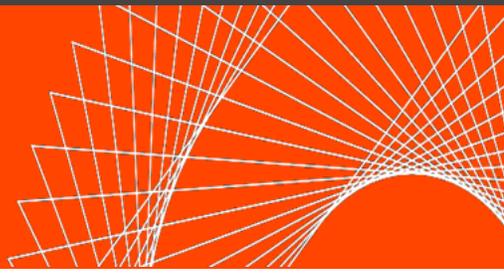


Financial Regulatory Alert



The UK regulator awakens from its COVID-19 slumber – A review of FCA enforcement in 2022 and a look ahead to 2023

Introduction

In September 2021, following the London Capital & Finance ‘mini-bonds’ scandal, the Treasury Select Committee of the UK House of Commons asked for a more “proactive” Financial Conduct Authority (FCA) that is “decisive” in its investigations.¹ The FCA appears to have taken this to heart.

Over the course of 2022, the FCA imposed 26 financial penalties on firms and individuals, up from 10 fines the year before.² The total quantum of fines decreased, but this was largely because the FCA achieved two very significant fines in 2021. In relation to individuals, the FCA imposed 10 financial penalties in 2022 (up from three the year before), totalling some £1.7 million³ (up from approximately £236,000 in the year before). The fines related to a fairly broad variety of different types of misconduct, including issues of market abuse, financial crime and money laundering issues, conflicts of interest, breaches of the Listing Rules and pensions mis-selling.

In line with one of its priorities, which became particularly acute during the height of the COVID-19 pandemic, the regulator also removed 14 times as many misleading adverts than in the previous year.⁴

To assist with this increased level of activity, the FCA opened a new office in Leeds and accelerated its expansion in Edinburgh. The regulator also hired over 1,000 new people, although questions remain as to how many of them have replaced employees who left during the year. This number is currently unknown but could be reasonably high given recently reported low staff morale. Nevertheless, it’s safe to say the Treasury is getting what it asked for.

In turn, 2023 promises to be an interesting year for the FCA’s enforcement strategy, not least with the recent announcement that the FCA’s Director of Enforcement and Market Oversight will soon be stepping down. Mr. Steward’s replacement is yet to be announced, but whoever is chosen will likely have their own agenda and objectives which will inform the direction of travel for the FCA’s enforcement decisions this year and beyond.

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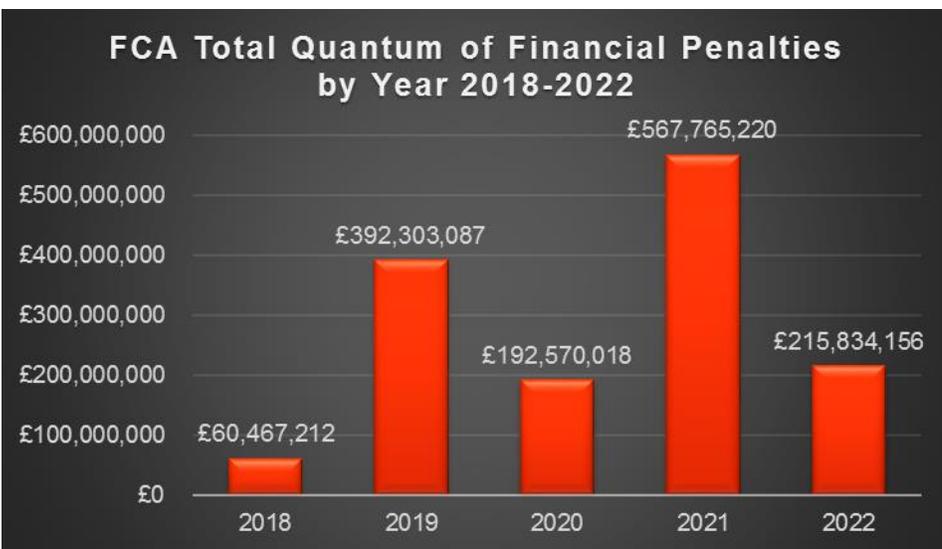
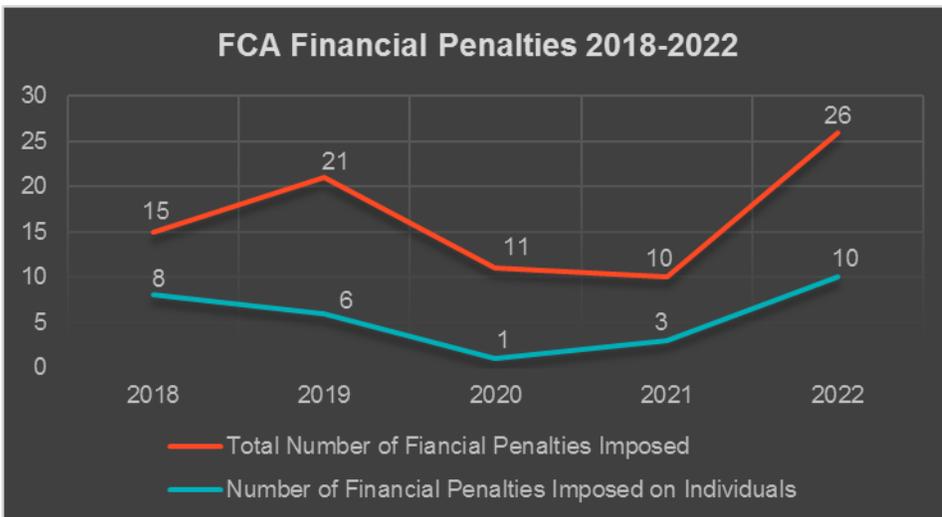
*The contribution of **Radu Suci** is gratefully acknowledged.*

