage appropriately the risks that their business poses to the markets in which they operate and to preserve market integrity, irrespective of whether or not those markets are regulated".[27] Firms should also "promote a culture which requires their staff to have regard to the impact of their behaviour on clients, other participants in those markets and the financial markets as a whole".[28]

Barclays' failings were considered to be particularly serious in light of their potential impact on the systemically important spot FX market. Georgina Philippou, the FCA's then acting Director of Enforcement and Market Oversight, commented:

> "This is another example of a firm allowing unacceptable practices to flourish on the trading floor. Instead of addressing the obvious risks associated with its business Barclays allowed a culture to develop which put the firm's interests ahead of those of its clients and which undermined the reputation and integrity of the UK financial system. Firms should scrutinise their own systems and cultures to ensure that they make good on their promises to deliver change."[29]

4.1.2 LIBOR/EURIBOR and Principle 11 issues

On 23 April 2015, the FCA imposed a £227 million fine on a major investment bank ("Bank") for LIBOR and EURIBOR-related misconduct and for apparently misleading the FCA in its investigations of these matters.[30] This is a significant penalty for Principle 11 (relations with regulators) related violation and it is the largest fine ever imposed by the FCA in a LIBOR/EURIBOR matter. This decision emphasises the importance of maintaining adequate systems and controls in these areas. Firms should also have regard to the FCA's comments in relation to culture.

From January 2005 to December 2010, the trading desks at the Bank were alleged to have manipulated LIBOR and EURIBOR submissions and improperly influenced other panel banks' submissions. The alleged misconduct involved individuals across multiple offices, including managers, traders and submitters. The FCA believed that the alleged misconduct was routine and reflected a culture at some trading desks to increase revenues without proper regard to market integrity. This led the FCA to conclude that the Bank was in breach of Principle 5 (market integrity).

The Bank was also said to have breached Principle 3 (management and control) by not having LIBOR/EURIBOR-specific systems and controls. Further, the FCA concluded that the Bank's systems for identifying and recovering recordings of trader telephone calls and mapping trading books to traders were insufficient. As a result, the FCA said that it took two years for the Bank to identify and produce all of the audio recordings it had requested.

The Bank was also said to have breached Principle 11 (relations with regulators). It had apparently told the FCA it was prohibited from disclosing a report to the FCA when no such prohibition existed. The Bank was also said to have provided a formal attestation to the FCA stating that its systems and controls in relation to LIBOR submissions were adequate, when the person giving the attestation was aware that this was not the case. More generally, the Bank was alleged to have failed to provide accurate, complete and timely information to the FCA during its investigation.

This case provided an opportunity for the FCA to articulate its expectations on culture. It said:

> "The Authority expects firms to promote a culture which requires staff to have regard to the impact of their behaviour on other market participants and the financial markets as a whole. This includes responding promptly, effectively and accurately to regulatory enquiries."[31]

Georgina Philippou, then acting Director of Enforcement and Market Oversight at the FCA, emphasised that a failure by firms to cooperate with the regulator is taken seriously by the FCA. She commented:

> "[The Bank's] failings were compounded by them repeatedly misleading us. The bank took far too long to produce vital documents and it moved far too slowly to fix relevant systems and controls. This case shows how seriously we view a failure to cooperate with our investigations and our determination to take action against firms where we see wrongdoing."[32]

4.1.3 Bank of Beirut

On 4 March 2015, the FCA imposed a £2.1 million fine on Bank of Beirut (UK) Ltd ("Bank") and imposed a 126-day restriction on the Bank from acquiring new customers from high-risk jurisdictions in respect of its regulated activities after it had repeatedly provided misleading information to the regulator. The FCA also imposed a £19,600 fine on the Bank's former compliance officer Anthony Wills and a £9,900 fine on the Bank's internal auditor Michael Allin. This case shows that if a firm does not address its anti-money laundering ("AML") systems and controls failings, the FCA may suspend or restrict the firm's regulated activities.[33] It is also a reminder of the need for firms and approved persons to be open and cooperative in their dealings with the regulator and to foster a culture that supports effective regulation.

In 2010 and 2011, the FCA became concerned that the Bank had failed to give sufficient consideration to the risk that it could be used for financial crime. As a result, it required the Bank to implement a remediation plan, which included steps to remediate customer files, resolve internal audit issues, develop and implement an adequate compliance monitoring programme and review the implementation of the plan.

Although the Bank had failed to complete these steps, it repeatedly provided inaccurate information to the FCA to suggest that it had done so. This led the FCA to find that the Bank had breached Principle 11 (relations with regulators). Similarly, it found that Mr Wills (who was responsible for addressing some of the remediation steps and had handled most of the Bank's communications with the FCA) and Mr Allin (who was responsible for reviewing whether the Bank had undertaken the remediation steps) had breached Statement of Principle 4 (open and cooperative dealings with the regulator).

The FCA emphasised its expectation on firms to demonstrate a culture that supports effective regulation. Its approach to supervision can involve engaging in discussion with a firm regarding its failure to meet regulatory standards and agreeing on an action plan for the firm to take corrective action. This relies on the firm in question to take on responsibility for completing the agreed corrective action, and the FCA must be able to rely on the firm's leadership to do so.[34] Georgina Philippou, then acting Director of Enforcement and Market Oversight, said that providing misleading information to the regulator is a serious breach of the responsibilities applicable to approved persons. She commented:

> "[the FCA is] reliant on compliance officers and internal audit to act as an important line of defence, to support effective regulation at firms and to show backbone even when challenged by their colleagues."[35]

This case also shows that AML issues continue to be a regulatory priority for the FCA. The regulator said that financial services firms are at risk of being abused by those seeking to launder the proceeds of crime to finance terrorism; accordingly, firms are required to take appropriate and proportionate steps to manage these risks in order to reduce the risk of financial crime.[36]

4.2 Market abuse

4.2.1 Da Vinci Invest Ltd

The High Court held on 12 August 2015 that the FCA was entitled to permanent injunctions and penalties totalling £7,570,000 against Da Vinci Invest Ltd ("DVI"), Mineworld Ltd ("Mineworld"), and three individuals for market abuse. The defendants were found to have committed market abuse in relation to 186 UK-listed shares using a manipulative trading strategy known as "layering" or "spoofing". This is the first time that the FCA has sought an order for a permanent injunction restraining market abuse and a penalty. Four of the five defendants were incorporated or resident abroad (in Switzerland, the Seychelles and Hungary).

The layering activity took place over 2010 and 2011. The traders entered large orders close to the best bid or offer price for shares traded on the London Stock Exchange ("LSE") or other multilateral trading facilities ("MTFs") which the traders had no intention of executing, in order to create a misleading impression of the demand and supply for those shares. They also placed small share orders to improve the best bid or offer price and, as the price improved, strategically placed further large orders close to the new best bid or offer price in order to support the new price. Once the share price had been moved to an advantageous level, the traders would enter the market on the opposite side in order to profit from the artificial price they had created. The large "layered" orders were then cancelled and the process would start over again, typically aimed at moving the price in the opposite direction.

The trading was conducted using contracts for difference ("CFDs"). When the traders placed an order for CFDs through a Direct Market Access Provider ("DMA Provider"), this caused the DMA Provider to enter an identical share order on the order book of the LSE or relevant MTF.

The Court was satisfied that the traders had engaged in market abuse within the meaning of s.118(5) of the FSMA. It found overwhelming evidence that "the (t)raders must have known full well what they were doing, and that they were well aware that what they were doing was wholly improper".[37] The Court granted a permanent injunction against the defendants as it considered the risk of repetition of market abuse by the defendants was a real possibility that could not be ignored. In reaching this conclusion, the Court had regard to the degree of potential harm caused by market abuse and commented:

> "Market abuse can cause serious harm, not only to other market participants and the many millions of private citizens whose personal wealth and provision for retirement is invested on the financial markets, but also to the reputation of those markets more generally. Protecting the integrity and proper functioning of those markets is a matter of substantial importance to individuals as well as to national and international economic interests. The policy imperative to prevent and deter market abuse is very clear."[38]

This proceeding follows the Swift Trade judgment in 2014. The traders involved had previously been involved with Swift Trade. It is notable that arguments that the defendants were "market making" were rejected by the Court, which observed that market making requires two-way prices and the traders' activities were not consistent with this.

