

FCA proposes enforcement action against portfolio manager for market manipulation under MAR

The FCA is proposing to take enforcement action against Corrado Abbattista for engaging in market manipulation under the Market Abuse Regulation (596/2014) (MAR)

This is the first case where the FCA is proposing to take enforcement action against a firm or an individual for committing one of the three substantive offences under MAR, namely insider dealing, market manipulation and unlawful disclosure.

Mr Abbattista has referred the decision notice to the Upper Tribunal (Tax and Chancery Chamber) where he and the FCA will each present their cases.

The tribunal will determine what, if any, is the appropriate action for the FCA to take, and will remit the matter to the FCA with such direction as it considers appropriate for giving effect to its determination. Accordingly, the proposed action outlined in the decision notice will have no effect pending the tribunal's determination of the case.

Background and facts

Mr Abbattista was a portfolio manager at Fenician Capital Management LLP (Fenician), an investment management firm. Mr Abbattista was Fenician's Chief Investment Officer and was approved by the FCA to perform the CF4 (Partner) and CF30 (Customer) controlled functions.

Between 20 January and 15 May 2017, Mr Abbattista placed large orders for contracts for difference (CFDs) referencing the shares of five listed issuers (companies), which he did not intend to execute (misleading orders). He placed the misleading orders on the opposite side of the order book to existing smaller orders, which he did intend to execute (genuine orders).

The FCA found that, by placing the misleading orders, Mr Abbattista falsely represented to the market an intention to buy or sell, when his true intention was the opposite. This, in turn, gave false and misleading signals as to demand/supply because Mr Abbattista did not place the misleading orders with a genuine intention that they would be executed. For example, when Mr Abbattista placed a large misleading buy order, it would likely have created the impression that there was a material buyer in the market when in fact there was not.

When Mr Abbattista placed the genuine orders, the FCA found that he almost always placed them as "iceberg orders", meaning that only a portion of each genuine order was visible to other market participants. However, Mr Abbattista did not place misleading orders (which were for volumes of shares far greater than the typical market size) as "iceberg orders". As a result, the full size of the misleading orders was visible to other market participants. The FCA found that Mr Abbattista adopted this approach in relation to the misleading orders in order to "maximise" the impression that the misleading orders created in the market.

Overall, the FCA found that Mr Abbattista's trading would likely have had a material impact on other market participants, may have caused other market participants to alter their trading strategies and would have created a false and misleading impression regarding the true supply and demand for the shares in question.

Proposed FCA enforcement action

The FCA found that Mr Abbattista had recklessly engaged in market manipulation as defined in Article 12(1)(a) of the Market Abuse Regulation ((EU) No 596/2014) (MAR) by placing the misleading orders. The FCA found that the misleading orders gave, or were likely to have given, false or misleading signals as to the supply of, or demand for, shares in the companies, in contravention of Article 15 of MAR.

The FCA proposed to impose a financial penalty of GBP100,000 on Mr Abbattista. It also proposed imposing a prohibition order on Mr Abbattista on the basis that he lacks integrity and is not fit and proper to perform any function in relation to any regulated activities.

Mr Abbattista referred FCA Enforcement's findings about him to the FCA's Regulatory Decisions Committee (RDC). This led to the FCA publishing an anonymised *warning notice statement* on its website in respect of Mr Abbattista in January 2020.

The RDC agreed with the findings made by FCA Enforcement, as well as the proposed sanction for Mr Abbattista.

The FCA went on to publish, on 16 September 2020, its *decision notice* (dated 22 July 2020) setting out its findings in relation to Mr Abbattista's conduct, as well as its proposed sanction. The decision notice includes excerpts of the representations Mr Abbattista made to the RDC, and the RDC's response to them. Some of these are considered in *Decision insight* below.