Helen Marshall, head of the Akin Gump London Financial Services Regulatory team, writes:

“Following the two years at the height of the pandemic when the FCA’s enforcement division secured comparatively few, but significant, financial penalties, 2022 saw a substantial uplift in the number of financial penalties imposed even if some were of comparatively lower value. Whether this was the result of a short-term effort during the pandemic to focus on a few large cases, and now we are seeing the backlog of smaller cases being cleared remains to be seen. It will be interesting to follow what the FCA does in 2023 and beyond, particularly with a new person at the helm of the Enforcement Division.”

In this alert, we take a closer look at a small number of the key cases of 2022 and signs of what may be on the horizon for 2023.

The year at a glance



Of the 26 matters where financial penalties were imposed in 2022, approximately a third of the cases were in relation to financial crime or anti-money laundering (AML) matters.

About a fifth of the cases involved pensions advice, and about another fifth related to market abuse (with a number of those cases arising out of the same underlying facts). Other issues which arose for enforcement action included breaches of the listing rules, failures in operational resiliency and the failure to manage conflicts of interests.

Key cases in 2022

| Name | Sanction | Basis |
|--|--------------------|---|
| Julius Baer International Limited ⁵ | Fine – £18,022,500 | Breaches of Principles 1, 3 and 11 regarding acting with integrity, governance and being open and cooperative with the FCA. |

The FCA started 2022—though the Final Notice was only published later in the year—by imposing one of the most high-profile fines ever seen in the wealth management sector. Following a complex investigation, it concluded that Julius Baer International Limited (JBI) facilitated uncommercial and unethical finder’s fee arrangements between Bank Julius Baer (BJB) and an employee of the Yukos Group companies.

Additionally, the FCA found that JBI did not have adequate policies and procedures in place to identify and manage risks flowing from relationships, such as the one it facilitated between BJB and the Yukos employee. The FCA also found that the firm had failed to report these matters to the FCA in a timely manner. JBI agreed to settle all issues of fact and partially agreed liability at an early stage, but the quantum of the penalty was not agreed. As a result, the firm qualified for a discount to the original fine proposed by the FCA, which would have been in excess of £24 million.