4.2.2 Navinder Sarao

US authorities are currently pursuing a case against Navinder Sarao, a London-based independent trader who is alleged to have repeatedly spoofed the Chicago futures market from 2010 to 2014 and to have played a critical role in the "flash crash" of 6 May 2010.[39] Although not an FCA-led investigation, this case shows that manipulative trading behaviour involving "spoofing" is of interest to regulators globally. Mr Sarao is said to have committed wire fraud, commodities fraud, market manipulation, and spoofing offences. An extradition hearing against Mr Sarao is currently pending.

4.2.3 Michael Coscia

Another spoofing case that demonstrates global regulatory interest is that of Michael Coscia. On 3 November 2015, a US jury convicted Michael Coscia, a futures trader and owner of Panther Energy Trading LLC ("Panther"), of spoofing and commodities fraud offences. This is the first criminal conviction under the anti-spoofing law introduced by the 2010 Dodd–Frank Wall Street Reform and Consumer Protection Act. Each count of commodities fraud carries a maximum sentence of 25 years in prison, and each count of spoofing carries a maximum sentence of 10 years in prison. Both offences carry significant criminal fines.

Mr Coscia and Panther had already reached a US$2.8 million settlement with the CFTC[40] in respect of the same conduct and were banned from trading on any CFTC-registered entity for one year. The FCA also imposed a US$903,176 fine on Mr Coscia for market manipulation. Mr Coscia's sentencing hearing is scheduled for 17 March 2016.

4.2.4 Tariq Carrimjee

On 4 March 2015, the Tribunal found that Tariq Carrimjee, an experienced investment adviser at Somerset Asset Management LLP ("Somerset"), had breached Statement of Principle 2 (due skill, care and diligence) by failing to react appropriately to warning signs that his client may have intended to engage in market manipulation. As a result, the Tribunal upheld the FSA's decision to impose a £89,004 penalty on Mr Carrimjee. This decision highlights the need for approved persons to be alive to the risk that those around them may be intending to commit market abuse and to escalate matters if needed to avoid being subject to regulatory sanction themselves.

Mr Carrimjee was the senior partner at Somerset and was approved to perform various significant influence functions on behalf of Somerset. In April 2010, he introduced his client, Rameshkumar Goenka, to a broker so that Mr Goenka could trade in the Closing Auction for certain Global Depositary Receipts ("GDRs") operated by the London Stock Exchange. He made that introduction, participated in discussions about trading and assisted with the arrangements for trading despite suspecting that Mr Goenka was intending to secure the price of GDRs at a false or artificial level. Although Mr Goenka abandoned his trading strategy at that time, he subsequently effected orders to trade (through the broker to whom Mr Carrimjee had introduced him) which artificially inflated the closing price of certain GDRs for that day. By increasing the closing price, Mr Goenka avoided a loss of over US$3 million. In October 2011, the FSA (as it then was) fined Mr Goenka US$9,621,240 (approximately £6 million) for market abuse.

The FSA found that Mr Carrimjee's conduct in relation to Mr Goenka amounted to a breach of Statement of Principle 1 (acting with integrity). The Tribunal did not uphold the FSA's finding, instead, concluding that Mr Carrimjee had acted in breach of Statement of Principle 2 (due skill, care and diligence) in failing to escalate the risk that Mr Goenka may have been intending to engage in market manipulation, when this risk should have been apparent to Mr Carrimjee. It decided that a significant financial penalty should be imposed as a deterrent to Mr Carrimjee and to others.

At the time of its decision, the FSA had proposed to remove Mr Carrimjee's approved person status and impose a prohibition order on him. The Tribunal remitted this matter to the FCA and directed the regulator to reconsider the proposal. The Tribunal noted that it is comparatively rare for the FCA to withdraw customer-facing functions and all significant influence functions, or impose a full prohibition, in one-off cases of failure to act with due skill, care and diligence, and suggested that it would be irrational and disproportionate if the FCA were to take that course of action in relation to Mr Carrimjee.

This case should serve as an important reminder that market participants, and in particular approved persons, should be alert to the possibility of market abuse when asked to trade or arrange a trade for a client. In this case, the Tribunal commented:

> "(A)n individual approved person who fails to report suspicions internally when he should have suspected the risk of market abuse will inevitably have failed to act with due, skill care and diligence in breach of Statement of Principle 2, and such a failure should be regarded as serious."[41]

4.3 Transaction reporting failures

4.3.1 Merrill Lynch International

On 22 April 2015, the FCA imposed a £13,285,900 penalty on Merrill Lynch International ("MLI") for transaction reporting failures. This is the largest fine ever imposed by the FCA in relation to transaction reporting failures. For the first time, the FCA applied a penalty of £1.50 per line of incorrect or non-reported data. It said that although a penalty of £1.00 per line had been used in recent reporting transactions cases, fines that were calculated on this basis had not been high enough to achieve credible deterrence.[42]

Between November 2007 and November 2014, MLI had failed to report 121,387 transactions and incorrectly reported 35,034,810 transactions to the FCA in breach of SUP 17.1.4R and SUP 17.4.1 EU/SUP17 Annex 1 EU. For example, some of MLI's transaction reports contained inaccuracies including incorrect details of the central counterparty and client, incorrect use of the Buy/Sell indicator, omission of the maturity dates of certain derivative transactions and the incorrect BIC code for certain transactions.

The FCA stated that:

> "[a]ccurate and complete transaction reporting is essential to enable the Authority to meet its operational objective of protecting and enhancing the integrity of the United Kingdom financial system. The primary purpose for which the Authority uses transaction reports is to perform surveillance for and to inform investigations into market abuse, insider trading and market manipulation and related financial crime."[43]

In determining the appropriate penalty, the FCA had regard to the importance it attaches to transaction reporting in general, the previous financial penalty imposed on MLI and MLI's compliance history in relation to transaction reporting.

This decision is a clear signal that the FCA is continuing to take tough action against firms that are not compliant with their transaction reporting obligations. Georgina Philippou, the FCA's then acting Director of Enforcement and Market Oversight, commented:

> "The size of the fine sends a clear message that we expect to be heard and understood across the industry. Accurate and timely reporting of transactions is crucial for us to perform effective surveillance for insider trading and market manipulation in support of our objective to ensure that markets work well and with integrity."[44]

4.4 Joint PRA/FCA investigation

4.4.1 Co-op Bank

Following an 18-month investigation by the FCA and the PRA, on 11 August 2015, the regulators issued a censure to the Co-op Bank.[45] The FCA found the Co-op Bank had breached Listing Rule 1.3.3R (Misleading information not to be published) by publishing misleading information in its financial statements. The PRA found the Co-op Bank had failed to manage its affairs responsibly, with adequate risk management in breach of Principle 3 (control and risk management).[46] Both regulators also found that the Co-op Bank had failed to deal with them in an open and cooperative manner, in breach of Principle 11 (relations with regulator).[47] The failings took place over July 2009 (around the time of the Co-op Bank's merger with Britannia Building Society) to December 2013.

The Co-op Bank's 2012 financial statements referred to the bank having maintained adequate capital to cover the bank's regulatory requirements and to withstand even the most severe stress scenarios, though this was not, in fact, the case. In fact, the bank had been in frequent discussions with the FCA on the steps necessary to improve its capital position. The FCA found it should have been apparent to the Co-op Bank that the statements made about its capital position were misleading. Also, there was apparently no reasonable basis for stating that the bank had adequate capital in the most severe scenarios, given that its financial statements reported a loss of £673.7 million.

