Debevoise & Plimpton

The Debrief

UK Financial Conduct Authority Imposes First Market Manipulation Penalty Under Market Abuse Regulation

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On 15 December 2020, the UK Financial Conduct Authority ("FCA") published a final notice against Corrado Abbattista, a portfolio manager and Chief Investment Officer at Fenician Capital Management LLP, an investment management firm. Mr Abbattista was fined £100,000 and prohibited from performing any function in relation to regulated activities for engaging in market manipulation under the EU Market Abuse Regulation ("MAR"). This is the first time that the FCA has taken enforcement action for any of the three substantive offences under MAR: market manipulation, insider dealing, and unlawful disclosure of inside information.

BACKGROUND

The FCA found that between January and May 2017, Mr Abbattista placed large orders for contracts for difference referencing the shares of five UK-listed companies, which he did not intend to execute (the "misleading orders"). These were placed on the opposite side of the order book to existing smaller orders, which he did intend to execute (the "genuine orders").

Mr Abbattista usually placed the genuine orders as 'iceberg orders' where only part of each order was visible to other market participants while the rest remained hidden. By contrast, he always made visible the full size of the misleading orders, which were for far greater volumes than the typical market size. The FCA found that Mr Abbattista did not use iceberg orders for the misleading orders because he wanted to maximise the impression of the supply or demand those orders created, while minimising the impact of his genuine orders. A trader placing very large buy orders close to the prevailing highest bid price creates the impression of significant market demand that tends to increase trading prices, leading other market participants to fill his or her genuine sell orders at artificially high levels (and vice versa). Cancelling the misleading buy orders before they can be filled establishes the benefit for the trader, who avoids the need to both sell and buy the shares at that higher price.

The FCA concluded that Mr Abbattista had falsely represented to the market an intention to buy or sell, when his real intention was the opposite. It found that his trading would likely have had a material impact on other market participants, caused them to alter their trading strategies, and given false and misleading signals as to the true state of supply and demand for the shares.

KEY PRINCIPLES CONFIRMED BY THE FCA

- Market manipulation arises where there is no actual intention to trade

  Mr Abbattista argued that the misleading orders were ‘genuine orders’ in the sense that he had been prepared to trade on them, since the orders were theoretically open to acceptance by another market participant once they were placed. However, the FCA found that the size and price of the orders and their quick cancellation showed that Mr Abbattista did not intend for them to be executed, with little risk that this would happen (and in fact none were executed). Importantly, the FCA determined that a key factor in market manipulation is the lack of a genuine intention to trade—a ‘real’ order that is at risk of acceptance may still be abusive when there is no intention for that order to be executed. This is the first time the FCA has explained this principle. We consider it to be consistent with market abuse principles and the purpose of MAR, but we note that this is not necessarily the correct or settled position in other jurisdictions. Further, the FCA did not require any specific evidence that the orders in fact misled market participants and moved the market—again, this is not necessarily the case in other jurisdictions.

- No legitimate trading technique was employed

  Mr Abbattista claimed that the misleading orders were part of a legitimate technique using “trial orders to help him assess the true state of liquidity in a market environment where visible liquidity had dramatically declined”. He obtained expert evidence generally stating that seeking information about market liquidity through placing orders is a common and widely accepted practice. However, the experts did not opine on his specific trading technique here, and the FCA did not accept that it conformed to any usual practice. We have seen similar trading patterns during investigations we have conducted and, in our experience, they clearly carry a high risk of constituting market manipulation, a view reinforced by the FCA’s conclusion.

- Lack of FCA guidance on trading techniques does not excuse market abuse

  Mr Abbattista argued that since there were no published FCA cases or guidance relevant to his trading technique, he had no reason to believe that it was impermissible. The FCA rejected this reasoning and stated that it was not necessary for there to have been any cases or guidance specifically addressing Mr Abbattista's trading technique for it to be clear to market users that placing orders with no intention of executing them is unacceptable.

THE FCA'S INCREASING FOCUS ON MARKET ABUSE

Combating market abuse has been a priority for the FCA for some time now and it has invested heavily in market surveillance tools. As at 31 March 2020, the FCA had 146 open market abuse investigations (representing over 20% of its total enforcement workload and the largest category of cases), 50 of which were opened in the previous year. However, it has historically struggled to bring successful enforcement actions on a regular basis. This decision may mark a significant turning point for the FCA.

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