The FCA also sought to impose a ban on BJB’s former Regional Head, the Sub-Regional (Market) Head for Russia and Eastern Europe and JBI’s former relationship manager on the Russian and Eastern European Desk. All three individuals decided to refer their Decision Notices to the Upper Tribunal for its consideration. It should be noted that even in situations where a firm agrees to settle at an early stage, it is not uncommon that individuals who are facing prohibition from working in the industry will seek to challenge their prohibitions at the Tribunal in order to maintain their livelihoods. We wait to see how the Upper Tribunal will rule in relation to the individuals’ references, perhaps sometime in 2023.

| Name | Sanction | Basis |
|-----------------------------------|----------------|--|
| Sir Christopher Gent ⁶ | Fine – £80,000 | Unlawful disclosure of inside information contrary to Article 10 and Article 14(c) of the Market Abuse Regulation. |

As Chairman of ConvaTec Group Plc, Sir Christopher Gent unlawfully disclosed inside information relating to the revision of ConvaTec’s financial guidance and the CEO’s plans for retirement to senior executives at two of ConvaTec’s major shareholders before this information was properly announced to the market.

Sir Christopher argued that he was acting in the best interest of ConvaTec in making the disclosures and that he was not advised by his key broker or the relevant legal adviser that the information was inside information and it should not have been disclosed.

The FCA accepted the truth of these explanations, and while it did not find evidence of any trading taking place on the back of Sir Christopher’s disclosure, the regulator said that, given his training and experience, “Sir Christopher should have realised that the information he disclosed constituted, or may have constituted, inside information and that it was not within the normal exercise of his employment, profession or duties selectively to disclose it”.⁷

The FCA took the somewhat unusual step of publishing an annex to the Final Notice that included the submissions put forward by Sir Christopher and his legal team, together with the FCA’s position in relation to these submissions. This provides a useful insight into the regulator’s thinking in respect of a number of points of interest, including what information qualifies as inside information and selective disclosures. This is therefore something that issuers and their management teams will want to be very mindful of, and there will of course also be a knock-on impact in terms of the amount of information that firms and individuals will be willing to share with actual and potential investors.

Individuals will also want to pay close attention to this case and in the words of the FCA, “Properly apply [their] mind to the specific question of what information, if any, [they] might properly disclose, as well as when, in what manner and to whom [...]”.

| Name | Sanction | Basis |
|-------------------------------|---------------------|---|
| Santander UK Plc ⁸ | Fine – £107,793,300 | Breaches of Principle 3 relating to AML failures. |

In this matter, the FCA found that Santander failed to adequately oversee and manage its AML procedures and systems, which resulted in a “prolonged and severe risk of money laundering and financial crime”.

One of the AML systems failures highlighted by the FCA in the Final Notice was a new account opened for a small translation business with expected monthly deposits of around £5,000. Despite the account receiving millions of pounds in deposits shortly after it was opened, and notwithstanding Santander’s AML team’s recommendation that the account be closed in March 2014, it took until September 2015 for the bank to take any action, due to its ineffective systems and procedures. The FCA found that close to £300 million passed through a number of suspicious accounts before Santander closed them. The regulator also concluded that the bank’s programme of improvement was insufficient and did not address the underlying weaknesses of its AML systems.

This fine is the latest in a series of notable penalties imposed on large financial institutions for poor implementation and management of AML systems and procedures. These include a £102.2 million fine imposed on Standard Chartered Bank, a £63.9 million fine imposed on HSBC and a £1.5 million fine imposed on Gatehouse Bank Plc for failing to conduct sufficient due diligence on customers from countries with a high-risk of money laundering and terrorist financing and on Politically Exposed Persons. The largest fine in this series was the colossal £264.8 million fine imposed by the Southwark Crown Court in criminal proceedings brought by the FCA against NatWest at the end of 2021.

The regulator seems to have its sights set on AML investigations into large financial institutions, which will likely continue into 2023 and for years to come.

| Name | Sanction | Basis |
|---|--|--|
| GAM International Management Limited ⁹ and Timothy Haywood ¹⁰ | Fine – £9,103,523 for the firm and £230,037 for Mr Haywood | For the firm, breaches of Principles 2 and 8 and for Mr Haywood breaches of APER 2 and 7, each relating to failures to properly detect and manage conflicts of interest. |

Greensill Capital has caused significant political attention in the United Kingdom in recent years. The most recent episode has involved GAM International Management Limited (GIML), a London-based asset manager, which invested customers' monies in Greensill originated assets. Following an investigation, the FCA imposed a financial penalty of over £9 million on GIML, and over £230,000 for Mr Timothy Haywood, a GIML executive, for failures in relation to conflicts of interests.