The PRA stated that the Co-op Bank's failure to maintain an adequate control and risk management framework had clear potential to impact on the safety and soundness of the bank as the board was not being provided with sufficient information in a timely manner. Although it was not possible to determine whether the Co-op Bank's capital shortfall could have been avoided, the PRA said a more risk-aware culture and effective systems and controls would have increased the bank's prospects of dealing with the issues more quickly and effectively.[48]

Further, the regulators saw the Co-op Bank's failure to notify them of intended personnel changes in senior positions as a serious failing. Firms are expected to notify the regulators of any intended changes to senior individuals without delay so that the regulator can properly consider and assess the management of the firm.[49]

Despite their findings, the FCA and the PRA decided that no financial penalty would be imposed. The Co-op Bank was engaged in a turnaround plan to ensure it holds capital above its Individual Capital Guidance on a sustainable basis and has adequate capital to withstand severe stress. The FCA thought that, in these circumstances, the bank's resources should be directed towards improving its resilience. Similarly, the PRA said imposing a financial penalty on the Co-op Bank would not advance its objective of promoting the safety and soundness of the firms it regulates.

This case is another example of serious failings by a firm that include failing to be open and cooperative with the regulator. While the reasons for the regulators not imposing a financial penalty on the firm are understandable, no senior manages appear to have been held to account at this stage. The FCA has stated that it is continuing to investigate individuals and it would be a curious result to have such serious findings made against the firm without senior managers being held to account, particularly given this is an FCA priority.

4.5 Keydata

The following cases relate to the FSA's investigation into the affairs of Keydata Investment Services Ltd ("Keydata"), which began in December 2007.[50]

4.5.1 Ford, Owen and Johnson

On 7 November 2014, the FCA published decision notices setting out its finding that three former members of Keydata senior management, Stewart Ford (former Chief Executive), Mark Owen (former Sales Director) and Peter Johnson (former Compliance Officer) had failed to act with integrity and had misled the FSA. As a result, the FCA decided to impose fines of £75 million, £4 million and £200,000 on the three individuals respectively, and to prohibit each individual from performing any role in regulated financial services. All three individuals have referred the FCA's decision to the Upper Tribunal. If upheld, the FCA's £75 million fine against Mr Ford (which includes disgorgement of £72.4 million) would be the highest fine the FCA (or its predecessor, the FSA) has ever imposed on an individual.[51]

Keydata designed structured investment products and distributed them to retail investors through a network of independent financial advisors ("IFAs"). The products involved Keydata's investment in bonds that were issued by Luxembourg special purpose vehicles SLS Capital S.A. ("SLS") and Lifemark S.A. ("Lifemark") which, in turn, invested in portfolios of life settlement policies.

The FCA found that although Keydata sold structured investment products as eligible for ISA status, Mr Ford, Mr Owen and Mr Johnson were aware it was likely that the products did not comply with ISA regulations. Further, they were aware that financial promotions in relation to the products were unclear, incorrect and misleading, Keydata had conducted inadequate due diligence and there were concerns about the performance of the underlying assets. In relation to the SLS products, the FCA alleged that Mr Ford had deliberately concealed problems with the performance of the underlying portfolio from investors, IFAs and the FSA. Further, the FCA found that Mr Owen recklessly relied on Mr Ford's assurances that these problems would be resolved and approved Keydata funding payments to investors (which should have been funded by SLS) from its own resources. This masked problems with SLS and the performance of the SLS products.

Mr Ford had received £72.4 million in fees and commissions from the sale of Lifemark products (either directly or through family trusts relating to him) and the conflict of interest arising from these payments was, in the FCA's view, not adequately managed. Mr Owen received £2.5 million in fees and commissions from the sale of Lifemark products, which the FCA said was not properly disclosed.

The FCA also found the individuals had deliberately misled the FCA about the performance of investment products, and Mr Johnson had failed to ensure the FCA was aware of problems with the performance of SLS products and related financial promotions.

The outcome of the case and, in particular, the Tribunal's ultimate decision regarding the quantum of financial penalty to be imposed, will be of particular interest to officers facing investigation and more generally, those in management positions in financial services firms.

4.5.2 McNeil

On 21 September 2015, the FCA imposed a £350,000 fine (reduced by 30 per cent due to agreed early (Stage 1) settlement) and a prohibition order on Craig McNeil, the former finance director of Keydata. As a result, Mr McNeil is prohibited from performing any significant influence function. This decision highlights the FCA's expectation on directors of financial services firms to be proactive in notifying the regulator about significant risks in their firms, particularly if they directly impact on customers' investments.

Mr McNeil knew that Keydata was making payments which should have been funded by SLS, and that the matter had not been notified to the FSA. Despite this, he failed to ensure that the FSA was informed of circumstances surrounding Keydata's SLS products. This led the FCA to conclude that Mr McNeil had breached his responsibilities under APER 4 (open and cooperative dealings with regulator).

The FCA also found that Mr McNeil had acted in breach of Statement of Principle 6 (due skill, care and diligence). In 2008, Keydata entered into a complicated transaction in an unsuccessful attempt to obtain security in respect of the income payments SLS had failed to make. Mr McNeil's breach arose when he authorised the use of Keydata funds for the purpose of the transaction without taking sufficient steps to understand the transaction or the risks that were involved.

Georgina Philippou, then acting Director of Enforcement and Market Oversight at the FCA noted that the FCA relies on senior directors to inform the FCA about the significant risks in their firms. Ms Philippou said:

> "It was not reasonable in the circumstances for Mr McNeil to rely on the fact that other directors might eventually tell us what was happening. If Mr McNeil had acted, and acted quickly, concerns about SLS might have come to light sooner."[52]

4.6 Case handling and publication of Decision Notices

On 21 May 2015, the Upper Tribunal upheld the FCA's decision to impose a £10,000 fine and a prohibition order (preventing the performance of significant influence functions) on Clive Rosier, the sole director and approved person of Bayliss & Co (Financial Services) Ltd ("Bayliss"). The Tribunal upheld all but one of the FCA's findings in relation to breaches of Statements of Principle 2 (due skill, care and diligence) and 7 (ensure compliance with regulatory standards),[53] but the decision is notable for the heavy criticism the Tribunal made of the FCA's handling of the case, including the submission of late evidence and the FCA's approach to publicity of its decision notice, which the Tribunal described as "deeply disappointing and troubling".[54]

The FCA submitted a witness statement just 10 days before the hearing without first seeking permission from the Tribunal. Further, new documents that were referenced in this statement were inserted into the trial bundle without permission from the Tribunal. The Tribunal thought that the FCA's introduction of material in this way showed "an unacceptable degree of arrogance".[55] It also said that following the proper course for introducing material is important where the applicants represented themselves and may be less familiar with the Tribunal's rules and procedures.

The Tribunal was highly critical of the FCA's approach to the publicity of the decision notice. The FCA had emailed a press release together with a link to the decision notice (which was mistakenly described as a final notice) to selected media outlets. The press release only referred to the provisional nature of the FCA's decision in the last paragraph and, in the Tribunal's view, did not accurately reflect the content of the decision notice. The Tribunal said that these actions "demonstrate a standard of care in drafting and approving an important public communication ... which fell well below the standard the Authority would find acceptable on the part of the firms it regulates in relation to the approval of financial promotions".[56] It also said that references to Mr Rosier by his surname only were "unnecessarily disrespectful".[57] The Tribunal also criticised the FCA's handling of Mr Rosier's complaint in relation to the press release, noting the lack of a "swift recognition of a mistake and a clear commitment to put it right"[58] on the part of the FCA. These failures led the Tribunal to conclude that the FCA's procedures in relation to publicity for decision notices should be strengthened.

The FCA has taken steps to strengthen its procedures following the Davis Review which heavily criticised the FCA's management on the release of its 2014/2015 Business Plan (leaks of which caused market disruption). This decision makes it clear that the Tribunal will hold the FCA to account in relation to following its procedures.

