

Staying ‘fit and proper’

Alexandra Carn reports on how the Financial Conduct Authority has broadened its concept of “fit and proper” to cover conduct issues not directly related to financial matters

Being a good man is not necessarily the same as being a good citizen, Aristotle noted. That is certainly true in financial services if only because what constitutes a good citizen from the perspective of a financial regulator, that is being “fit and proper”, has changed markedly over recent years.

Under the Financial Services and Markets Act (FSMA), the concept of “fit and proper” always extended beyond qualifications, training, capability and financial soundness to encompass “personal characteristics”, but such characteristics were never defined. Scroll back 10 years and the Financial Conduct Authority (FCA) concept of “fit and proper” was inextricably tied to financial probity.

The first question on Form A (the application form for individual FCA approval), which has changed little since it was introduced in the time of the Financial Services Authority, and concerns fitness and propriety, is whether the individual has been convicted of a criminal offence relating expressly to fraud, false accounting, tax offences, money laundering or insider dealing. Criminal convictions other than these are addressed much later. There then follow many questions relating to financial soundness.

Although these questions remain entirely pertinent, the scope of conduct that the FCA considers relevant has now broadened substantially. There are arguably two key reasons for this: the introduction of the Senior Managers and Certification Regime (SMCR) and the #MeToo movement.

The credit crunch, and the financial failings and scandals that surrounded it, led to the foundation of the Prudential Regulation Authority (PRA) and the FCA. They adopted an increased focus on culture and individual personal accountability that in turn led to the introduction of the SMCR. The SMCR has been in force since 2015 and was extended to cover all firms regulated under the FSMA on 9 December, 2019. Fines by the FCA as of mid-November 2019 for the 2019 calendar year totalled around £390m. The highest fine for an individual, Keydata former chief executive Stewart Ford for the eye-watering amount of £76m was related to mis-selling of structured products.

The FCA’s last Enforcement Annual Performance Report for 2018-19 records total fines made against individuals of £80.2m, a drastic shift from £900,000 in both 2016-17 and 2017-18. Excluding Ford’s fine still leaves an increase of more

than 400 per cent. The single biggest fine in 2019, of £102m, was slapped on Standard Chartered Bank for breaching money laundering rules.

Fines and bans for financial impropriety are not new. What is new is how the FCA views conduct issues with no direct relation to financial matters. The FCA is clear that such matters are now firmly on its radar. Megan Butler, the director of supervision, said in 2018: “Sexual harassment and other forms of non-financial misconduct can amount to a breach of our conduct rules, which include the requirement to act with integrity, and the SMCR imposes requirements on firms to notify us [the FCA] of conduct breaches.” She added that “misconduct is misconduct”, whether it is financial or not.

“ *The highest FCA fine for an individual was an eye-watering £76m and related to mis-selling* ”

This position was developed further by the then FCA chief executive, Andrew Bailey, in a February 2019 conference speech on diversity and inclusion, in which he stated: “We define culture quite simply as the typical behaviours that characterise a firm. We care about it because it is a key cause of major conduct failings. And we believe a healthy culture is good for business – both for consumers and for markets as a whole.”

Sexual harassment is a failing that continues to shame the City of London. A survey of Lloyd’s of London by the Banking Standards Board in September 2019, for example, reported that, out of the 6,000 people who responded, 500 had either suffered or observed sexual harassment in the past 12 months. It was hardly an encouraging report, not least given attempts by Inga Beale, the then Lloyd’s chief executive, to improve the institution’s reputation, starting with the daytime drinking ban in 2014.

In response to continued problems, Lloyd’s has threatened potential lifetime bans for anyone found guilty of “inappropriate behaviour”, which would be in addition to any sanctions imposed by the firm that employs the individual. Lloyd’s has also said it may fine or ban the firms employing

the miscreant individuals if they are found not to be doing enough to stamp out such behaviour. Whether this happens in practice remains to be seen.

Lloyd's is not the only bastion of the City under fire in this regard. A partner at a "Magic Circle" law firm has also faced censure from his supervising body, the Solicitors Disciplinary Tribunal, over sexual misconduct. In the past 12 months, the Solicitors Regulation Authority has received 70 reports of sexual harassment, prompting it to launch a dedicated sexual harassment unit.

Moves to prevent sexual harassment demonstrate a cultural shift that sees fitness and propriety in financial services as far more than just refraining from embezzling. It now encompasses the conduct of an individual as a whole, with a greater focus than in the past on personal character and behaviour. That means the FCA is not just concerned with matters that could be considered criminal behaviour, but also civil law infractions.

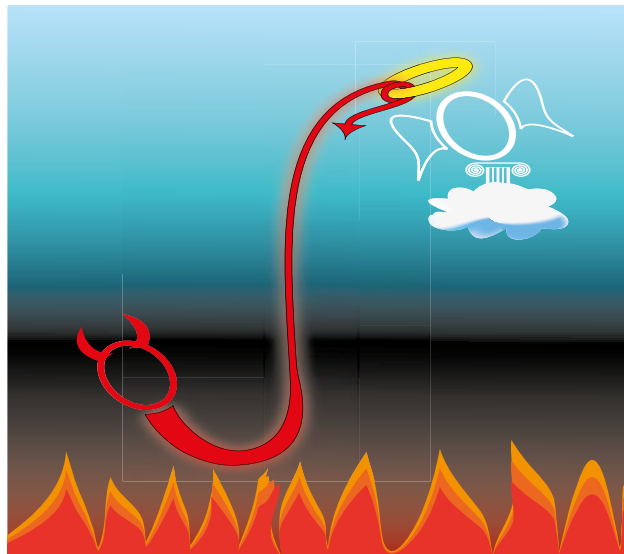
That is an important shift. Criminal law deals with offences that, because they can damage society as a whole, can be punished by the state with imprisonment. Civil law tackles the rights and property of individuals and, unlike criminal law, its main aim is redress and not punishment.

In 2014, Anthony Verrier, a former senior executive at BGC Brokers, was issued with an FCA Final Notice prohibiting him from carrying out regulated activity as he was considered not to be a fit and proper person. The main reason for the decision was in respect of his integrity, which stemmed from evidence he had given in a civil case. The case concerned a

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“team move” of brokers from Tullett Prebon to BGC, in which Verrier had been found to have taken part in an “unlawful means” conspiracy, invoking a memorable comment from the judge that Verrier “stuck to the truth where he was able to, but departed from it with equanimity and adroitness where the truth was inconvenient”.

The FCA, in reaching its decision to ban Verrier, placed significant weight on the comments regarding his veracity. But the case has wider significance. Given the current cultural shift and the FCA's stated stance, deliberate breaches of contract by individuals may attract the regulator's attention in ways that civil cases would not have in the past.



This links back to the integral part of the SMCR on personal accountability and the sanctions of public censure and financial penalties. The FCA is clear that it considers an open culture where people are encouraged to speak up to be one where any sort of unethical behaviour will not gain a foothold. Importantly, although there are director and officer insurance products and policy extensions that have been devised specifically to cover potential SMCR liability, personal regulatory fines are not insurable under such policies. This is because it would be against public policy and the FCA Handbook for the fines to be paid by a third party since it would reduce the deterrent effect.

The introduction of significant personal risk and a marked cultural change have created perfect conditions for a redefinition of what “fit and proper” means. Non-financial misconduct can no longer be considered the sole preserve of the HR department. The millennial workforce is different from its predecessors. It cares about more than the pay cheque. Millennials want to work for organisations they can trust and that reflect their values. It has long been said that the definition of citizenship is the chance to make a difference to the place where you belong. Citizenship just reached the City. ■



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