

Chapter 10

Injunctions

10.2 Section 380 (injunctions for breaches of relevant requirement⁹) and section 381 (injunctions in cases of market abuse): the FCA's policy

⁹ Under sections 380(6)(a) and (7)(a), a 'relevant requirement' in relation to an application by the appropriate regulator means a requirement: which is imposed by or under the *Act* or by a qualifying provision specified, or of a description specified, for the purpose of subsection 380(6) by the Treasury by order; or which is imposed by or under any other Act and whose contravention constitutes an offence mentioned in section 402(1) of the *Act*; or which is imposed by the *AIFMD UK regulation*. The definition of "appropriate regulator" is set out in subsections 380(8) to (12) of the *Act*.

10.2.1

The court may make three types of order under these provisions: to restrain a course of conduct, to take steps to remedy a course of conduct and to secure assets. As is explained below, the court may also make an order freezing assets under its inherent jurisdiction. In certain cases, the *FCA* may seek only one type of order, although in others it may seek several.

10.2.2

The broad test the *FCA* will apply when it decides whether to seek an *injunction* is whether the application would be the most effective way to deal with the *FCA*'s concerns. In deciding whether an application for an *injunction* is appropriate in a given case, the *FCA* will consider all relevant circumstances and may take into account a wide range of factors. The following list of factors is not exhaustive; not all the factors will be relevant in a particular case and there may be other factors that are relevant.

- (1) The nature and seriousness of a contravention or expected contravention of a relevant requirement. The extent of loss, risk of loss, or other adverse effect on *consumers*, including the extent to which *client* assets may be at risk, may be relevant. The seriousness of a contravention or prospective contravention will include considerations of:
 - (a) whether the losses suffered are substantial;
 - (b) whether the numbers of *consumers* who have suffered loss are significant;
 - (c) whether the assets at risk are substantial; and
 - (d) whether the number of *consumers* at risk is significant.
- (2) In cases of *market abuse*, the nature and seriousness of the misconduct or expected misconduct in question. The following may be relevant:

- (a) the impact or potential impact on the *financial system* of the conduct in question. This would include the extent to which it has resulted in distortion or disruption of the markets, or would be likely to do so if it was allowed to take place or to continue;
 - (b) the extent and nature of any losses or other costs imposed, or likely to be imposed, on other users of the *financial system*, as a result of the misconduct.
- (3) Whether the conduct in question has stopped or is likely to stop and whether steps have been taken or will be taken by the *person* concerned to ensure that the interests of *consumers* are adequately protected. For example, an application for an *injunction* may be appropriate where the *FCA* has grounds for believing that a contravention of a relevant requirement, *market abuse* or both may continue or be repeated. It is likely to have grounds to believe this where, for example, the *Takeover Panel* has requested that a *person* stop a particular course of conduct and that *person* has not done so.
- (4) Whether there are steps a *person* could take to remedy a contravention of a relevant requirement or *market abuse*. The steps the *FCA* may require a *person* to take will vary according to the circumstances but may include the withdrawal of a misleading *financial promotion* or publishing a correction, writing to *clients* or investors to notify them of *FCA* action, providing financial redress and repatriating funds from an overseas jurisdiction. An application by the *FCA* to the court under section 380(2) or 381(2) for an order requiring a *person* to take such steps may not be appropriate if, for example, that *person* has already taken or proposes to take appropriate remedial steps at his own initiative or under a ruling imposed by another regulatory authority (such as the *Takeover Panel* or a *recognised investment exchange*). If another authority has identified the relevant steps and the *person* concerned has failed to take them, the *FCA* will take this into account and (subject to all other relevant factors and circumstances) may consider it is appropriate to apply for an *injunction*. In those cases the *FCA* may consult with the relevant regulatory authority before applying for an *injunction*.
- (5) Whether there is a danger of assets being dissipated. The main purpose of an application under section 380(3), sections 381(3) and (4) or pursuant to the court's inherent jurisdiction, is likely to be to safeguard funds containing *client* assets (e.g. *client* accounts) and/or funds and other assets from which restitution may be made. The *FCA* may seek an *injunction* to secure assets while a suspected contravention is being investigated or where it has information suggesting that a contravention is about to take place.
- (6) The costs the *FCA* would incur in applying for and enforcing an *injunction* and the benefits that would result. There may be other cases which require the *FCA*'s attention and take a higher priority, due to the nature and seriousness of the breaches concerned. There may, therefore, be occasions on which the *FCA* considers that time and resources should not be diverted from other cases in order to make an application for an *injunction*. These factors reflect the *FCA*'s duty under the *Act* to have regard to the need to use its resources in the most efficient and economic way.

- (7) The disciplinary record and general compliance history of the *person* who is the subject of the possible application. This includes whether the *FCA* (or a *previous regulator*) has taken any previous disciplinary, remedial or protective action against the *person*. It may also be relevant, for example, whether the *person* has previously given any undertakings to the *FCA* (or any *previous regulator*) not to do a particular act or engage in particular behaviour and is in breach of those undertakings.
- (8) Whether the conduct in question can be adequately addressed by other disciplinary powers, for example *public censure* or financial penalties.
- (9) The extent to which another regulatory authority can adequately address the matter. Certain circumstances may give rise not only to possible enforcement action by the *FCA*, but also to action by other regulatory authorities. The *FCA* will examine the circumstances of each case, and consider whether it is appropriate for the *FCA* to take action to address the relevant concern. In most cases the *FCA* will consult with other relevant regulatory authorities before making an application for an order.
- (10) Whether there is information to suggest that the *person* who is the subject of the possible application is involved in *financial crime*.
- (11) In any case where the *FCA* is of the opinion that any potential exercise of its powers under section 381 may affect the timetable or the outcome of a *takeover bid*, the *FCA* will consult the *Takeover Panel* before taking any steps to exercise these powers and will give due weight to its views.