

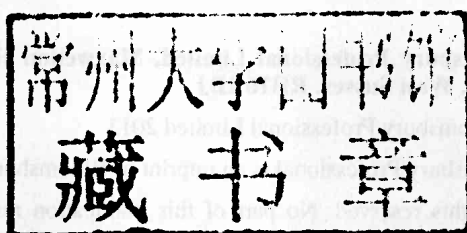
MARKET ABUSE
ENFORCEMENT:
PRACTICE AND PROCEDURE

STUART BAZLEY

BLOOMSBURY

Market Abuse Enforcement: Practice and Procedure

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Preface

The market abuse regime now presents a significant area of law and regulation for the financial services industry. From December 2001 the Financial Services and Markets Act 2000 (FSMA) provided for the first time a civil law system for dealing with market abuse that could be enforced against both investment professionals and members of the public. From that date, significant enforcement power was centred on the Financial Services Authority (FSA), which had available a menu of administrative and criminal law powers to address insider dealing and market manipulation, whether committed by investment professionals or members of the public. Since 2001, along with changes to the definitions of abusive behaviour in 2005 as a result of the EU Market Abuse Directive, the FSA's market abuse enforcement work has grown in stature and profile, and there is now a growing body of law and enforcement decision-making, which together with practitioner and academic publications, combine to provide a useful insight into the nature of market abuse enforcement.

At the time of writing, a Financial Services Bill to radically overhaul the institutional structure of UK financial services regulation is before Parliament. Once enacted the new law will establish a Prudential Regulatory Authority to be responsible for the prudential regulation of Banks, Insurers and other significant investment firms and will rename the Financial Services Authority (FSA) as the Financial Conduct Authority (FCA) which will be responsible for the prudential aspects of all other firms plus business conduct and financial markets regulation. Although the Financial Services Bill will grant a series of new objectives and powers to the FCA and proposes a criminal offence of manipulating benchmarks, such as LIBOR, the UK's administrative law Market Abuse regime will largely remain unchanged and thus the analysis provided in this book of the Financial Services Authority's work to date, will remain invaluable for the continued study of market abuse enforcement. Other than when addressing historical matters, throughout the book I use the name 'Authority' in order that the reader may consider the law and regulation being discussed in the context of either the FSA or FCA.

In general terms, this book attempts to examine both the law of market abuse and the operation of the Authority's market abuse enforcement powers including the role played by the Upper Tribunal (Tax and Chancery) and considers the extent to which the Tribunal's role in holding the FSA's enforcement decision making to account has to date provided a wider contribution to the law on Market Abuse. In an attempt to provide some perspective to the drivers behind the current statutory system, the book starts with an historical analysis of the law concerning market manipulation and insider dealing regulation. Chapters 2, 3 and 4 then explore the relationship between the FSMA's statutory definitions

of behaviour constituting market abuse and the source of the Authority's market abuse controls, investigation and enforcement powers, as well as some of the policy issues that have shaped how such powers are deployed. A general analysis of concepts of accountability is provided (Chapter 5) thereby allowing an appreciation of the framework of accountability within the FSMA as well as the benefits and deficiencies of accountability provided by the courts when compared to those provided by the Upper Tribunal. Consideration is then provided (Chapters 6 and 7) of the nature of the Upper Tribunal's functional independence from the Authority and whether its membership, decision-making and rules of procedure (including evidential standards of proof) have hitherto acted to influence FSA enforcement. The justiciability of the Authority's principles-based rules before the Upper Tribunal and the courts is explored in Chapter 8, and Chapter 9 considers whether the criminal law and alternative sources of enforcement complements the regime or provides an effective alternative to civil law market abuse enforcement. In conclusion, the book reflects on its key findings plus provides some observation about the impact that the regulatory reforms in the Financial Services Bill may have on market abuse enforcement. In addition, I have presented in a series of appendices at the end of the book analysis of the market abuse and associated enforcement cases published by the FSA since 2001. Not only should the appendices offer a useful compendium of market abuse enforcement cases, but they also offer an interesting evaluation of the FSA's approach to and experience of market abuse enforcement.

There are a number of people that I wish to specially thank for their support. I am especially grateful to Professor Barry Rider of Jesus College Cambridge who over many years has provided me with the inspiration and opportunity to develop and conduct my research into financial services regulation and market abuse, including the opportunity to work with him, Professor Kern Alexander and Lisa Linklater and contribute some of my research to the 2nd edition of *Insider Dealing and Market Abuse and Insider Dealing* (Tottel Publishing). I also extend my considerable gratitude to the editorial staff at Bloomsbury Professional and in particular Jane Bradford and my friend Andy Hill, who over many months have patiently encouraged me to complete and submit each chapter, which they have then diligently transformed into this book.

To my children Catherine, Richard, Edward, Beatrice and Harriet, I must say thank you for not complaining when work has taken priority over my time with you.

But, the majority of my appreciation is saved for my wife Mary, who has and continues to provide me with unconditional support, and who for many years has suffered from the disturbance and interruption that my research and writing has caused. I know she will appreciate this coded message, 'GYB'.

The law, regulation and practice set out in this book is that in force as at 30 September 2012.

Stuart Bazley
London
2013

Stuart Bazley

Stuart has over 30 years of experience working in the UK financial services industry including holding senior roles as in-house lawyer, head of compliance and expert consultant. Stuart has worked in the United Kingdom and Republic of Ireland with both medium-sized enterprises and large and complex transnational financial services corporations advising on and investigating market conduct and sales practice compliance and enforcement matters. Stuart trained as a lawyer, and has a doctorate from the Institute of Advanced Legal Studies, University of London. Stuart now works as an expert consultant and is a Visiting Professor in financial services regulation and compliance in the faculty of law at BPP University College, where he teaches on the University's LLM in Financial Regulation and Compliance.

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