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Market Abuse – private enforcement under MAR?

If you commit market abuse, do other market participants have a private right of action against you? Alternatively, if you believe someone else in the market has committed market abuse, can you bring a claim against them? Until the Market Abuse Regulation (Regulation 596/2014 ("**MAR**")) came into effect on 3 July 2016, the answer in the UK was a certain "no". Now, however, the answer is no longer clear-cut.

In *Hall v Cable and Wireless PLC* [2009] EWHC 1793 (Comm) the English High Court held that there was no private right of action for market abuse. The object of the market abuse regime contained in section 118 Financial Services and Markets Act ("FSMA") could be achieved by the imposition of regulatory penalties under section 123 FSMA, or the imposition of restitution orders by the court on the application of the FCA under section 383 FSMA. Given those remedies, and in the absence of an express private right of action in FSMA, it was clear that Parliament had not intended such a right of action to exist.[1]

Market abuse is, however, no longer defined in FSMA, but in Chapter 2 of MAR. Section 118 FSMA has been repealed and sections 123 and 383 FSMA have been amended to take account of MAR. Whilst MAR itself only references enforcement by public bodies, EU law does not preclude private enforcement simply because a regulation does not refer to it. EU regulations may confer rights on individuals which national courts have a duty to protect. In other contexts, claimants have successfully relied on these principles to bring civil claims for breaches of regulations.

Private rights under regulations?

Muñoz v Frumar (Case C-253/00) concerned Regulation 2200/96 relating to the marketing of fruit and vegetables. It did not provide for a private right of action. The Horticultural Marketing Inspectorate (the "**HMI**") was the UK authority charged with enforcement.

Muñoz and Frumar sold grapes in the United Kingdom. Muñoz complained on several occasions to the HMI that Frumar was mis-describing its grapes in breach of the Regulation, but the HMI took no action. Muñoz brought a claim against Frumar in the High Court. Frumar accepted that it had been in breach, but the High Court dismissed Muñoz's claim on the basis that Muñoz had no private right of action.

Muñoz appealed to the Court of Appeal which referred the question of whether Regulation 2200/96 should be capable of enforcement by means of civil proceedings. The ECJ held that it should. Citing *Factortame* (C-213/89) and *Courage and Crehan* (C-453/99) the ECJ emphasised that national courts have an obligation to ensure that community law takes full effect. Examining the recitals to the Regulation, the court held that it could not be fully effective without a private right of action.

The Advocate General in *Muñoz* opined that regulations would give rise to private rights as a general rule, subject to the satisfaction of the following conditions:

1. a link between the interest which the person concerned is invoking and the protection afforded by a provision in the regulation;
2. an economic interest on the part of the claimant which differentiates that person from others;
3. loss suffered as a result of an infringement of the relevant provision; and

[1] Section 138D FSMA (formerly section 150) provides that a contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result, but market abuse is defined in law rather than in rules made by the FCA.

4. exhaustion of other remedies.

The ECJ in *Muñoz* did not go so far as to say that satisfaction of these conditions would necessarily lead to a private right of action (although it is likely that these conditions will need to be satisfied before any claim can succeed).

In *R (on the application of United Road Transport Union) v Secretary of State for Transport* [2013] EWCA Civ 962, the Court of Appeal rejected an argument based on *Muñoz* that road transport workers should have a private right of action against their employers for breach of Regulation 561/2006 regulating their working hours. The Court held that criminal penalties enforced by the Vehicle and Operator Services Agency, to whom drivers had a right of complaint, were sufficient to ensure that the rights conferred on drivers by community law were given full effect. *Muñoz* could be distinguished because drivers would not normally have suffered financial loss and had other means of enforcing their employers' obligations.[2]

Nevertheless, it is possible that the reasoning applied by the ECJ in *Muñoz* could also be applied by the courts in relation to MAR.

