Financial Regulation international

Worldwide regulatory developments and their implications for the financial services industry

Civil claims: The cost of market manipulation

Banks have already 'paid the price' for market manipulation in so far as they have paid billions of fines in British pounds and US dollars to regulators. However, none of those fines have made their way back to customers. As a result, we are now seeing a wave of civil claims being brought against banks seeking to recover losses. In the main, claimants are corporates, institutional investors such as hedge or pension funds, high-net-worth individuals and local authorities. London is a natural starting point, as English law concepts relating to implied terms or representations, conspiracy and breach of fiduciary duty are sufficient to mount claims.

Several factors are contributing to this rise in the number of civil claims against banks, but there are two particularly significant developments. Firstly, in the case of *Property Alliance Group Ltd v The Royal Bank of Scotland plc (February 2015)*, the High Court decided that claimants are able to obtain documents relating to regulatory enforcement action or criminal prosecution which banks might otherwise consider to be confidential. This case reinforced the point that in English courts, confidentiality and the risk of prosecution in foreign jurisdictions are not defences against disclosure of documents which are relevant to civil claims.

Secondly, although European jurisdictions are not as developed as the US when it comes to bringing anti-trust related civil claims, the European Commission is currently investigating whether any EU competition laws have been broken. This would provide an additional legal 'cause of action' if more traditional routes to claim compensation based on breach of contract, misrepresentation or conspiracy were unsuccessful. A recent US class action lawsuit alleged that banks conspired to fix the price of currencies and manipulate key benchmark rates in FX markets by exchanging confidential customer information in chat rooms. As a result of the claim, nine banks agreed to pay $2 bn in settlement to US investors. The early US settlements very much reflect a pro-claimant litigation culture where claimants can use wide powers of discovery, the threat of punitive damages decided by a jury and a well-established contingency fee regime to put pressure on financial institutions, and trends in the US do tend to find their way to Europe eventually.

If banks start to defend claims on the grounds that they are not responsible for employees acting fraudulently (or criminally), claimants and courts will investigate whether the bank should have identified, or was aware but turned a blind eye to, the fact misconduct was taking place. This would involve looking at whether policies were consistent with legal duties, regulatory obligations and industry standards, and whether they were in fact complied with in practice.

It will be difficult to track the volume of civil claims being brought, other than by reference to the banks' accounting records, as we can expect banks to make further provision for litigation costs and settlements. One thing we can be sure of is that there will be no let-up for the banking and financial services industry, which will only come under further scrutiny heading into 2016.

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October 2015
Issue 18.8

informa law