Reference to Upper Tribunal

Mr Abbattista has referred the decision notice issued to him to the Upper Tribunal (Tax and Chancery Chamber) where he and the FCA will each present their cases. The tribunal will then determine what, if any, is the appropriate action for the FCA to take, and will remit the matter to the FCA with such

direction as it considers appropriate for giving effect to its determination. Accordingly, the proposed action outlined in the decision notice will have no effect pending the tribunal's determination of the case.

Decision insight

FCA focus on identifying and tackling market abuse

Identifying and taking enforcement action in relation to conduct that amounts to market abuse has been a long-standing priority of the FCA. This focus on tackling potential market abuse is reflected in the FCA's high number of open market abuse investigations. As at 31 March 2020, the FCA had 117 open market abuse investigations, 54 (46%) of which were opened during 2019/20. However, the FCA has only taken enforcement action in relation to a very small proportion of its open market abuse investigations over the last few years. For example, in the last two financial years, the FCA has only taken enforcement action for market abuse in two cases. These cases concerned breaches of obligations in MAR relating to market announcements by listed issuers and the notification of personal trading by persons discharging managerial responsibilities (PDMRs) within listed issuers.

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In its *press release* relating to the decision notice, the FCA explains that Mr Abbattista's trading was initially identified by the FCA's internal surveillance systems, which, "[ingest] order book data from the leading UK equity trading venues and then [run] surveillance algorithms, designed to identify potentially abusive behaviours, across that consolidated data set."

This information echoes comments made in a February 2020 *speech* by Mark Steward, FCA Executive Director of Enforcement and Market Oversight:

"We made a strategic decision to ingest the equity order book into our Markets Data Processor because it is very difficult, if not impossible, to detect trading manipulation with transaction data alone. Indeed, I cannot imagine how there could be any sensible attack on such manipulation without an ability to surveil the order book in a consolidated way in tandem with transaction reports, which is what we are now able to do.

Now we can look for manipulative trading more easily and the proportion of investigation work is now split 60:40 between insider dealing and manipulation. This is a big change from relatively recent days when our wholesale investigation caseload was almost exclusively based on suspected insider dealing."

The distinction between being prepared to trade and intending to trade

Mr Abbattista argued before the RDC that the misleading orders were genuine. In support of this argument, he stated that, even though he did not intend for the misleading orders to be executed, the misleading orders could have been executed and would have been within his permitted trading limits. Mr Abbattista asserted that there is no legal distinction between a person who is prepared to trade (as he was) and a person who actually intends to trade.

The RDC rejected Mr Abbattista's representations on this point. It found that Mr Abbattista did not intend for the misleading orders to be executed, even though he "took the small risk that they might be". The RDC took the view that the risk of the misleading orders being executed was 'small' due to their distance from the "Touch" (that is, the highest price to buy and the lowest price to sell at the relevant times) and the relatively short periods of time for which the misleading orders remained open. The RDC found that Mr Abbattista "deliberately placed the misleading orders away from the Touch" and that he "cancelled them relatively quickly to reduce the chance of them being filled". The RDC also noted that no misleading orders were in fact executed.

In addition, contrary to what Mr Abbattista had asserted, the RDC expressly stated that "there is a significant distinction between being prepared to trade, in the sense of accepting a risk of trading, and intending to trade". The RDC confirmed that an order that is available for execution is still capable of being abusive, even if there is no intention for that order to in fact be executed.

Recklessness

The FCA found that, as an experienced market professional, Mr Abbattista must have been aware of the risk that his trading might constitute market manipulation (that is, that the misleading orders would give false or misleading signals to other market participants as to the supply of, or demand for, shares in the companies). However, notwithstanding this risk, he still proceeded with his trading. This led the FCA to find that Mr Abbattista's conduct was reckless. In support of this finding, the FCA also referred to one of Mr Abbattista's colleagues (who the FCA referred to as "Colleague A" in the decision notice) having expressed concerns about his approach to trading, which the FCA described as "a warning that the [trading] technique might be unacceptable". The FCA found that Mr Abbattista failed "to heed this warning" thereby "closing his mind to the risk that the [trading] technique was abusive".

