
FCA Enforcement Annual Performance Report – 2018/19

JULY 31, 2019

On 9 July 2019, the Financial Conduct Authority (“FCA”) released its Enforcement Annual Performance Report for 2018/19¹ (the “Report”). Complementing the wider FCA Annual Report², it provides an overview of the FCA’s enforcement activity throughout the year, highlighting particular trends and developments. Three key touchpoints to be drawn out are the number of new cases opened; the average length of cases; and enforcement outcomes, with a particular emphasis on financial penalties. Together, these provide a skeleton framework of how an investigation will develop and can be used both as benchmarks to compare to past performance and indicators of the FCA’s future approach to enforcement.

Caseload – too much to handle?

A recurring theme throughout the FCA’s approach to enforcement in recent years – and a recurring observation from the legal profession – is the agency’s ever-increasing workload. This is no more apparent than in the number of investigations it continues to open year on year without closing existing cases; this year’s figures paint the same picture, with a 31% increase in total open cases.³

Of course, these figures are not, in and of themselves, problematic. In fact, they underscore the FCA’s current strategy of using investigations as a fact-finding tool to diagnose issues rather than being a representation of a foregone conclusion of misconduct. It is clear that the FCA is committed to this strategy and this commitment, on some level, is laudable. However, the approach is only sustainable if the FCA is adequately resourced to fund its growing caseload. Its Annual Funding Requirement – its overall budgeted running costs for the year, funded through levies applied to the firms it regulates – has increased just 2.7% from last year.⁴ Clearly, this cannot sustain a 31% uptick in open investigations.

Such a discrepancy can lead to one of two outcomes. Firstly, there is a possibility that open investigations simply aren’t undertaken thoroughly, leading to potentially ineffective investigations and fewer enforcement actions; or secondly, underfunded investigations progress more slowly than they should. Other aspects of the Report suggest that the latter is, increasingly, the reality.

Investigations continue to drag on

For civil and regulatory cases, the general trend when compared to 2017/18 is one of slight

decrease in the length of cases, with contested cases continuing longer than those which are settled.⁵ However, the picture is rather different when compared to 2016/17, and sees increasing case lengths almost across the board.⁶ This increase could potentially be a reflection of the FCA's expanding workload; resources are stretched so thinly across so many investigations that they simply cannot be progressed in a timely manner.

Mark Steward, the FCA's current Director of Enforcement and Market Oversight, has been clear that, for him, "*speed is not the only measure of success*" when it comes to examining the FCA's caseload.⁷ While it is indeed true that a quick turnaround is not (and should never become) the hallmark of a well-conducted investigation, the practical implications of investigations which run for many months or years cannot be escaped. Especially when considering the impact on individuals under investigation, the personal and professional detriment suffered due to long running cases should not be overlooked. Indeed, the FCA is aware of such concerns: summarised at the end of the Report is feedback received from ten firms and individuals under investigation. Two key themes highlighted were: (i) that some subjects believed that their investigations had gone on too long and that it seemed that little progress was being made at times; and (ii) the significant impact investigations had on firms and individuals, for example on "*reputation, time, finances, employment and family life.*"

Missing from this section, however, is what the FCA plans to do with this feedback. Steward has in the past emphasised that the FCA is committed to becoming more efficient and improving strategic allocation of resources.⁸ This year's marginal drop in the average length of cases, however, does not suggest that these efficiencies have had a significant impact.

Penalties: a skewed picture

One potential high point of the Report is the three-fold increase in financial penalties imposed when compared to last year, with a total of £227.3m worth of fines meted out to eight firms and eight individuals. A key theme for corporate fines has been foreseeability: headline fines such as those handed to Tesco Bank (£16.4m for cyber breaches) and Carphone Warehouse (£29m for insurance mis-selling) represent situations which the FCA deemed to have been avoidable. These cases indicate a focus on holding corporates accountable for harm which could have been prevented had appropriate systems, controls and escalation procedures been in place.

However, a different story emerges from the penalties imposed on individuals. While the total figure stands at £80.2m – up from a comparatively small £0.9m in both 2018 and 2017 – this has been heavily skewed by the record £76m fine imposed on Stewart Ford, former CEO of Keydata Investment Services Ltd ("**Keydata**"), for misconduct relating to the sale of structured financial products. The investigation into Keydata and Mr. Ford's role in the company was initiated by the FCA's predecessor, the Financial Services Authority, in December 2007 and involved misconduct dating as far back as 2005. The case, therefore, aside from being an outlier in terms of its size, is not wholly reflective of recent FCA work, and this level of individual fines is unlikely to indicate any pattern or trend which will continue in the coming years.

Looking ahead

The FCA is continuing to chase down and investigate potential misconduct; its growing caseload is clear evidence of that. However, high numbers of open cases are not the be all and end all of effective enforcement. When the efficiency of investigative work is sacrificed in favour of increasing numbers, with a consequent impact on the length the investigations themselves, action must be taken. The Report does not address how the FCA proposes to tackle such problems. Although the increase in financial penalties could be seen as a step in the right direction, the FCA must not allow its expanding workload to become overwhelming. Over the next year, its outcomes will be closely scrutinised; criticism may very well be in store if the FCA cannot turn its increased caseload into tangible, hard-hitting enforcement action.

¹ FCA Enforcement Annual Performance Report for 2018/19, available at:

<https://www.fca.org.uk/publication/corporate/annual-report-2018-19-enforcement-performance.pdf>

² FCA Annual Report and Accounts for 2018/19, available at:

<https://www.fca.org.uk/publication/annual-reports/annual-report-2018-19.pdf>

³ 650 open cases as at 31 March 2019, compared with 496 on 1 April 2018.

⁴ FCA Annual Report for 2018/19.

⁵ There has been a slight decrease in the average length of all cases (including those where no further action is taken) from 19.1 to 17.5 months. The time taken to resolve cases by agreement has dropped by 3.2 months; the length of cases referred to the RDC has dropped by 8.6 months; and the length of cases referred to Tribunal has increased by 21.7 months.

⁶ Since 2017, the average length of cases resolved by agreement has increased by 5.9 months; the average length of cases referred to the RDC has increased by 17.2 months; the average length of cases referred to Tribunal has increased by 12.9 months; and the average length of all cases (including those where no further action is taken) has stayed almost the same, at 17.6 months in 2017 versus 17.5 months in 2019.

⁷ Speech by Mark Steward, Director of Enforcement and Market Oversight at the FCA, delivered at GIR Live London on 4 April 2019: <https://www.fca.org.uk/news/speeches/partly-contested-cases-pipeline-and-aml-investigations>

⁸ Speech by Mark Steward, Director of Enforcement and Market Oversight at the FCA, delivered at the AFME European Compliance and Legal Conference 2017: <https://www.fca.org.uk/news/speeches/better-view>