

# Recent developments in market abuse and insider trading

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# Agenda

- UK legislative and regulatory developments
  - Notice publication
  - How is the new penalties regime working?
- Recent cases
- Pending developments
  - Financial Services Bill
  - European Changes
  - Sunset on the “sunset provisions”

# Publication of notices

- 3 types of notice
  - Warning Notice
  - Decision Notice
  - Final Notice
- Before Financial Services Act 2010 FSA only under a duty to publish Final Notices and could only publish a Decision Notice once the Upper Tribunal Process had been exhausted or the time limit for referring the decision to the Upper Tribunal had expired.
- The 2010 Act required FSA to publish a Decision Notice if it considers it appropriate to do so



# Publication of Notices

- PS 11/3 – “Decision Procedure, Penalties Manual and Enforcement Guide Review”
- FSA said it expects to publish a decision notice if there is a compelling reason to do so or the subject of the enforcement action decides to refer the matter to the Upper Tribunal
- Decision Notices were published for the first time in the cases of Derek White (23 February 2011) and Stuart Unwin (2 March 2011)
- Both Mr White and Mr Unwin had referred their cases to the Upper Tribunal
- Next Steps – Financial Services Bill

## Recent cases – Swift Trade

- Swift Trade was accused of systematically and deliberately engaging in a form of manipulative trading known as “layering”.
- The FSA published a Decision Notice stating “this manipulative trading caused” a succession of small price movements in a wide range of individual shares on the London Stock Exchange from which Swift Trade was able to profit.
- The Decision Notice stated Swift Trade had been fined £8 million for its actions.
- Swift Trade has referred its case to the Upper Tribunal.
- Case highlights FSA’s stance around publicity and its approach to penalties.

# Recent cases – David Massey

- Corporate financier who used inside information in effecting a short sale.
- The case raised two interesting interpretations of the meaning of “inside information” in the Financial Services and Markets Act 2000 ‘the Act’.
- 1. Massey argued that the information he had received was not sufficiently “precise” under the terms of the Act.
- The Act states (sec 118C(5)) that the information must be **“specific enough to enable a conclusion to be drawn as to the possible effect (circumstances that it indicates exist or may reasonably be expected to occur)”**.
- The Upper Tribunal held that the information will be precise if that information will have an effect on price in a particular known direction (i.e. either up or down)
- In this case, as an effect on price was possible and would have a negative effect if any, the Upper Tribunal held the information was sufficiently precise.



## Recent cases – David Massey – cont.

2. The next issue was whether such information was “inside information” for the purposes of the Act.
  - Inside information under the Act (sec.118C(2)) is information likely to have a “significant effect” on price.
  - The Upper Tribunal stated that in interpreting the meaning of inside information you also have to take into account (sec 118C(6)) which states **“Information would be likely to have a significant effect on price if and only if it is information of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions”**.
  - Therefore the Upper Tribunal held that, as long as a reasonable investor would be likely to use the information, as part of the basis of their investment decision, this information was inside information.
  - Therefore, Mr Massey was fined £150,000 and the Upper Tribunal imposed a ban.

## Recent cases – Samuel Khan

- Kahn coordinated a scheme to deliberately inflate the share price of a company.
- First person to have his penalty determined under the new process introduced by the FSA in March 2010.
- Five step penalty setting framework.
- Specific guidance to application provided in the Decision Procedure and Penalties Manual.
- Mr Khan was fined £1,094,900.00

# Recent Cases – Da Vinci Invest PTE Ltd

- FSA twice obtained an interim High Court injunction freezing the assets of a number of companies and individuals who were manipulating the market in UK listed shares.
- Example of the FSA making more use of its civil injunction power in market abuse cases that enable it to gain earlier publicity.



## Recent cases – Jason Geddis

- Mr Geddis was accused of committing market abuse by securing the price of lead contracts on the London Metal Exchange at an abnormal and artificial level.
- FSA held Mr Geddis had deliberately squeezed the market.
- The Upper Tribunal rejected the FSA's decision and held Mr Geddis had shown a lack of care.
- Case demonstrates the Upper Tribunal can and will take a very different view to the FSA where circumstances warrant it.

# Criminal Insider Dealing – Neel & Matthew Uberoi

- Case involved a father and son.
- The son, working as a corporate intern, passed inside information to his father concerning three companies, who his father proceeded to buy shares in.
- The case was brought before the criminal courts by the FSA.
- The son and his father received 12 and 24 month prison sentences respectively for insider trading.



# Criminal Insider Dealing – Christopher McQuoid

- Mr McQuoid became privy to inside information regarding his employer and passed this inside information to his father-in-law.
- His father-in-law traded in shares and made a profit using this inside information.
- Mr McQuoid received an eight month prison sentence for insider trading.

# Criminal Insider Dealing – Malcolm Calvert

- Mr Calvert was a former partner at stock broker Cazenove.
- Mr Calvert obtained confidential information about upcoming takeovers and instructed a friend, Bertie Hatcher, to buy shares in these companies.
- Mr Calvert was sentenced to 21 months in prison for insider dealing.
- Mr Hatcher was only sanctioned by the FSA's regulatory powers rather than a criminal prosecution due to his assistance in the investigation.

# FSA Business Plan 2011/2012

- In regards to regulation and enforcement the FSA's aim is to reduce the extent by which the industry can be used for financial crime.
- The FSA's priorities include the following:
  1. preventing crime by encouraging regulated firms to improve their systems and controls;
  2. continuing with its intensive and intrusive supervision by conducting further thematic work in this area;
  3. working in partnership with UK and international partners to reduce crime; and
  4. continuing with its credible deterrence strategy by taking action where we see evidence of wrongdoing.

# Financial Services Bill

- Expected to give the Financial Conduct Authority right, but not a duty, to publish a Warning Notice.
- Individual or firm may not have the opportunity to set out their defence to the Regulatory Decisions Committee before their case enters the public domain.

# Financial Conduct Authority approach

- Financial Conduct Authority looking to develop a new model of early and proactive intervention rather than only acting after detriment has been suffered.
- This will involve issues based supervision of particular products, activities or issues affecting a particular type of sector.
- This type of approach could result in an increase in penalties and enforcement action.

# European Changes

- Market Abuse Regulation
  - Text expected same time as MiFID and MiFIR
  - A Regulation as opposed to a Directive
  - Orders to trade and other behaviour affecting or affected by instruments traded on regulated markets, MTFs and OTFs
  - Definition of inside information for commodities
  - Territorial jurisdiction
  - High-frequency trading
- REMIT – MAD for the wholesale gas and power markets
- The Spector case

# Sunset on the “sunset provisions”

- Due to end 31 December 2011
- Proposal to extend for a further two years to fit with expected EU timetable
- Then with MAR likely to disappear
- Other impacts
  - Defences
    - Due diligence – the “call Brett defence”
  - UK interpretations

# Thank you

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- Areas of practice
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