

FCA Enforcement Annual Performance Report for 2018/19

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Last month the FCA published the FCA Enforcement Annual Performance Report for 2018/19. The Report presents a series of statistics regarding number, length and cost of cases (amongst other measures) within the FCA Enforcement Division.

The key 'takeaways' for firms looking to manage their 'compliance risk' (ie the disadvantages that can accrue from an adverse relationship with the FCA) are:

- fines are getting bigger, with a three-fold rise to £227m;
- fines are increasingly focused on individuals, where there's been a ninety-fold rise over a year to £80m – fines against individual account for over a third of all fines;
- a formal regulatory/civil investigation is likely to take at best several years to conclude, with the inevitable impact as regards your own resources and meeting your representatives' costs;
- steps which the FCA may take within those very lengthy investigations (prior to determining the outcome) could push a business and its managers to – perhaps even beyond - the limits of their resources and resilience.

Key findings

Whilst fines rose to a total of £227.3m (compared with £181m in 2016/17 and £69.9 in 2017/18) the number of financial penalties has remained largely static at 15 in 2016/17, and 16 in both 2017/18 and 2018/19. Though it should be said that 2018/19 saw a large increase in the amount of fines against individuals to £80.2m from just 0.9m in the two preceding years.

Interestingly, the average length of all regulatory and civil cases again has not seen much movement, the average length of all regulatory and civil cases is 17.5 months (compared with 19.1 months in 2017/18 and 17.6 months in 2016/17).

The average length of regulatory cases and civil cases referred to the Regulatory Decisions Committee (the RDC) was 50.8 months (over 4 years) and the average length of a case referred to Tribunal was 74.1 months (over 6 years) (higher than both previous years). The average length of cases "resolved by agreement" has slightly fallen from 32.3 in 2017/18 to 29.1 in 2018/19.

The average length of all criminal cases was 75.9 months, an increase on the two preceding years.

In contrast to the limited movement on case duration, there appears to have been progress on the cost of regulatory and civil cases. The average cost of regulatory and civil cases has notably fallen to £103,400 (compared with £182,900 in 2016/17 and £137,800 in 2017/18). The average cost of a case referred to Tribunal was £447,300 (compared with £251,700 in 2016/17 and £72,400 in 2017/18) and to the RDC was £253,500 (compared with £122,900 in 2016/17 and £469,000 in 2017/18). Perhaps surprisingly the average cost of a regulatory/civil case "resolved by agreement" is still £195,200 though again showing a fall from the previous two years.

The average cost of all criminal cases has seen a dramatic rise from £1.16m in 2017/18 to £7.232m in 2018/19 (though it appears that this increase may concern a single case).

As to the total open cases, as at 31 March 2019 this stood at 650, compared with 496 cases at 1 April 2018 (an increase of over 31%). A graph included in the Report shows rise in open cases (a trend of the last 3 years) and the number of closed cases has also fallen

compared with 2017/18.

The cancellation/refusal/variation/approval cases dominate the “published outcomes” at 238 cases of 288 ie 82.5% (a higher percentage than both preceding years and the trend suggests that this will continue). Whilst only the last three years are considered in the Report notably of the last four years it is only 2015/16 when the percentage of such cases was less than 50% of published outcomes.

The Report highlights a particular issue regarding consumer credit firms failing to submit returns or to pay fees. The vast majority of “threshold cases” (i.e. cases considered by the Thresholds Conditions Team (TCT)) involved consumer credit firms (over 95% of the TCT cases closed in the year). Of the 2141 TCT cases opened in the year, a total of 2123 cases were closed (of which 2013 concerned consumer credit firms). The TCT cases open at 1 April 2018 were 273 and the cases open at 31 March 2019 were 290, appearing to confirm that a significant number of such cases are processed during the year and that the vast majority of the processed TCT cases concern consumer credit firms.

The RDC issued 265 Final Notices in 2018/19 (the Report does not set out a comparison with previous years but the 2017/18 report reveals a total of 269 Final Notices were issued).

A limited feedback section appears at the end of the Report though notably this is only based on the responses of only 10 firms or individuals being investigated (no comparison is offered with previous years but the report for 2017/18 reveals a feedback section was based on only 6 respondents). The statistical basis of the findings is not set out and clearly represents the views of only a fraction of the firms and individuals which were the subject of an investigation during the year. References are made to both positive and negative feedback. Of the latter notably certain respondents referred to: the length of cases; a lack of planning; the impact of the investigations on the business and personally; a perception that matters had been pre-judged.

Comment

The total cases included in the FCA's analysis encompass cases of an exceptionally wide range of seriousness and complexity. This is likely to mean that on measures such as average duration and cost, the average is only a small fraction of that incurred on cases requiring formal investigation. Therefore considering an average across total number of cases may provide an inaccurate impression.

The vast majority of Final Notices issued by the RDC continue to concern ‘less serious’ or administrative cases in the consumer credit sector and where Final Notices were issued on formal investigations, it is generally the case that the Final Notice will have only been issued many years after the investigation commenced.

Whilst average costs on regulatory and civil cases fell in 2018/19, it is noticeable that duration of such cases did not see a similar fall. The fact that RDC regulatory and civil cases will include many cases which are not complex suggests that an average duration of over 50 months should be a concern.

As to the feedback sought by the FCA, whilst there is a clear need to analyse the views of those subject to investigation, the very limited numbers of parties participating suggests that such feedback is not necessarily representative and suggests that there needs to be further consideration of the reasons why so few firms/individuals were willing to comment.

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