In its Final Notices, the FCA found that Mr Haywood was at the centre of conflict of interests failures that were not properly reported and dealt with. He received gifts and entertainment, including travelling on a Greensill private aircraft, and he subsequently failed to report these benefits to GAM. Despite the fact that the FCA did not find evidence that Mr Haywood had made investment decisions based on these gifts, the regulator decided that his poor management of this conflict of interests resulted in an increased risk that he may have been motivated to invest based on his personal interests. The FCA also found that, in relation to these breaches, GIML had failed to manage its conflicts of interest fairly, and had failed to conduct its business with due skill, care and diligence.

Personal conflicts of interests coming from gifts and entertainment have been a focal point for the FCA in a number of recent investigations. Firms should take the opportunity to review their policies and procedures to ensure that potential conflicts of interests are raised by employees at the earliest opportunity and dealt with in an appropriate manner. Accurate recordkeeping of gifts, entertainment and any other benefits in kind received is also essential for the firm's compliance with the conflicts rules.

| Name | Sanction | Basis |
|--|--|--|
| 1. Sigma Broking Limited ¹¹ | Fine of £531,600 for the firm | Breaches of SUP 17, SUP 15, Principle 3 and Article 16 of MAR relating to market abuse and transaction reporting failures. |
| 2. Matthew Kent ¹² | Fine of £83,600 for Mr Kent | |
| 3. Stephen Tomlin ¹³ | Fine of £69,600 for Mr Tomlin and a prohibition from working in the industry | In relation to the individuals, breaches of the APER rules, which have since been superseded by the SMCR. |
| 4. Simon Tyson ¹⁴ | Fine of £67,900 for Mr Tyson | |

Failures in transaction reporting have been a frequent theme in FCA enforcement actions over recent years. In this case, the FCA found that the firm had failed to report both legs of a transaction—both a hedging and a client-side transaction—for approximately 56,000 contracts for difference (CFD) transactions.

The FCA also found that the firm had breached its obligations under the Market Abuse Regulation and SUP 15 to submit reports of suspicious transactions and orders.

What perhaps makes this case most significant, however, is not the transaction reporting failures, but the FCA’s findings in relation to the breach of Principle 3, namely the requirement for a firm to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems. In this case, the FCA found that Sigma’s business had grown rapidly, but that this had not been accompanied by equivalent growth in compliance capabilities, including understanding applicable regulation and ensuring personnel with regulatory obligations is properly trained, increases the risks of noncompliance. This was found as a distinct failure by the FCA, and firms which intend to grow rapidly should ensure that they have included in their plans a sufficiently enhanced compliance function.

In relation to the individuals, the analysis proceeded under the former “approved person” regime, which has since been replaced by the Senior Managers and Certification Regime (SMCR). At the time, each of the three individuals were CF1 Directors, but in addition, Mr Tyson was the CF11 Money Laundering Reporting Officer, and Mr Tomlin was the CF10 Compliance Oversight function. It is notable that Mr Kent was only fined, but not prohibited, whereas both Mr Tyson and Mr Tomlin were fined and also prohibited. The FCA had particular criticism for Mr Tyson and Mr Tomlin for their failures to understand the applicable rules to which they were subject or to adequately inform themselves of what was being done to oversee compliance with the relevant rules.