Application to MAR

For the purposes of determining whether MAR may give rise to a private right of action for market abuse, the courts are likely address the following two main questions:

1. Does MAR confer rights on individual market participants?
2. Can those rights take full effect without a private right of action?

As to the first of these questions, would-be claimants may argue that the object of the market abuse regime set out in MAR is not just to promote the integrity of the market as a whole, but also to protect market participants from unfair market behaviour. Support for this proposition can be found in the recitals to MAR and the jurisprudence of the CJEU.

As to the second question, claimants may argue that individual rights conferred by MAR cannot be fully effective if the only means that market participants have of asserting those rights is to complain to the FCA or another competent authority. The FCA has limited resources and can only be expected to investigate a fraction of the cases of potential market abuse it identifies. Furthermore, the FCA's Enforcement referral criteria give weight to taking action in serious cases as a means of deterrence to preserve the wider integrity of the market. They are not tailored towards the FCA enforcing the rights of individual market participants who feel they may have suffered loss through market abuse. Such market participants may well be able to argue that, in the absence of another means of asserting rights conferred by MAR, those rights are not fully effective.

In deciding the issue, the English courts may look to the position in other jurisdictions. In other European jurisdictions, for example France, Italy, Spain and Poland, a private right of action for market abuse existed before MAR, because the general law in those jurisdictions provided a private right of action for breach of the legislation implementing the Market Abuse Directive. Similarly in the US, there are private rights of action for breach of the securities fraud offences established by the Securities Exchange Act.

Conclusion

MAR has re-opened the question of whether there is a private right of action for market abuse in the UK. For now, the answer remains unclear but the possibility creates added risk for firms.

MAR extends the range of instruments, markets and behaviours to which the market abuse regime applies, whilst maintaining an "effects based" regime in which market abuse may be committed without any form of intent. The risk of firms falling-foul of the market abuse regime has thus increased with the introduction of MAR. Moreover, firms may now find their conduct scrutinised not only by the FCA and other European competent authorities, but also by potential claimants examining the possibility of civil claims, either after public enforcement action has already been taken, or beforehand, with the possibility of triggering subsequent action by the authorities.[3]

Of course, if a private right of action for a breach of MAR exists, it does not necessarily follow that any breach of MAR will give rise to actionable civil claims. Any case is

[2] Although the court expressly left open the possibility that a competitor haulage company might have a private right of action, following the reasoning in *Muñoz*, for wilful breach of the working time requirements giving a competitive advantage.

[3] Although, save in the case of some instances of market manipulation, there may be practical difficulties for claimants in identifying market abuse without the benefit of a pre-existing enforcement action to provide a road map.

likely to give rise to issues as to who has standing to bring a claim, whether loss has been suffered (and in what amount), and whether that loss was caused by the alleged abuse. Defining who suffers loss when a person commits insider dealing or market abuse may be particularly difficult for the courts.

In principle, the possibility of a private right of action arises in respect of any provision in MAR, not just those relating to market abuse. In respect of claims against issuers for the publication of false, misleading or incomplete information to the market, however, a breach of MAR will not be sufficient to establish a civil claim. For such claims (other than information contained in listing particulars, which is governed by section 90(1) and Schedule 10 FSMA), the position will continue to be governed by section 90A and Schedule 10A FSMA, which provide that a civil claim only arises if a person discharging managerial responsibility within the issuer knew the relevant statement to be untrue or misleading (or was reckless as to the same), or knew the omission to be a dishonest concealment of a material fact.

Given the uncertainty over whether a private right of action exists, it seems unlikely, for now at least, that claimants will assert stand-alone claims for market abuse. Claimants are more likely to seek to use claims for market abuse to bolster claims based on a range of other causes of action.

The possibility of a private right of action for market abuse also opens up the possibility of injunctive relief in circumstances in which it was previously unavailable. An obvious potential use of such relief is in the restraint of transactions said to be based on the use of inside information.

It is possible that the uncertainty introduced by MAR over whether a private right of action for market abuse exists will persist even if the UK leaves the EU.

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