4.7 Third-party rights

4.7.1 Macris

On 19 May 2015, the Court of Appeal upheld a decision by the Upper Tribunal and found the FCA should have afforded Achilles Macris third-party rights in relation to a final notice issued to JPMorgan Chase Bank NA ("JP Morgan").[59] The notice concerned failures relating to trading losses incurred by JP Morgan's Synthetic Credit Portfolio ("SCP"), under transactions commonly referred to as the "London Whale" trades. It has been reported that the Supreme Court has granted the FCA permission to appeal the Court of Appeal's decision.[60]

The FCA had issued a warning notice, a decision notice and a final notice to JP Morgan, that were, so far as relevant, in identical terms. The notices contained criticism against JP Morgan's "CIO London management" although they did not refer to Mr Macris by name. The FCA did not give Mr Macris a copy of the warning notice or the decision notice , or an opportunity to make representations, as it did not consider that he was identified in the notices.

Mr Macris was the International Chief Investment Officer of the SCP. He argued that the FCA, in promulgating the notices, had included reasons which prejudicially identified him in relation to which he had had no opportunity to contest. Section 393 of the Financial Services and Markets Act 2000 ("FSMA") states that, if a warning notice or decision notice contains reasons which identify a third party (i.e. someone other than the person to whom the notice is given) and those reasons are prejudicial to the third party, a copy of the notice must be given to the third party unless he has been given a separate notice in respect of the same matter. The third party must also be given a reasonable period within which he may make representations to the FCA.

The question before the Tribunal,[61] and subsequently the Court of Appeal,[62] was whether Mr Macris was identified in the decision notice given by the FCA to JP Morgan through the term "CIO London management". The Tribunal found that Mr Macris was prejudicially identified. In particular, it found that in the context of the decision notice, references to "CIO London management" were references to an individual rather than a level of management. It also concluded that the individual described in the notice could only be Mr Macris.

The Court of Appeal agreed the notice prejudicially identified Mr Macris. It rejected the argument that a person must be identifiable solely from the content of the notice, and found that external material may be used to determine if a third party is referenced in the notice provided it is material that persons acquainted with the claimant or operating in the same area of the financial services industry might reasonably have known when the notice was published.

This decision is highly significant for the FCA. If upheld, the FCA will need to approach its description of third parties in its notices more carefully than in the past and may take a step back from the approach it took in the LIBOR and FX notices where it published extracts of calls between traders in the notices (some of which are also subject to challenge in relation to third-party rights). The outcome of the appeal will be awaited with interest.

4.7.2 Bittar

The test articulated in the Court of Appeal judgment on Macris was recently applied in the decision on third-party rights relating to Christian Bittar.[63] Mr Bittar, a former employee of a bank which had been fined for attempting to manipulate LIBOR argued that he had been identified in a decision notice issued by the FCA within the meaning of s.394 of the FSMA. Applying the objective test in *Macris v Financial Conduct Authority*,[64] the Tribunal found that the "relevant reader" of the notice would have had Mr Bittar's name in mind at the time of its publication as a result of ongoing media interest.

4.7.3 Ashton

On 21 October 2015, the Tribunal published a decision allowing Christopher Ashton to make a reference to the Tribunal out of time in relation to the contention that he was identified (but not named) in a final notice issued by the FCA to UBS AG in relation to misconduct in UBS' foreign exchange operations ("UBS Notice").[65] The Tribunal's decision to allow the reference could be seen as a desire to ensure that FCA final notices are robustly tested, particularly when issues relating to third-party rights are raised.

Mr Ashton was employed by a subsidiary of Barclays as a foreign exchange trader. He had made a reference in time on the same grounds in relation to a final notice issued by the FCA to Barclays Plc in relation to misconduct in Barclays' foreign exchange operations ("Barclays Notice").[66] Although the Tribunal thought that this was a borderline case, it decided to allow Mr Ashton's reference as there was a close link between the matters complained of in the UBS Notice and those in the Barclays Notice. The Tribunal also considered the public interest in the FCA's decisions being as accurate as possible, and thought that this is more likely to be achieved if those decisions were properly tested. It said that public interest considerations, and the fact that Mr Ashton would have no other opportunity to make representations, were strong factors favouring the extension of time. Finally, the Tribunal considered the fact that Mr Ashton had delayed making a reference in respect of the UBS Notice on the advice of his legal advisors. It stated that it would be unfair for Mr Ashton to bear the consequences of the approach he took on the advice of his solicitors, though this factor would not be persuasive in the absence of a strong linkage between the UBS Notice and the Barclays Notice.

Like the Macris case, the Tribunal's decision on third-party rights issues arising from the UBS Notice is expected to impact the FCA's approach to the contents of statutory notices.

4.8 Additional Tribunal reasons resulting in FCA change of position on prohibition order

In an unusual case, the FCA was forced to back down from its attempt to prohibit Andrew Wilkins, a former Director of Catalyst Investment Group Ltd ("Catalyst"), following the Tribunal issuing additional reasons clarifying its decision of 6 August 2015.[67]

In August 2013, the FCA issued a censure to Catalyst and published decision notices against Timothy Roberts (who was a Director and the Chief Executive of Catalyst) and Andrew Wilkins. The notices set out the FCA's intention to fine each of them £450,000 and £100,000 respectively, and prohibit them for recklessly misleading investors when promoting bonds offered by ARM Asset Backed Securities SA between November 2009 and May 2010. The individuals referred the decision notices to the Tribunal.

The Tribunal upheld the FCA's finding that Mr Roberts and Mr Wilkins had acted without due care, skill and diligence and that Mr Roberts' conduct demonstrated a reckless disregard for the interests of investors and a lack of integrity. However, the Tribunal rejected the FCA's allegation that Mr Wilkins had acted recklessly and without integrity. The FCA pleaded that even if the Tribunal did not accept that Mr Wilkins did not lack integrity, it was open to the Tribunal to conclude that he was nonetheless not fit and proper (e.g. on the basis of his competence and capability).

The Tribunal decision referred in its conclusion to both the issues of integrity and competence and it stated that it did not consider that Mr Wilkins' failings to be such that they justified a finding that he was not fit and proper. In the decision the Tribunal reduced the fine on Mr Wilkins to £50,000 and remitted the matter of his prohibition back to the FCA to reconsider in the light of its findings of fact, noting that although Mr Wilkins had made certain errors it did not consider that he had acted with a lack of integrity or with a reckless disregard to investors' interests. The decision stated: "As noted above, we do not consider that Mr Wilkins is not fit and proper as alleged by the Authority."[68]

The FCA believed that it was still open to it to prohibit Mr Wilkins on the basis that he lacked competence and made the decision to do so. The FCA considered that it could take this position as it was of the view that despite its comments, the Tribunal did not make an overall finding that Mr Wilkins was fit and proper.

It was left to Mr Wilkins to seek additional reasons from the Tribunal, which were issued on 8 September 2015. The Tribunal said that its decision needs to be read as a whole and it dismissed the allegation that Mr Wilkins was not fit and proper including the allegation of lack of competence.

The FCA was left to reconsider the matter and decided it was not appropriate to prohibit Mr Wilkins after all. [69]

It will be interesting to see what position the FCA will take in future cases where the Tribunal has remitted a matter relating to a prohibition order back to it for consideration as required by s.133(6) of the FSMA. The FCA is not constrained from disagreeing with the Tribunal but such an approach may lead to the individual taking the matter back to the Tribunal. This can result in a situation that is embarrassing for the FCA and it will remain to be seen how robust it is in its approach in similar circumstances on future cases.

4.9 Change in control applications

On 23 October 2015, the Office of the Complaints Commissioner ("Complaints Commissioner") published a final decision in which it criticised the FCA's handling of the complainant's change in control application.

This case concerns a complaint to the Complaints Commissioner regarding the FCA's handling of a change in control application made by the complainant. One of the issues raised was that the FCA had set extremely short deadlines for the complainant to respond to issues the FCA had raised about the application. Under the FSMA,[70] the FCA has 60 working days to assess a change in control application. The FCA can pause the assessment period once and so extend the time it has to consider an application (a process referred to as "stopping the clock"). In this case, the FCA accidentally removed the ability to stop the clock on the complainant's application by requesting supplemental information early on in its assessment process. As a result, the FCA was bound by the 60-day statutory period. This led the FCA to set very short timeframes for the complainant to respond to its requests for further information.