Under the SMCR, where Senior Managers are each required to have a Statement of Responsibilities, it might be hoped that such gaps in oversight, and failure to understand one’s own responsibilities, might be avoided. The recently proposed Edinburgh Reforms include a review of the SMCR, so it will be interesting to see whether and for how long the regime remains in its current guise.

| Name | Sanction | Basis |
|----------------------------|---|--|
| TSB Bank plc ¹⁵ | Fine – £29,750,000 by the FCA and £18,900,00 by the PRA | FCA: Breaches of Principles 2 and 3 relating to operational resilience and effective control. PRA: Breaches of Fundamental Rules 2 and 6. |

Following its acquisition by Sabadell, a Spanish bank, there was a “Migration Programme” in place under which TSB Bank plc would migrate to using Sabadell’s IT platform. Changing the IT platform had the possibility of affecting critical functions for TSB, including the ability for customers to access and use their accounts. The Migration Programme would, in part, rely on another of Sabadell’s subsidiaries providing outsourced work to allow for TSB to start to use the new platform.

In the event, there were significant problems after the start of the migration to the new system. Some 5.2 million customers were affected by significant disruptions, including being unable to access their accounts. The problems were so widespread there was significant media interest.

The FCA and the PRA investigated, and found that TSB had failed in its obligations to ensure operational resilience or to conduct its business with due skill and care.

In particular, it was found that there were problems in the outsourcing of such a critical function as IT, even though the outsourcing was to another firm in the same group. Ultimately, the regulators fined TSB almost £50 million, and TSB has paid customers some £33 million in redress. The firm received more than 220,000 complaints from customers.

Firms should be very mindful of their outsourcing arrangements, and ensure that proper risk assessments—including in relation to business continuity—have been undertaken, even when the outsourcing is to a group company.

On the horizon in 2023

As noted above, late last year the FCA announced that Mark Steward, the executive director of Enforcement and Market Oversight, will be stepping down in early 2023, following seven years in the role.¹⁶ Mr Steward has been at the forefront of developing the regulator's data-led approach to market oversight and has led a number of complex high-profile investigations, while also taking a 'no case too small' approach. The FCA has not yet announced Mr Steward's successor, but it has said that the search for a replacement will be "global", potentially indicating someone from outside the regulator rather than an internal promotion. It will be interesting to see what approach Mr Steward's successor will take and what objectives and areas for development they will set for the FCA's enforcement division.

Other matters of note for 2023 include that from 31 July 2023, the new Consumer Duty—Principle 12—will apply to all new products and services.¹⁷ It would be surprising if the FCA doesn't "assertively" start taking "quick and effective action" in respect of noncompliance, as it indicated in its latest business plan.¹⁸ See [here](#) for our more detailed alert on this topic.

In addition to this new area requiring oversight and potential enforcement, we expect that the FCA will continue to be particularly interested in financial crime detection systems, conflicts of interests and market conduct-related issues. Firms and individuals will want to ensure that they are not just aware of the regulatory rules and guidance applicable, but that they also apply their knowledge in practice and thoroughly document their mechanisms and procedures so that they can demonstrate compliance with their regulatory obligations.

¹ [House of Commons LCF briefing](#).

² Including one criminal fine imposed by the Court.

³ Approximately £1.2 million consisted of fines to five individuals in relation to a pensions selling investigation – [Andrew Page](#), [Aiden Henderson](#), [Thomas Ward](#), [Robert Ward](#) and [Tristan Freer](#).

⁴ <https://www.fca.org.uk/news/press-releases/highlights-fcas-approach-2022>.

⁵ [Final Notice – Julius Baer International Limited](#).

⁶ [Final Notice – Sir Christopher Gent](#).

⁷ [Final Notice](#), Paragraph 2.3.

⁸ [Final Notice – Santander UK Plc](#).

⁹ [Final Notice – GAM International Management Limited](#).

¹⁰ [Final Notice – Timothy Haywood](#).

¹¹ [Final Notice – Sigma Broking Limited](#).

¹² [Final Notice – Mr Matthew Charles Kent](#).

¹³ [Final Notice – Mr Stephen John Tomlin](#).

¹⁴ [Final Notice – Mr Simon Tyson](#).

¹⁵ [FCA Final Notice – TSB Bank plc.](#), [PRA Final Notice – TSB Bank plc.](#)

¹⁶ [Press release – Mark Steward to step down from FCA](#).

¹⁷ [PS22/9: A new Consumer Duty](#).

¹⁸ [FCA Business Plan 2022/23](#).