



CMCE response to the FCA's Consultation Paper CP24/2 Our Enforcement Guide and publicising enforcement investigations - a new approach

April 2024 (deadline 30 April)

Opening remarks

CMCE welcomes the opportunity to provide feedback on the new FCA's approach to Enforcement Guide and publicising enforcement investigations.

CMCE's membership comprises members who may be directly impacted by the FCA's new approach to publishing information about enforcement investigations. CMCE members, whether or not under investigation, will be negatively affected by the proposed approach because of the detrimental effect this will have on the UK financial and commodity markets.

CMCE opposes the new approach proposed by the FCA regarding the review of the Enforcement Guide and the publication of investigations. This approach would pose risks to the financial and commodities markets and inflict potentially unjust damage to the reputation and businesses of market participants.

We note that the consultation paper gives no consideration to the level and nature of accountability, which FCA should face for cases where innocent market participants suffer harm. The level of advance notice proposed ("normally 1 business day") would be wholly inadequate for most subjects either to make representations to FCA or to take other measures (e.g. seeking injunctions). As such, we question whether the proposals adequately provide for natural justice, as the subjects would in effect have no ability to contest the decision to name them.

Reasons:

- Financial markets, more than other markets, are driven by reputational considerations. Loss of trust in a financial firm can trigger adverse consequences for that firm and, systemically, to others. Associating firms and individuals with ongoing investigations will inevitably damage their reputations and, in some cases, that will prove to have been unjust. FCA should regard the reputations of firms in financial markets as contributing to the systemic integrity of those markets and treat them accordingly.
- FCA already recognises the critical importance for individuals in the financial sector of an unblemished reputation. FIT 1.3.1B shows that reputation is one of the first things FCA considers in determining fitness and propriety. FCA should not itself initiate a policy which would inevitably, in some cases, inflict unfair damage to the reputations of individuals in the sector.
- Naming companies at the beginning of an investigation poses significant reputational risks for both the company under scrutiny and the broader industry.

- Prematurely associating a company with an ongoing investigation can lead to misinformation, unfair judgments, and loss of investor trust.
- Adopting a policy of naming companies at the outset may undermine the FCA's own reputation, credibility and effectiveness (especially where those companies are later proved innocent), damaging the competitiveness of the UK as a financial centre.

In its response to the questions raised by the FCA, CMCE provides feedback on different proposals, as featured in the CP, and urges the FCA to reassess its strategy and explore alternative methods to enhance transparency and achieve the desired outcomes.

Chapter 3 – Our proposed new approach to publicising our enforcement investigations

Q1: Do you agree with our proposal to announce our investigations, including the names of the subjects, and publish updates on those investigations, when in the public interest? Please give reasons for your answer.

CMCE answer

CMCE members appreciate the FCA's proactive stance towards fostering transparency and accountability within the financial markets. We commend the initiative to enhance the dissemination of information regarding enforcement investigations, as it aligns with our shared commitment to upholding market integrity and safeguarding consumer interests. Transparency plays a pivotal role in maintaining trust and confidence in regulatory processes, and we welcome the opportunity to provide feedback on this proposal.

However, CMCE members are deeply concerned about the impacts of the proposed approach outlined in CP24/2. While the overarching objective of providing timely information about FCA's investigatory activities is commendable, the specific methods proposed raise significant apprehensions among our members.

First and foremost, the proposed new approach could lead to substantial harm for market participants and consumers. Publicising investigations and naming subjects introduces inherent risks, including the risk of undue reputational damage to firms and the consequent systemic risks to financial markets which may result from a loss of trust in those firms. The information disclosed could unfairly tarnish the reputation of implicated companies or individuals – such firms, by definition, will not have been found to be in breach of any regulatory obligations at the time of publication. These reputational risks not only impact the firms directly involved, through their potential systemic impact, could trigger losses for others.

Moreover, publicising investigation names would inevitably imply a presumption of guilt in the eyes of the public – including, in particular, consumers. This would have a prejudicial impact on the subjects. This could result in adverse outcomes for both the companies under scrutiny and the broader financial ecosystem. The added potential for misunderstanding and misinterpretation underscores the need for caution in implementing such a strategy.

In addition to the risks posed to firms and consumers, the proposed approach may also strain the resources and capabilities of regulatory bodies like the FCA. Managing the fallout from publicised investigations, including

addressing inquiries and managing public perceptions, could necessitate additional time and resources, diverting attention away from other critical regulatory functions.

Furthermore, as the FCA in its Consultation Paper drew comparisons with other regulatory bodies, which may not be ideal given the differences in terms of markets dynamics, legal systems and approach to public information, CMCE would like to kindly bring to the FCA's attention the approach to this matter of other regulatory authorities which adopt approaches directly opposite to that proposed by the FCA. Both the Civil Rights Division of the U.S. Department of Justice and the U.S. Commodity Futures Trading Commission (CFTC) refrain from publicly announcing investigations or investigative findings and designating subjects. Particularly, the U.S. Department of Justice [states](#) that *"Announcing an investigation of some civil or criminal violations could make it more difficult to obtain witness cooperation or gather evidence. It also could result in the unfair identification of an individual as a person of interest to the federal government."*

When assessing approaches adopted by other regulatory authorities, the FCA should also take note of the Prudential Regulation Authority's (PRA) policy on publication. The PRA considers potential prejudice risks of unfairness and/or disproportionate damage to subjects of investigations and third parties when determining whether to make a public announcement (see [9.7: 1 'The PRA's general approach'. 2 Annex 1 to 'The Bank of England's approach to enforcement: statements of policy and procedure'. 92 Bank of England | Prudential Regulation Authority](#)).