The Complaints Commissioner thought that the FCA's request for information was "ill-considered".[71] It criticised the FCA for failing to recognise the error earlier, and for failing to provide a candid explanation of the resulting timeframes to the complainant. He also criticised the rushed process for considering the application that resulted from the FCA's error. This led the Complaints Commissioner to recommend the FCA to make a compensation payment of £750. He also saw a need for the FCA to review its procedures for handling change of control applications to ensure that FCA staff are properly focused upon the management and purpose of the process, are trained to understand when deadlines should be adjusted in order to avoid unnecessary stress and potential unfairness, and are fully aware of how and when the FCA can stop the clock to allow firms to provide further information.

5. MiFID II: A whistle-stop tour for investment managers

5.1. Introduction

Over the past 12 months or so, the commentary regarding the second Markets in Financial Instruments Directive ("MiFID II") has ranged from the gravely concerned to the welcoming when discussing the impending paradigm shift in the regulation of the European financial markets. However, notwithstanding the wide-ranging coverage on the subject matter, it is often unclear to legal and compliance personnel, as well as senior managers, traders and other front-of-office staff, what all the noise about MiFID II is about and, more importantly, what business impact the new rules in MiFID II will have.

The very short answer to the open question about business impact is that any business that involves the distribution and trading of shares, bonds or other financial instruments in the EU is highly likely to feel the impact of the changes introduced by MiFID II. While the specific impact will largely depend on the strategy of the managers and their business model (e.g. commodity derivatives and algorithmic traders being subject to specific rules), there are some common considerations for firms active in the sector generally. To better understand what this broad effect of MiFID comprises, we will explore below some of the key topics in MiFID II generally concerning investment managers.

5.1.1 Application

MiFID II/MiFIR will apply to investment firms, including: investment managers, investment advisers, wealth managers and brokers; banks and other credit institutions when providing investment services and/or performing investment activities; operators of trading venues, including any pure market operator; financial counterparties (and certain non-financial counterparties) subject to the European Markets

Infrastructure Regulation ("EMIR"); Central Counterparties ("CCPs") and persons with proprietary rights to benchmarks; and non-EU firms who wish to provide investment services or activities in any EU member state.

5.1.2 Objectives

The changes to the EU-wide financial regulatory framework introduced by MiFID II seek to bring about greater stability of the international financial system, to improve the symmetry of market information and to achieve a more transparent and responsible financial system in the EU, countering market abusive trading practices in the financial markets, and awarding greater protection to consumers.

5.1.3 Structure

While MiFID I set out a framework for the regulation of the financial markets and the provision of investment services in the EU, as it was required to be separately implemented into national legislation in the different EU member states, in practice MiFID amounted to a heterogeneous set of rules applicable to EU investment firms, with a great deal of variation in the substance of the regulatory requirements and oversight investment firms were subject to.

MiFID II actually consists of a revised Directive and the accompanying Markets in Financial Instruments and Amending Regulation ("MiFIR") (which is here referred to, together with the revised Directive, as MiFID II without further distinction), both of which are legislative measures of the European Commission and the European Parliament. MiFID II is a material departure and development of the legislative framework introduced by MiFID.

Key policy objectives of MiFID II include increased investor protection; improved efficiency of financial markets through greater transparency of trading information; enhancing supervisory powers both at a national and at an EU-wide level; protecting the integrity of the EU financial markets through identifying, monitoring and restricting abusive or potentially harmful practices; and the harmonisation of the rules governing access to the EU markets by third-country firms.

In broad terms, the revised MiFID II Directive contains the rules that govern the operation of investment firms and operators of trading venues and other trading-related market infrastructures, which rules will be separately implemented into national legislation. By contrast, MiFIR will be directly applicable across the EU and the regulatory requirements set out therein in respect of the trading of financial instruments are maximum harmonisation measures, as there will be no national divergence in the implementation of those rules.

By way of a high-level overview, the five headline issues affecting all investment managers arising from MiFID II are:

5.2. Use of dealing commissions to pay for research

MiFID II extends the rules applicable to investment firms on incentives. While firms under the existing MiFID rules are not permitted to accept inducements (i.e. "fees, commissions or any monetary or non-monetary benefits paid or provided by any third party") other than in limited circumstances, original, meaningful research is currently considered to be a permissible benefit as it falls within the limited circumstances permitted. MiFID II will effectively prohibit investment firms from receiving investment research from brokers pursuant to bundled commission arrangements, which is currently market practice. Investment managers may continue to receive research, provided that such research is paid for separately.

The key objective and effect is to sever any link between execution volumes and research spend. The shift is bound to have an impact on the quantity and quality of research acquired, and likely also on the scope of investments regarding which research is produced.

5.3. Best execution

Best execution was an investor protection concept introduced under MiFID, but its impact on the market and trading practices has been uneven. The central difficulty has been the objective measurement of best execution in most asset classes, with the exception of very liquid shares. MiFID II aims at enhancing this regime by requiring greater transparency of execution quality of different execution venues. Execution venues will be required annually to publish their execution quality data based on factors including price offered, execution costs, and speed and likelihood of execution.

The aim is that investment managers will use the data provided by the execution venues to select the venues they use going forward. Investment managers in turn will be required to publish their top five execution venues per asset class in terms of volume, as well as information on the execution quality obtained. This is ultimately intended to be a mechanism to allow investors to compare best execution between investment managers, as well as between execution venues.

5.4. Regulatory reporting and recording requirements

The MiFID transaction reporting regime, aimed at providing information to regulators to assist in the monitoring and investigation of market abuse, will be considerably broader under MiFID II. The scope of transaction reporting is extended to all financial instruments traded on an EU trading venue, as well as derivatives where the underlying is such an instrument.

This represents a material expansion of scope both in terms of the instruments covered, and the scope of information to be reported. The number of data items to be completed has increased from the original 23 to over 60, and includes short sale flags and the identification of the individual trader or the algorithm responsible for the decision to trade and the execution of the trade.

While delegation of transaction reporting will still be permitted, it is likely to be more complicated, as the investment manager would be required to capture and transmit all relevant information, including the trading decision/execution identifier. It is expected that for the vast majority of investment managers the preferred solution will be to undertake the transaction reporting in-house.

As a separate aspect of the enhanced transparency regime under MiFID II, the draft Regulatory Technical Standards concerning certain record-keeping requirements introduced an EU-wide requirement for firms subject to MiFID II to record "relevant conversations". The requirement applies to all conversations intended to result in a client transaction. This is in contrast to the existing position under MiFID, which currently contains no mandatory requirement to record telephone calls. However, the UK (along with some other EU member states) mandates the recording of telephone calls that actually result in a client transaction. While in the UK the existing recording obligation is subject to an exemption allowing investment managers to rely on EU brokers to record the calls, MiFID II contains no such exemption. In addition, the retention period for such records will be extended from six months under the existing FCA rules to five years under MiFID II.

5.5. Transparency

Under MiFID II, investment firms will be required to make public trade reports regarding a much broader scope of financial instruments and transactions than under the existing requirements. Currently, an investment firm must report OTC trades in shares that have been admitted to trading on a regulated market or an MTF. Under MiFID II, the post-trade public reporting requirements will be significantly extended and such reportable instruments will include not only shares, but also a wide range of "equity-like instruments" such as depositary receipts, exchange-traded funds and certificates, and, significantly, bonds, derivatives and certain other categories of instruments that are traded on a trading venue.

As the extended scope of the trade reports will also apply to the pre-and post-trade reporting requirements to which trading venues are subject, there should be considerably more market data available regarding a much expanded body of financial instruments. MiFID II preserves exemptions for the publishing and reporting of illiquid shares, large orders and transactions, and overall, the transparency regime is expected to be calibrated to the instrument and the trading venue.

