

Rt Hon Mel Stride MP
Chair, Treasury Select Committee
House of Commons
London
SW1A 0AA

14 July 2021

Our Ref: C210624B

Dear Mr Stride,

RE: Assessment of Corporate Fraud Through Online Promotion

At the Committee's economic crime inquiry on 14 June, I was asked for the FCA's view on whether Google may be guilty of fraud in relation to advertising investment scams that may appear in its searches and which cause losses to UK consumers.

As I explain below, the FCA believes that search and social media platforms may be breaching section 21 of the Financial Services and Markets Act 2000 (FSMA) if they provide optimised or value-added services in relation to a financial promotion that is not approved by an FCA authorised firm or that is not otherwise exempt. We are pleased that, following extensive engagement by the FCA, Google has recently announced that it will only allow financial services advertisements approved by an authorised firm to appear in its optimised search services. The FCA considers this to be an important step in the right direction and will assess the impact of this change when Google's new policy takes effect in September.

The FCA is committed to ensuring the number of investment scams promoted through search and social media platforms is reduced and is in dialogue with other search and social media platforms as well. We are prepared to take action for breaches of section 21 where appropriate to do so and we have made that clear.

However, the effective reduction of online fraud and scams will require the enactment of further appropriate legal obligations to prevent online harm, covering fraud and other economic crime. This is a widespread problem across online and social media and all users deserve protection.

The FCA's powers to investigate and prosecute

Section 168 of FSMA prescribes the offences which the FCA is authorised to investigate and prosecute, which do not include offences under the Fraud Act. We can only use our investigation powers for those offences listed in section 168. However, if we find evidence that justifies a prosecution not only for one of these offences but also for an offence under the Fraud Act, we are able to prosecute the Fraud Act offence. However, any such prosecution must be brought as a private prosecution.

The offences specified in section 168 of FSMA all arise from an aspect of our jurisdiction under FSMA or specific provisions of other legislation. As the Committee knows, the perimeter of our jurisdiction is complex and technical. Whether we can investigate an investment scam depends not on the seriousness of the harm or the public interest in seeing offenders brought to justice but on whether the subject matter is within the scope of FSMA or the definition of a relevant investment or agreement covered by Part 7 of the Financial Services Act 2012.

As I set out to the Committee on 14 June 2021, one of the offences that the FCA is authorised to prosecute is that created by section 21 of FSMA. This provision prohibits a person from communicating, or causing to be communicated, a financial promotion unless (i) the person is authorised by the FCA and/or Prudential Regulation Authority (PRA); (ii) the promotion has been approved by a person authorised by the FCA/PRA; or (iii) the promotion is communicated within an exemption in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (the 'Financial Promotions Order').

A general EU-derived exemption in the Financial Promotions Order broadly exempted electronic financial promotions from the scope of this offence where these were made from an establishment in an EEA State other than the UK. However, since 1 January 2021, following the end of the transition period, this exemption no longer forms part of UK law. While the Financial Promotions Order also contains certain other exemptions for online intermediaries communicating electronic promotions, our view is that these exemptions do not apply where a search or social media platform provides optimised or value-adding services in communicating a financial promotion. In this case, our view is that the platform needs to ensure that the promotion has been approved by an authorised person or is otherwise exempt.

The Fraud Act

Under the Fraud Act, the offences that are most relevant are those created by sections 2-4, namely: section 2 - dishonestly making a false representation; section 3 - dishonestly failing to disclose information where there is a legal duty to do so; or section 4 - dishonestly abusing a position of trust.

The essential element of each of these offences is dishonesty. The test for dishonesty is now an objective one.

Any view of whether these offences may be committed is inherently fact-sensitive and so asking us to take a view based on generic facts and circumstances – in this case a firm offering optimised search results for paid-for advertisements accessible on the internet, that turn out to be scams or frauds – must be approached and expressed with considerable caution.

Successful prosecution of an offence under section 2 would require proof, beyond reasonable doubt, that Google had communicated a representation about an investment that it knew was false or knew there was such a risk, which it ignored unreasonably. This would require appropriate evidence that Google had specific knowledge about a specific advertisement. It is not enough to have suspicions. In circumstances where a company is processing advertisements in bulk and is not involved or privy to any information that is not apparent to anyone else, a prosecution under this provision would fail.

Successful prosecution of an offence under section 3 would require proof, beyond reasonable doubt, that Google not only knew that the content of a particular representation was false, but had a legal obligation to disclose that fact. A disclosure duty typically arises under statute, or under contract, for example under a contract of utmost good faith, or because a fiduciary relationship exists. It would be difficult to establish such a legal duty owed by Google to its users.

Finally, successful prosecution of an offence under section 4 would require Google to be in breach of a fiduciary duty to users of its services. This offence is one that might be committed typically by a company director or trustee who misuses company or trust assets for their own profit.

In addition, each of these offences gives rise to the challenge of establishing knowledge in a corporate defendant for the purposes of a criminal offence. This is a complicated area of law. In general, where there is no applicable statutory provision creating corporate liability based on the knowledge or conduct of an employee (vicarious liability), knowledge of any employee, by itself, will not be sufficient to establish corporate knowledge. In a criminal prosecution, the law requires the mind of the company to be established through a senior person or group, usually referred to as the company's 'directing mind and will'. Any knowledge that is required to be proven, including any knowledge of specific falsity in an advertisement for an investment fraud, would need to be within the knowledge of the company's directing mind and will for the offence to be proven against a company.

The issues I have outlined which complicate our ability to bring criminal charges outside of FSMA against online platforms illustrate why we consider that it would be appropriate to include legal and enforceable obligations to prevent online harm, covering fraud and other economic crime, in the Online Safety Bill. The existing proposals as drafted do not extend to paid-for advertising, which is where key consumer harm arises, and we welcome the Treasury Committee's recent recommendation for an urgent amendment to address this significant gap.

I hope that this is helpful.

Yours sincerely,



Mark Steward
Executive Director of Enforcement and Market Oversight