

## The Partly Contested Process - a part success?

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A recent [speech](#) by the Director of Enforcement and Market Oversight at the Financial Conduct Authority (“**FCA**”) has highlighted the progress of the partly contested process for disciplinary action. The first three cases using the process have now completed, although only details as to the first two cases were available as the time of going to press.

### Partly Contested Process

The FCA established the partly contested process in 2017. We have explored this change to the regulator’s enforcement regime in a previous blog. In short, parties subject to disciplinary action are able, through the process, to agree part of the FCA’s case against them whilst challenging other aspects through referral to the Regulatory Decisions Committee (“**RDC**”).

The benefit to parties choosing this process is that they can still receive credit for agreeing some of the issues with the FCA (through a sliding-scale discount on penalty received), whilst continuing to dispute other issues.

The regulator hoped that the process would have the potential to promote a more transparent and consistent system for decision-making and enforcement.

Parties who choose the partly contested process also have recourse on appeal from the RDC to the Upper Tribunal. However, they cannot seek to reopen any agreed issues.

### Observations on the Process

Just three cases have completed under this process so far. All of these cases have involved a dispute of the level of penalty only, not a dispute over the facts or the alleged breaches. We set out details of the three cases below.

Despite the hope for a higher take-up, the FCA has hailed the system a success in allowing the parties involved to challenge decisions whilst not losing credit.

The FCA has commented on some important considerations for continuing to make the process a success. For example, the agreed statement of facts, which effectively takes the place of a Warning Notice, should be clearly particularised in terms of the scope of what is in dispute. Further, aggravating and mitigating factors, which influence penalties, should be precisely particularised and have an evidential basis.

The partly contested process has the potential to improve the transparency of the disciplinary process, which can only be a good thing. It is also encouraging that the FCA is seeking to learn from experience and improve its practices.

However, with the relatively slow up-take, more cases are required to assess its success in achieving this aim.

### Three concluded cases

The case of Linear Investment Limited (“**Linear**”) related to the firm’s breach of Principle 3. The FCA found that



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Linear had failed to take reasonable care in controlling its affairs and ensuring the effective detection and reporting of market abuse. Linear used the partly contested process by agreeing the facts and its liability but challenged the level of the penalty. After the FCA published its Decision Notice on the case upholding the penalty, Linear appealed the dispute to the Upper Tribunal, which last week published its [decision](#). The Upper Tribunal agreed with the penalty level imposed by the FCA. The Upper Tribunal did not open up the agreed issues and, through the partly contested process, Linear was still able to benefit from a 30% reduction on the penalty.

The second case to use the partly contested process involves the mis-selling of mobile phone insurance by The Carphone Warehouse ("**Carphone**"). As with Linear, Carphone exercised its right to the partly contested process and disputed the level of the sanction. Following a hearing before the RDC, the FCA has published its [final decision](#) of a fine of over £29million. Again, the RDC upheld the fine (which incorporated a 30% discount for the partial admissions).

A decision is expected shortly on the third and final case to use the process so far.

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