5.6. Investor protection

A central policy objective for MiFID II was the enhancement of the investor protection afforded under it. With a view to ensuring the same, MiFID II introduces more robust controls on firms with respect to designing and distributing products, and expands the supervisory powers of the national competent regulatory authorities under ESMA's guidance. Regulators will have powers to intervene in the process of product development, as well as powers to require the suspension or withdrawal of products or marketing materials where there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial or commodity markets or stability of the whole or part of the financial system, and provided that certain other conditions are satisfied.

In addition, while currently under MiFID business dealings with eligible counterparties are effectively outside the scope of the investor protection requirements, MiFID II extends some existing investor protection requirements currently applicable to dealings with retail and professional clients to eligible counterparties.

MiFID firms will be expressly required, when dealing with eligible counterparties, to act honestly, fairly and professionally; to communicate in a way which is fair, clear, and not misleading; and to provide certain information and reports to eligible counterparties.

The actual impact of this on existing market practices is unclear, and, to date, there has not been any guidance or further clarification as to the meaning of acting honestly, fairly and professionally, or communicating in a manner that is fair, clear and not misleading in relation to eligible counterparty business.

5.7 Implementation: What next?

The original timetable for implementation of MiFID II, which is embedded into the primary legislation, requires EU Member States to amend or implement new legislation by 3 July 2015 and for firms to begin complying by 3 January 2017.

However, in November 2015, ESMA wrote to the Commission recommending that MiFID II be delayed as it had concluded that "a number of technically complex elements envisaged in MiFID will not be operational by the time that MiFID II becomes applicable in January 2017". Although initial indications are that there is political support for such a delay, it is not clear at the time of writing how long this delay may be or what form it may take. The most likely outcome appears to be a piecemeal implementation throughout 2017/2018 requiring complex transitional arrangements.

Investment managers should be working in the first instance to undertake a gap analysis to establish the key areas of change as applicable to their specific strategies and business models, and to address operational issues and systems requiring updating or material improvement.

Notwithstanding this likelihood of delay, firms will have to work within the new regulatory framework and should be preparing to do so. While the overall impact of MiFID II on investment managers will be significant, the changes are likely to provide opportunities as well as challenges.

6. MiFID II: Algorithmic trading

As noted above, MiFID II, which is comprised of a directive[72] and a regulation,[73] is a revision and recasting of the European Directive on Markets in Financial Instruments[74] (MiFID I) which came into force on 1 November 2007 and established the framework for the regulation of financial markets and their participants across the EU.

MiFID I, which is still currently in effect, contains a series of requirements for investment firms relating to their authorisation; their ability to provide investment services on a passported basis into other EU member states; their governance, systems and controls; as well as their interaction with clients. Additionally, MiFID I sets out rules promoting transparency in the equities market, and transaction reporting rules to enable regulators to monitor most financial markets for potentially abusive behaviour.

Despite MiFID I's attempts to strengthen the overall integrity of the European financial system, the financial crisis in 2008 exposed certain weaknesses in how the markets and their participants are currently regulated. In general, MiFID I was perceived as unfit to handle both the increasingly complicated types of financial instruments being developed since its promulgation and also the way in which technological advancements, such as automated trading, had affected the interaction between financial markets and their participants.

To address some of these issues, MiFID II contains new measures relating to the use of algorithmic trading (including high frequency algorithmic trading) by firms.

"Algorithmic trading" is defined by MiFID II to mean:

> "… trading in financial instruments where a computer algorithm automatically determines individual parameters of orders such as whether to initiate the order, the timing, price or quantity of the order or how to manage the order after its submission, with limited or no human intervention, and does not include any system that is only used for the purpose of routing orders to one or more trading venues or for the processing of orders involving no determination of any trading parameters or for the confirmation of orders or the post-trade processing of executed transactions."

6.1. Summary of algorithmic trading measures

In addition to having to provide their home regulators with details about the nature of their algorithmic trading strategies, trading parameters, testing and key compliance and risk controls, MiFID II also requires firms engaging in algorithmic trading to have in place effective systems and risk controls suitable to the business they operate to:

- ensure that their trading systems are resilient and have sufficient capacity, and are subject to appropriate trading thresholds and limits;
- prevent the sending of erroneous orders or the systems otherwise functioning in a way that may create or contribute to a disorderly market; and
- ensure the trading systems cannot be used for any purpose that is contrary to the European Market Abuse Regulation[75] or to the rules of a trading venue to which it is connected.

The current drafts of MiFID II secondary legislation add flesh to the above requirements. Some of the main secondary level requirements include (but are not limited to) the following:

6.1.1 General organisational requirements

- Having a clear governance process with respect to the development and monitoring of trading systems and trading algorithms, taking into account the nature, scale and complexity of their business.
- Providing the firm's compliance function with access to the kill functionality of the algorithm or having direct contact with the persons who have access to it, and to those who are responsible for each trading system or algorithm.

6.1.2 Resilience of trading systems

- Setting up clearly delineated development and testing methodologies prior to the initial deployment or substantial update of an algorithm or related system.
- Controlling the deployment of algorithms by setting limits on the number of financial instruments being traded, on the price, value and number of orders, on the strategy positions, and on the number of trading venues to which orders are sent.
- Performing an annual self-assessment and validation process (i.e. stress tests) to enable the risk management control function to create a validation report.
- Keeping records of all material changes made to the software used for algorithmic trading (to include: when, by whom, who approved and nature of change).

6.1.3 Means to ensure resilience

- Establishing and maintaining surveillance systems that are automated and adapted to the nature, scale and complexity of the firm's trading activity, generating alerts and reports.
- Monitoring all trading activity on their systems for signs of potential market abuse.
- Having the ability, as an emergency measure, to cancel all unexecuted orders on all venues and individual unexecuted orders based on trader, desk, trading venue.

- Having business continuity arrangements in place with respect to their algorithmic trading systems which are appropriate to the nature, scale and complexity of their business.
- Having in place prescribed pre-trade controls on order entry (e.g. order limits, repeated automated execution throttles, and pre-trade risk limits).
- Having in place prescribed post-trade market and credit risk controls.
- Establishing and maintaining appropriate arrangements for physical and electronic security that minimise the risk of attacks against their information systems and implement effective IT strategy.

Whilst these topics were not addressed in MiFID I, these measures reflect and build upon technical guidelines that were issued by ESMA in February 2012 on systems and controls in an automated trading environment for trading platforms, investment firms and competent authorities.[76]

Firms engaging in algorithmic trading will need to ensure that they comply with these MiFID II rules by January 2017, though this should not be a significant task provided they are already fully compliant with the existing ESMA guidelines on automated trading.

7. In summary: 10 key things to know about MiFID II

7.1. Transparency: Bonds

The scope of the pre- and post-trading transparency requirements, disclosing the depth of market, and the regulatory reporting requirements, will now include bonds. This will lead to a considerable increase of the volume of information regarding the bond markets, which in the EU have historically been relatively opaque. The proposed consolidated tape of pan-EU trading information, intended to be launched from 2019 in respect of bonds and other non-equities would be a welcome development, replicating the US model. The increased volume, scope and availability of market information should, among other things, improve the price discovery process and assist firms with delivering best execution.

7.2. Transparency: Extended data reporting obligations

The extended data reporting requirements will present a real systems challenge to investment firms who must ensure that their systems can identify, capture, record and report numerous data items that currently are not caught in the systems.

The challenge will be even greater for trading venue operators and systematic internalisers for whom the pre-and post-trade public data reporting requirements will present a wholesale systems revision. The operational challenges in implementing the reporting requirements are one of the key reasons for the rumoured 6–12-month delay of MiFID II implementation.

7.3. Market making

Market making on trading venues will now be subject to much increased regulation, including a commitment by the market maker to the trading venue to quote in the relevant instrument for no less than 50 per cent of the daily trading hours, and to abide by various related systems and controls obligations. An investment firm will be considered to be a market maker and must enter into a market making agreement when it quotes in at least one financial instrument on a single trading venue for no less than 30 per cent of the daily trading hours during one trading day. Additional rules apply to market makers that are algorithmic traders, including HFT traders.

