

Chapter 11

Restitution and redress

11.2 Criteria for determining whether to exercise powers to obtain restitution

11.2.1

In deciding whether to exercise its powers to seek or require restitution under sections 382, 383 or 384 of the *Act*, the *FCA* will consider all the circumstances of the case. The factors which the *FCA* will consider may include, but are not limited to, those set out below.

(1) Are the profits quantifiable?

The *FCA* will consider whether quantifiable profits have been made which are owed to identifiable *persons*. In certain circumstances it may be difficult to prove that the conduct in question has resulted in the *person* concerned making a profit. It may also be difficult to find out how much profit and to whom the profits are owed. In these cases it may not be appropriate for the *FCA* to use its powers to obtain restitution.

(2) Are the losses identifiable?

The *FCA* will consider whether there are identifiable *persons* who can be shown to have suffered quantifiable losses or other adverse effects. In certain circumstances it may be difficult to establish the number and identity of those who have suffered loss as a result of the conduct in question. It may also prove difficult in those cases to establish the amount of that loss and whether the losses have arisen as a result of the conduct in question. In these cases it may not be appropriate for the *FCA* to use its powers to obtain restitution.

(3) The number of persons affected

The *FCA* will consider the number of *persons* who have suffered loss or other adverse effects and the extent of those losses or adverse effects. Where the breach of a relevant requirement by a *person*, whether *authorised* or not, results in significant losses, or losses to a large number of *persons* which collectively are significant, it may be appropriate for the *FCA* to use its powers to obtain restitution on their behalf. The *FCA* anticipates that many individual losses resulting from breaches by *firms* may be more efficiently and effectively redressed by *consumers* pursuing their claims directly with the firm concerned or through the *Financial Ombudsman Service* or the *compensation scheme* where the *firm* has ceased trading. However, where a large number of *persons* have been affected or the losses are substantial it may be more appropriate for the *FCA* to seek or require restitution from a *firm*. In those cases the *FCA* may consider combining an action seeking or requiring restitution from a *firm* or *unauthorised person* with disciplinary action or a criminal prosecution.

(4) FCA costs

The FCA will consider the cost of securing redress and whether these are justified by the benefit to *persons* that would result from that action. The FCA will consider the costs of exercising its powers to obtain restitution and, in particular, the costs of any application to the court for an order for restitution, together with the size of any sums that might be recovered as a result. The costs of the action will, to a certain extent, depend on the nature and location of assets from which restitution may be made. In certain circumstances it may be possible for the FCA to recover its costs of applying to the court for an order for restitution, or a proportion of those costs, from the party against whom a restitution order is obtained, though this would have the disadvantage of reducing the amount available to pay redress.

(5) Is redress available elsewhere?

The FCA will consider the availability of redress through the *Financial Ombudsman Service* or the *compensation scheme*. This will be relevant where the loss has resulted from the conduct of a *firm*. It will not be relevant where losses have resulted from the conduct of *unauthorised persons* operating in breach of the *general prohibition*. The *Financial Ombudsman Service* and the *compensation scheme* (where the *firm* has ceased trading) may be a more efficient and effective method of redress in many cases. The *Financial Ombudsman Service* provides a way for some *consumers* to obtain redress. The *compensation scheme* may provide redress for some *consumers* and businesses. The FCA's power to obtain restitution is not intended to duplicate the functions of the *Ombudsman* or *compensation schemes* in those cases. However, in certain cases it will be more appropriate for the FCA to pursue restitution. Further details of these schemes are set out in *COMP*.

(6) Is redress available through another regulator?

The FCA will consider the availability of redress through another regulatory authority. Where another regulatory authority, such as the *Takeover Panel*, is in a position to require appropriate redress, the FCA will not generally exercise its own powers to do so. If the FCA does consider that action is appropriate and the matters in question have happened in the context of a *takeover bid*, the FCA will only take action during the bid in the circumstances set out in ■ DEPP 6.2.26G if the *person* concerned has responsibilities under the *Takeover Code*. If another *regulatory body* has required redress and a *person* has not met that requirement, the FCA will take this into account and (subject to all other relevant factors and circumstances) may consider it appropriate to take action to ensure that such redress is provided.

(7) Can persons bring their own proceedings?

The FCA will consider whether *persons* who have suffered losses are able to bring their own civil proceedings. In certain circumstances it may be appropriate for *persons* to bring their own civil proceedings to recover losses. This might be the case where the *person* who has suffered loss is a *eligible counterparty* and so may be expected to have a high degree of financial experience and knowledge. When considering whether this might be a more appropriate method of obtaining redress, the FCA will consider the costs to the *person* of bringing that action and the likelihood of success in relation to the size of any sums that may be recovered.

(8) Is the firm solvent?

The FCA will consider the solvency of the *firm* or *unauthorised person* concerned. Where the solvency of the *firm* or *unauthorised person* would be placed at risk by the payment of restitution, the FCA will consider whether it is appropriate to seek restitution. In those cases, the FCA may consider obtaining a compulsory *insolvency order* against the *firm* or *unauthorised person* rather than restitution. When considering these options, the FCA may also take account of the position of other creditors who may be prejudiced if the assets of the *firm* or *unauthorised person* are used to pay restitution payments prior to insolvency.

(9) What other powers are available to the FCA?

The FCA will consider the availability of its power to obtain a compulsory *insolvency order* against the *firm* or *unauthorised person* concerned or to apply to the court for the appointment of a receiver. In certain circumstances it may be appropriate for the FCA to obtain an administration order, winding up order or bankruptcy order against a *firm* or *unauthorised person* carrying out *regulated activities* in breach of the *general prohibition*.

The FCA may decide to exercise its power to obtain a compulsory *insolvency order* or to apply for the appointment of a receiver rather than to exercise its powers to obtain restitution. This could happen if the FCA has particular concerns about a *person's* conduct, or financial position and, in particular, whether it is solvent (though the appointment by the court of a receiver is not conditional on the insolvency of the *person* concerned). The FCA may also consider the cost of seeking compulsory *insolvency orders* which will be paid out of the assets of the *firm*, or of the *unauthorised person* concerned, compared to the cost of seeking restitution. In the case of *unauthorised persons* operating in breach of the *general prohibition*, a decision to apply for a compulsory *insolvency order* rather than restitution will depend on all the circumstances of the case. In particular, the FCA may consider the significance of the unauthorised activities compared to the whole of the business; the nature and conduct of the activities carried on in breach of the *general prohibition*; and the number and nature of the claims against the *person* or *firm* concerned. The FCA's powers to apply for compulsory *insolvency orders* are discussed in ■ chapter 13 of this guide.

(10) The behaviour of the persons suffering loss

The FCA will consider the conduct of the *persons* who have suffered loss. As part of its operational objective of securing an appropriate degree of protection for *consumers*, the FCA is required to publicise information about the *authorised* status of *persons* and is empowered to give information and guidance about the regulation of financial services. This information should help *consumers* avoid suffering losses. When the FCA considers whether to obtain restitution on behalf of *persons*, it will consider the extent to which those *persons* may have contributed to their own loss or failed to take reasonable steps to protect their own interests.

(11) Other factors which may be relevant

The FCA will consider the context of the conduct in question. In any case where the FCA believes that the exercise of its powers under section 383 or 384 of the *Act* may affect the timetable or outcome of a *takeover bid*, it will consult the *Takeover Panel* before taking any steps to exercise such powers, and will give due weight to its views.