In his representations before the RDC, Mr Abbattista attempted to argue that if he had committed market abuse, he had done so negligently as opposed to recklessly. In particular:

- Mr Abbattista claimed that Colleague A was "prone" to being anxious, did "not consider that there was anything wrong with the [trading] technique" and that he "stopped using the [trading] technique out of respect for Colleague A's feelings".
- Mr Abbattista also tried to draw comparisons between his conduct and a previous FCA enforcement case. In that case, Paul Axel Walter, a former bond trader, was found to have committed market abuse negligently, even though he had received a telephone call from a third party, which raised concerns about his trading.

The RDC rejected these representations and sustained FCA Enforcement's finding that Mr Abbattista had acted recklessly. It also distinguished Mr Abbattista's conduct from Mr Walter's case on the basis that the concerns expressed to Mr Walter about his trading were expressed by a third party, who was unknown to him, and Mr Walter's position was that he had believed it may have been a "hoax". The RDC contrasted that case with the case against Mr Abbattista, noting that the concerns expressed to Mr Abbattista about his trading had been expressed by a "senior colleague" (that is, Colleague A), "for whom [Mr Abbattista] has professed respect".

Expert evidence

In his representations to the RDC, Mr Abbattista claimed that the purpose of the misleading orders was to "help him assess the true state of liquidity in a market environment where visible liquidity had dramatically declined". He described this approach as "a legitimate trading technique of liquidity testing". Mr Abbattista presented expert evidence to the RDC on this point, which "showed that the practice of seeking information about market liquidity by placing orders in this way is a common and widely accepted practice". The RDC did not dispute this point. However:

- The RDC noted that the multiple experts Mr Abbattista instructed were not asked to express an opinion on specifically whether what Mr Abbattista was doing when placing the misleading orders was either common or widely accepted in the market. It is not clear why this point was not covered by Mr Abbattista's experts.
- One of the experts instructed by Mr Abbattista expressed a view that "it was a "usual" practice to use an order on the opposite side of the book to the intended trade to test liquidity". The RDC noted that this view was inconsistent with the view that was expressed by the FCA's own expert, as well as Colleague A. The FCA also noted that the view of this expert conflicted with Mr Abbattista's presentation of his trading approach as one that he had developed himself, thereby indicating that it did not conform to any usual market practice.

Procedural unfairness

Mr Abbattista also raised concerns about the way in which FCA Enforcement conducted their investigation. In his submissions to the RDC, Mr Abbattista indicated that, although the FCA interviewed him twice during their investigation, the FCA should have re-interviewed him once it had gathered more information in relation to his trading. Mr Abbattista alleged that a further interview would have provided him with an opportunity to address the FCA's "flawed case theory" and provide "input on the central issue of his purpose in placing the [misleading] orders before issuing a warning notice".

In addition, Mr Abbattista asserted that FCA Enforcement based their findings on information that was not provided to him in advance of his interviews, some of which had "come to light only very recently". In his representations, Mr Abbattista suggested that FCA Enforcement had told him that it was not necessary for them to re-interview him as he could be "confident of a fair hearing before the RDC".

The RDC rejected Mr Abbattista's representations on this point. Dealing with the point briefly, the RDC explained that it had reached its decision "after careful consideration of all the evidence available to it", which included Mr Abbattista's representations. It also noted that:

- Mr Abbattista had been provided with all the information seen by the RDC and that he had the opportunity to comment on that information.
- The FCA does not consider Mr Abbattista's complaint about the lack of a further interview "undermines the evidence relied upon by it in reaching its decision".

There are usually various points during the FCA Enforcement investigation process when subjects of investigations can make representations to the FCA, including before the commencement of formal settlement negotiations. However, it is not clear from the decision notice whether Mr Abbattista made such representations before the FCA issued its warning notice and the extent to which relevant evidence was made available to him at that stage.

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