7.4. Investment firms engaged in high frequency algorithmic trading

MiFID II will effectively consolidate the existing guidance issued by ESMA in respect of controls for algorithmic trading activities, particularly in respect of firms using high frequency trading techniques. The key changes include a requirement that all high frequency traders should be duly authorised and regulated under MiFID as investment firms; and the requirement that algorithmic traders acting as market makers should sign a market-making agreement.

7.5. Trading obligation: Shares and derivatives

The trading of shares admitted to trading on a venue, and certain designated classes of derivatives, will be mandated to take place on a trading venue, significantly curtailing the volume of OTC transactions and further encouraging the standardisation of trading process.

7.6. Transparency: Double volume cap

The trading of equities under the reference price waiver and the negotiated price waiver will be subject to hard limits to ensure the restricted volume of trading that takes place in "dark pools". The volume cap introduces a cap of four per cent per trading venue, subject to an eight per cent global cap.

7.7. Commodity derivatives: Position limits

MiFID II introduces harmonised position limits across the EU for the trading of commodity derivatives. The limits aim at ensuring orderly pricing and preventing market abuse. The genesis of the position limits is in the impact that volatility in the commodity derivatives markets had on the real economies in a number of developing countries, and the resulting social and political unrest.

The position limits regime is highly political, which somewhat overshadows the inherent difficulties in determining the parameters of the limits, such as "deliverable supply" or "market size", on the basis of which the position limits are intended to be set. There is confusion on the horizon when it comes to practical implementation of the position limits provisions.

7.8. Use of dealing commission to pay for research

MiFID firms will no longer be able to receive research from brokers by paying for it through the dealing commissions, and will be required to pay for research directly from their own accounts or from a separate research account disclosed to and funded by the client.

As the new rules will require the unbundling of the existing arrangements, this will spell real change to a number of research departments within brokers. It is expected that similar requirements will be extended to UCITS managers and AIFMs.

7.9. Best execution: Disclosure requirements by trading venues and investment firms

MiFID II introduces several changes for investment firms executing client orders. The execution policy must be provided in sufficient detail and in clear, easy to understand language. Investment firms must summarise and make public, for each class of financial instrument, the top five execution venues where they executed client orders in the preceding year. Firms should not receive any remuneration for routing clients' orders to a particular trading or execution venue if this is not compliant with conflicts of interest and inducements rules.

7.10. Third-country investment firms: Access to EU market

MiFID seeks to establish an EU "passport" for non-EU firms enabling them to access EU markets to provide investment services to professional clients and eligible counterparties on a cross-border basis. As the passport is based on an equivalence assessment of third-country jurisdictions—a highly political process—no one is expecting speedy progress on this.

8. REMIT

In December 2011, the European Parliament and the Council of Europe published the Regulation on Wholesale Energy Market Integrity and Transparency ("REMIT").[77]

REMIT introduces a consistent EU-wide framework to:

- define market abuse, in the form of market manipulation, attempted market manipulation and insider trading, in wholesale energy markets;

- introduce the explicit prohibition of market manipulation, attempted market manipulation and insider trading in wholesale energy markets;
- establish a new framework for the monitoring of wholesale energy markets to detect and deter market manipulation and insider trading; and
- provide the enforcement of the above prohibitions and the sanctioning of breaches of market abuse rules at national level.

In particular, as a tool for national regulators to monitor potential market abusive behaviour in the wholesale energy markets, REMIT introduces a transaction reporting requirement applicable to wholesale energy "market participants".

"Market participant" is expressly defined in REMIT as "any person, including transmission system operators, who enters into transactions, including the placing of orders to trade, in one or more wholesale energy markets", though ACER has subsequently clarified[78] that for derivatives related to EU wholesale gas or electricity products that are only for financial settlement, only the person entering into the transactions in the EU gas or electricity derivatives traded on venues, via its own trading membership, is the REMIT market participant for the purpose of reporting.

REMIT requires market participants to register with the relevant national authority (which, for the UK, is OFGEM[79]) and report to such body orders and transactions in:

- wholesale energy contracts (i.e. contracts for the supply or transportation in the EU of electricity or natural gas);
- options, futures, swaps and any other derivatives of contracts relating to electricity or natural gas produced, traded or delivered in the EU; and
- options, futures, swaps and any other derivatives of contracts relating to the transportation of electricity or natural gas in the EU.

The start date for reporting orders and transactions in wholesale energy products and relevant wholesale energy derivatives that are executed through an organised market place was 7 October 2015. Orders and transactions in wholesale energy products and relevant wholesale energy derivatives that are executed outside of an organised market place must be reported from 7 April 2016.

9. UK companies: Public disclosure of beneficial ownership

The UK government has been leading efforts at the G20 to encourage the major economies to take action to tackle the criminal misuse of companies, including by increasing the transparency of company ownership and control. Leading by way of example, it has introduced legislation that is intended to ensure that from January 2016 it must be possible for anyone to track and identify, from publicly available records, the natural persons (i.e. individuals) who are the ultimate significant beneficial owners of, or who otherwise exert significant control and influence over, a UK company (regardless of whether that UK company is listed or privately owned).

The Small Business, Enterprise and Employment Act (the "Act") will, when it comes into force in January 2016, require (subject to a very limited set of exemptions) all UK domiciled companies to maintain a register of people with significant control ("PSCs") over the company (a "PSC register"). The PSC register must include details of its current and former PSCs' names and residential addresses (amongst other things). The Act draws the concepts of PSC, ownership, significant control and influence very broadly and as a result the individuals who will be required to be listed in the register will capture a much wider category of people than one might naturally expect. The details of the individuals on the PSC register must be provided to the UK's Companies House by April 2016. Companies House will make the PSC information available for free in one central, searchable public register.

Companies whose shares are admitted to trading on a UK market (a "UK listed company") are already subject to the FCA's "Disclosure and Transparency Regime" ("DTR") which requires persons with voting rights of more than three per cent to notify the company and for the company to then make a public announcement of that fact.

The new PSC regime requires every natural person who ultimately beneficially owns more than 25 per cent of, or who otherwise exerts significant control and influence over, a UK company (each a PSC) (other than a UK-listed company) to be identified in a publicly available PSC register of that company. Currently, the only exception to this rule is if there is one or more intermediary entity (each being a "blocker") between the individual and the UK company, each of which would fall within the Act's definition of a PSC if either:

- it is a natural person and has its own PSC register kept pursuant to the Act; or
- it is a UK listed company.

But even if this exception applies, it does not mean that the individuals, who are the ultimate significant beneficial owners or controllers of a PSC company, will be anonymous to the outside world. Instead, their identities will be publicly accessible in, or via, the publicly accessible records of the "blockers" (i.e. if the blocker has its own PSC register the information will be available there or if the company is a UK-listed company it will have made public announcements about who its shareholders are).

Although the UK has taken the lead on this issue and is currently the only major economy requiring this level of transparency with respect to the ownership of private and publicly owned companies, the rest of Europe is not far behind. The Fourth Anti-Money Laundering Directive[80] of the European Union will require that all companies and other legal entities incorporated in EU Member States (including the UK) will have to keep a register of beneficial owners from the Summer of 2017. The only material difference is that while the UK's PSC register must be publicly available, the Directive's register will be required to be made available to tax and law enforcement agencies and to individuals with a "legitimate interest" (the meaning of which is yet to be defined but which is anticipated to be broadly interpreted) in seeing the information.

It therefore appears that the ownership of UK and EU domiciled companies will no longer be a private affair.

