

Chapter 12

Prosecution of Criminal Offences

12.3 Criminal prosecutions in cases of market abuse

12.3.1 In some cases there will be instances of market misconduct that may arguably involve a breach of the criminal law as well as *market abuse*. When the *FCA* decides whether to commence criminal proceedings rather than impose a sanction for *market abuse* in relation to that misconduct, it will apply the basic principles set out in the Code for Crown Prosecutors. When deciding whether to prosecute market misconduct which also falls within the definition of *market abuse*, application of these basic principles may involve consideration of some of the factors set out in ■ EG 12.3.2.

12.3.2 The factors which the *FCA* may consider when deciding whether to commence a criminal prosecution for market misconduct rather than impose a sanction for *market abuse* include, but are not limited to, the following:

- (1) the seriousness of the misconduct: if the misconduct is serious and prosecution is likely to result in a significant sentence, criminal prosecution may be more likely to be appropriate;
- (2) whether there are victims who have suffered loss as a result of the misconduct: where there are no victims a criminal prosecution is less likely to be appropriate;
- (3) the extent and nature of the loss suffered: where the misconduct has resulted in substantial loss and/or loss has been suffered by a substantial number of victims, criminal prosecution may be more likely to be appropriate;
- (4) the effect of the misconduct on the market: where the misconduct has resulted in significant distortion or disruption to the market and/or has significantly damaged market confidence, a criminal prosecution may be more likely to be appropriate;
- (5) the extent of any profits accrued or loss avoided as a result of the misconduct: where substantial profits have accrued or loss avoided as a result of the misconduct, criminal prosecution may be more likely to be appropriate;
- (6) whether there are grounds for believing that the misconduct is likely to be continued or repeated: if it appears that the misconduct may be continued or repeated and the imposition of a financial penalty is unlikely to deter further misconduct, a criminal prosecution may be more appropriate than a financial penalty;

- (7) whether the person has previously been cautioned or convicted in relation to market misconduct or has been subject to civil or regulatory action in respect of market misconduct;
- (8) the extent to which redress has been provided to those who have suffered loss as a result of the misconduct and/or whether steps have been taken to remedy any failures in systems or controls which gave rise to the misconduct: where such steps are taken promptly and voluntarily, criminal prosecution may not be appropriate; however, potential defendants will not avoid prosecution simply because they are able to pay compensation;
- (9) the effect that a criminal prosecution may have on the prospects of securing redress for those who have suffered loss: where a criminal prosecution will have adverse effects on the solvency of a *firm* or individual in circumstances where loss has been suffered by *consumers*, the *FCA* may decide that criminal proceedings are not appropriate;
- (10) whether the *person* is being or has been voluntarily cooperative with the *FCA* in taking corrective measures; however, potential defendants will not avoid prosecution merely by fulfilling a statutory duty to take those measures;
- (11) whether an individual's misconduct involves dishonesty or an abuse of a position of authority or trust;
- (12) where the misconduct in question was carried out by a group, and a particular individual has played a leading role in the commission of the misconduct: in these circumstances, criminal prosecution may be appropriate in relation to that individual;
- (12A) where the misconduct in question was carried out by two or more individuals acting together and one of the individuals provides information and gives full assistance in the *FCA's* prosecution of the other(s), the *FCA* will take this co-operation into account when deciding whether to prosecute the individual who has assisted the *FCA* or bring market abuse proceedings against him;
- (13) the personal circumstances of an individual may be relevant to a decision whether to commence a criminal prosecution.

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

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