Similarly, the FCA may wish to consult Chapter 10 of the Office of Financial Sanctions Implementation (OFSI) [guidance](#) on enforcement and monetary penalties for breaches of financial sanctions. Public disclosure may be published by OFSI when the Treasury is satisfied, on the balance of probabilities, that a person has breached a prohibition, or failed to comply with an obligation, imposed by or under financial sanctions legislation. These powers may be used for enforcement and deterrence, particularly where there are valuable lessons for industry to learn (para 10.2 OFSI guidance). It's important to note that OFSI considers whether disclosure is fair and proportionate before making a public announcement (para 10.2 OFSI guidance). If disclosure is deemed appropriate, OFSI provides 28 working days' notice to allow the entity to make representations. After considering representations and the expiration of the notice period, should OFSI wish to make a public announcement, they share the written case summary with the firm to ensure factual accuracy. OFSI sets a high bar before disclosing the name of a firm and only does so in genuinely exceptional cases (para 10.4 OFSI guidance). Additionally, OFSI does not usually identify who performed the breach if the disclosure is made solely to highlight compliance lessons for the industry and the breach is considered of lesser severity (para 10.10 OFSI Guidance).

Finally, the FCA's predecessor organisation (the FSA) had previously consulted on a similar matter with the CP08/10 (Decision Procedure and Penalties manual and Enforcement Guide Review 2008). However, it decided not to move forward with the similar proposed approach and it is not clear why that decision needs to be reviewed at this point.

Overall, while CMCE members share the FCA's commitment to transparency and accountability, we believe that the proposed approach may not be the most effective or efficient means of achieving these objectives. As such, we urge the FCA to reconsider its strategy and explore alternative avenues that strike a better balance between transparency and the protection of market participants' interests.

Q2: Do you agree with the structure and content of our proposed new public interest framework, including the factors proposed, and the other features of our proposed new policy described in paragraphs 3.5 to 3.12 above? Please give reasons for your answer if you do not agree.

CMCE answer
<p>CMCE members are concerned about the new public interest framework outlined in the consultation paper, particularly due to the lack of assessment regarding the potential impact on the subject under investigation. This omission undermines the public interest factor. While we appreciate the FCA's intention is to safeguard consumers and uphold confidence in UK financial markets, it's crucial for the FCA to consider the proposed approach from the perspective of all stakeholders and to reflect on the fact that its proposal would as likely lead to the undermining of confidence in the UK financial markets. Announcing investigations before they are finalised could lead to reputational damage not only for the entity involved but also for the broader financial services sector, ultimately harming consumers - contradicting the FCA's objectives..</p> <p>In reviewing the proposed public interest framework by the FCA, CMCE members highlight a significant departure from the approach taken by the U.S. Department of Justice. This comparison is crucial as it underscores the importance of transparency while ensuring the effectiveness of investigations by safeguarding witness cooperation and evidence acquisition. Publicly disclosing investigations, as envisaged, carries a distinct risk of impeding these critical aspects, potentially hindering the investigative process and unfairly implicating individuals. Such repercussions not only undermine the fundamental principles of effective investigation practices but also compromise the pursuit of the public interest.</p> <p>Furthermore, CMCE underscores a pressing concern regarding the unintended consequences of the proposed approach. The introduction of such measures may inadvertently fuel public concern and market speculation, contrary to the intended objective of transparency and accountability. This assertion builds upon our response to Question 1, where we highlighted the tangible risks associated with the potential reputational damage and market volatility resulting from the public disclosure of investigation names. The overarching fear is that such actions could damage market confidence and have a systemic impact, triggering concerns among consumers and participants in the financial markets.</p> <p>Finally, while CMCE remains steadfast in its support for safeguarding and enhancing the integrity of the UK financial system, it highlights the paramount importance of a judicious assessment of associated risks. Publicising investigation subjects in the financial markets poses a significant threat of a spillover effect, potentially destabilising market participants beyond the immediate purview of the investigation. This could have far-reaching implications, including disruptions in market stability and erosion of investor confidence. Consequently, it is imperative to meticulously weigh these risks against the intended benefits of increased transparency and regulatory oversight to ensure the preservation of market integrity and investor trust.</p>
<p><i>Q6: Do you agree with our proposed approach to publicising investigation updates, outcomes and closures? Please give reasons for your answer if you do not agree.</i></p>
CMCE answer
<p>CMCE recognises the significance of transparency in disclosing updates, outcomes, and closures of investigations, as outlined in the proposal. Nonetheless, we harbour reservations concerning the prolonged naming of investigation subjects. This practice could heighten reputational hazards and unjustly link individuals or entities to alleged misconduct prior to the presentation of conclusive evidence. Additionally, such an approach might impede witness cooperation and jeopardise the integrity of ongoing investigations. Hence, while we endorse transparency, we advocate for meticulous deliberation on the enduring consequences and propose exploring alternative avenues to harmonise transparency with equity and procedural fairness.</p>

Q8: Do you have any comments on the revised content of chapters 1-6 of EG?

CMCE answer

CMCE would advocate that for transparency, background and ease of reference, these provisions should be retained and remain within the EG and not relocated elsewhere. Such provisions within the EG provide helpful and descriptive colour and context around when the FCA decides to exercise certain powers. For example, the FCA's text describing when it would seek to apply to a court for an injunction, such as in market abuse cases.

Q16: Do you have any comments on our proposed approach to future consultation?

CMCE answer

We would advocate that the FCA should continue to consult when making any changes to the Enforcement Guidance, as the FCA itself has confirmed in the consultation that this has historically been its approach. We would argue that this is of particular importance in light of proposals within this CP by the FCA in certain instances to only provide 1 day's notice before releasing any announcements around the potential opening of an investigation against a firm.