Notes

1. Mansion House, Speech by the Chancellor of the Exchequer, Rt Hon George Osborne MP, 10 June 2015.
2. *Financial Times*, 11 June 2015, "UK bank rule reformers call end to age of big stick".
3. At the Association of British Insurers Conference on 18 September 2012.
4. At the FCA's Annual Public Meeting in July 2015.
5. *Financial Times*, 5 June 2015, "George Osborne to signal end to banker bashing".
6. "The rapidity of change" (FCA speech, Tracey McDermott, 22 October 2015).
7. HM Treasury Press Release, 21 July 2015, "Bank of England reforms announced".
8. Thomson Reuters, 26 October 2015, Peter Elstob, "Last FSA head urges mingling principles, rules and standards to keep wholesale regulation flexible".
9. HM Treasury policy paper, "Senior Managers and Certification Regime: extension to all FSMA authorised persons".
10. HM Treasury policy paper, "Senior Managers and Certification Regime: extension to all FSMA authorised persons".
11. Fair and Effective Markets Review: Final Report, June 2015.
12. HM Treasury policy paper, "Senior Managers and Certification Regime: extension to all FSMA authorised persons".
13. "Learning the lessons of the past as an industry" (FCA speech, Tracey McDermott, 2 December 2014).

14. "The importance of culture in driving behaviours of firms and how the FCA will assess this" (FCA speech, Clive Adamson, 19 April 2015).
15. "The commercial importance of culture to industry" (FCA speech, Martin Wheatley, 2 December 2014).
16. "The fairness challenge" (FCA speech, Martin Wheatley, 25 October 2013).
17. "The fairness challenge" (FCA speech, Martin Wheatley, 25 October 2013).
18. FCA Risk Outlook 2014/2015.
19. "Culture and Governance" (FCA speech, Mark Steward, 11 November 2015).
20. "Culture and Governance" (FCA speech, Mark Steward, 11 November 2015).
21. "Culture and Governance" (FCA speech, Mark Steward, 11 November 2015).
22. FCA Business Plan 2015/2016 said this would commence in 2015 with start and end dates to be confirmed.
23. BBC News, 31 December 2015, "Banking culture inquiry shelved by regulator FCA".
24. It was later reported that the FCA has decided such a review will not be conducted. BBC News, 31 December 2015, "Banking culture inquiry shelved by regulator FCA".
25. See http://www.fca.org.uk/news/fca-fines-five-banks-for-fx-failings [Accessed December 4, 2015].
26. Company announcement, 12 November 2014, http://www.londonstockexchange.com/exchange/news/market-news/market-news-detail/12147412.html [Accessed 4 December 2015].
27. Barclays Bank Plc Final Notice, 20 May 2015, para.2.3.
28. Barclays Bank Plc Final Notice, 20 May 2015, para.2.3.
29. FCA press release: https://www.fca.org.uk/news/fca-fines-barclays-for-forex-failings [Accessed 4 December 2015].
30. Deutsche Bank AG Final Notice, 23 April 2015.
31. Deutsche Bank AG Final Notice, 23 April 2015, para.2.4.
32. FCA press release: https://www.fca.org.uk/news/deutsche-bank-fined-by-fca-for-libor-and-euribor-failings [Accessed 4 December 2015].
33. Bank of Beirut (UK) Ltd Final Notice, 4 March 2015, para.2.10.
34. Bank of Beirut (UK) Ltd Final Notice, 4 March 2015, para.2.5.
35. FCA press release: https://www.fca.org.uk/news/the-financial-conduct-authority-imposes-2-1m-fine-and-places-restriction-on-bank-of-beirut [Accessed 4 December 2015].
36. Bank of Beirut (UK) Ltd Final Notice, 4 March 2015, para.2.1.
37. *The Financial Conduct Authority v Da Vinci Invest Ltd, Da Vinci Invest PTE Ltd, Mineworld Ltd, Szabolcs Banya, Gyorgy Szabolcs Brad, Tamas Pornye* [2015] EWHC 2401 (Ch) at [166].
38. *The Financial Conduct Authority v Da Vinci Invest Ltd, Da Vinci Invest PTE Ltd, Mineworld Ltd, Szabolcs Banya, Gyorgy Szabolcs Brad, Tamas Pornye* [2015] EWHC 2401 (Ch) at [260].
39. On that day, the value of US equities collapsed and rebounded within the course of minutes.
40. US Commodity Futures Trading Commission.
41. Upper Tribunal Decision, 4 March 2015, para.310.
42. See FCA press release: https://www.fca.org.uk/news/fca-fines-merrill-lynch-international-for-transaction-reporting-failures [Accessed 4 December 2015].
43. Merrill Lynch International Final Notice, 22 April 2015, para.2.4.

44. FCA press release: https://www.fca.org.uk/news/fca-fines-merrill-lynch-international-for-transaction-reporting-failures [Accessed 4 December 2015].

45. The Co-operative Bank Plc.

46. The PRA's Principles for Businesses have now been replaced by the PRA Fundamental Rules.

47. This amounted to a breach of Principle 11 of the FCA's and the PRA's Principles for Businesses. As noted, the PRA's Principles for Businesses have now been replaced by the PRA Fundamental Rules.

48. PRA Co-op Bank Final Notice, 10 August 2015, para.2.14.

49. FCA Co-op Bank Final Notice, 10 August 2015,para.2.11; PRA Co-op Bank Final Notic, 10 August 2015, para.2.8.

50. Further information about the FSA's investigation into Keydata is available here: http://www.fsa.gov.uk/consumerinformation/firmnews/2010/keydata_faq.shtml [Accessed 4 December 2015]. The Serious Fraud Office also launched an investigation into Keydata in July 2009, though the investigation was closed in April 2011 due to insufficient evidence.

51. As mentioned, the FCA's proposed fine of £75 million in relation to Mr Ford includes proposed disgorgement of £72.4 million. The contrast between the FCA's proposed £75 million fine and the £6 million fine imposed on Mr Goenka should be seen in this context and does not necessarily reflect a complete departure from the sorts of fines historically imposed by the FCA (or the FSA) on individuals.

52. FCA press release: https://www.fca.org.uk/news/fca-fines-and-prohibits-craig-mcneil [Accessed 4 December 2015].

53. The breaches in this case relate to Mr Rosier's failure to maintain adequate records to demonstrate the suitability of Bayliss' recommendations to clients and to inform the FCA that he could not conduct a review he had undertaken to do. The FCA (and subsequently, the Tribunal) also found that Mr Rosier had failed to take reasonable steps to ensure that Bayliss did not promote (and could demonstrate that it did not promote) UCIS in breach of the promotion restrictions applicable to collective investment schemes, respond appropriately to customer complaints and maintain appropriate records of compliance monitoring.

54. Upper Tribunal Decision, 21 May 2015, para.63.

55. Upper Tribunal Decision, 21 May 2015, para.83.

56. Upper Tribunal Decision, 21 May 2015, para.63.

57. Upper Tribunal Decision, 21 May 2015, appendix 2, para.71.

58. Upper Tribunal Decision, 21 May 2015, para.63.

59. See http://www.fca.org.uk/your-fca/documents/final-notices/2013/jpmorgan-chase-bank-na [Accessed 4 December 2015].

60. Complinet article: *Macris, Maxwellisation and the senior managers regime*, 6 November 2015.

61. *Achilles Macris v FCA* (FS/2013/0010).

62. *The Financial Conduct Authority v Macris* [2015] EWCA Civ 490.

63. *Christian Bittar v The Financial Conduct Authority* [2015] UKUT 0602 (TCC).

64. [2015] EWCA Civ 490.

65. UBS AG Final Notice, 11 November 2014.

66. Barclays Plc Final Notice, 20 May 2015.

67. Upper Tribunal Additional Reasons for Determination, 8 September 2015.

68. Upper Tribunal Decision, 6 August 2015, para.286.

69. Wilkins Final Notice, 22 October 2015, para.2.3.
70. FSMA s.189.
71. Complaints Commissioner Final Report at p.4.
72. Directive 2014/65/EU.
73. Regulation (EU) 600/2014.
74. Directive 2004/39/EC.
75. (EU) No.596/2014.
76. ESMA/2012/122.
77. EU Regulation No.1227/2011.
78. Annex III of the REMIT Transaction Reporting User Manual.
79. UK Office of Gas and Electricity Markets.
80. Directive (EU) 2015/849.

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