HOGAN LOVELLS INTERNATIONAL LLP

RESPONSE TO

FCA CONSULTATION PAPER CP24/2

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HOGAN LOVELLS INTERNATIONAL LLP
RESPONSE TO FCA CONSULTATION CP24/2

1. INTRODUCTION

1.1 In this document we respond to the FCA's Consultation Paper CP24/2. The views expressed in this document are our own. However we have, in considering our views, discussed CP24/2 with a number of our clients. Our views are therefore informed by these discussions.

1.2 In this response, we take the first two consultation questions together since they are closely linked, and make a number of wide-ranging comments and observations on the proposals for early announcement of FCA investigations. Thereafter, we respond separately to each of the other questions.

1. 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.

2. 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.

2. RESPONSE TO CONSULTATION QUESTIONS 1&2

2.1 Introduction and Summary

We do not agree with the FCA's proposed approach in respect of announcement of the opening of FCA investigations. We and our clients have a number of serious concerns about the approach generally and the implications of it. In summary:

(a) We have concerns around the disproportionately adverse consequences that firms will face as a result of publication at this early stage of an FCA investigation. It may be the FCA has not fully taken these into account in this consultation.

(b) As a corollary of this, there are likely to be adverse consequences to the FCA in pursuing this proposal which again the FCA may not fully have taken into account.

(c) We have serious concerns about the legal basis of the approach the FCA is proposing and the risk of challenge the FCA may face if it persists in this approach following this consultation.

(d) We think there are a number of alternative methods by which the FCA can achieve its objectives as specified in CP24/2 without announcing the opening of specific investigations and/or naming specific firms. The FCA have not discussed any of these alternatives in their consultation paper or explained why they have been rejected.

(e) We think this proposal makes the FCA an outlier internationally which is potentially damaging to the public interest and the UK's competitiveness.

We expand on each of these issues below.

2.2 **Consequences of early announcement of investigations for firms and the FCA**

(a) **Introduction**

(i) A significant part of our (and our clients') concerns in relation to the FCA's proposal is the clear statement that the reputational interests of and impact on our clients is proposed not to be included as a specified factor in the proposed new public interest framework test for whether or not the FCA will make an early announcement of investigation[1]. Instead, it has said that its primary focus in arriving at its decision in each case will be on promoting its statutory objectives.

(ii) However, in our view, the interests of the subject of an investigation are a key and integral part of what we regard as the proper balancing exercise that the FCA needs to conduct as a matter of law before deciding whether it is in the public interest to make an announcement (see legal analysis below). The FCA's proposed approach appears not to be properly taking into account the serious impact that any such announcement will have. For our larger clients, this will be highly damaging. For some of our smaller and emerging clients, it could be existential. We set out our thoughts on this aspect below.

(iii) We set out in this section the factors that, based on our experience and on aspects that our clients have highlighted to us, must be part of that balancing exercise. Failure to perform such a balancing exercise and to actively and properly consider and weigh these matters in each case, would in our view amount to a breach of the FCA's public law duties and make such a decision potentially vulnerable to challenge.

(b) "**No smoke without fire" risk: impact on firms**

The FCA appears to think that merely adding a caveat to its investigation announcements to the effect that no findings of breach or misconduct have yet been made (or something similar) will address the risk of adverse reputational consequences to our clients. We think this will in practice be entirely inadequate for the following reasons:

(i) We expect that in reality, press reporting will either entirely ignore the caveat, or at best include it at the end of an otherwise sensationalist article reporting the FCA's decision to investigate, leading to routine imbalance and reputational harm for our clients.

(ii) In reality there is a significant risk that consumers will interpret any such announcement as an indication of the FCA's view of culpability, despite the caveat and despite the strict legal analysis. As has been held in numerous cases, including by the Supreme Court in the case of *Bloomberg -v- ZXC,* consumers will not readily understand the effect of the caveat and the distinctions being drawn[2]. It is unlikely that in reality the firm's explanation

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1 CP24/2 para 3.8

2 [2022] UKSC 5. It was argued in *Bloomberg* that since there was a presumption of innocence, and that the public would understand the difference between the fact of an investigation and a conviction, the risk of damage or harm to reputation

or defence is likely to be focussed on, particularly where it is complex or nuanced. We would be interested to see any supporting evidence the FCA has gathered in relation to its view that the proposed caveat will be effective in this regard (see footnote 2 below specifically in relation to judicial commentary on this issue).

(iii) The unwarranted harm caused by early announcements is demonstrated in the case of investigations which are then subsequently discontinued. At present, over 60% of investigations are discontinued with no further action being taken. If an announced investigation is subsequently discontinued, the reputational – and, potentially, financial - harm to the firm will already have been suffered, for which the firm is unlikely to obtain redress.

(iv) However this statistic is, to an extent, a reflection of the approach and philosophy of the previous Head of Enforcement (investigation as a mere "diagnostic tool" etc). If, as indicated, the FCA's criteria for taking on investigations is going to change so as to focus more on cases where a disciplinary action is likely to result, or selective cases are chosen to make a particular example, the negative impact of an early announcement (and the limited effect of the proposed FCA caveat) will in fact be exacerbated.

(v) There is no proper explanation in CP24/2 as to what the proposed FCA policy will be on on-going updates on investigations, and in what circumstances such announcements will be made, other than by reference to the proposed public interest test. It would be helpful to have further clarification of the FCA's proposed approach on this, for example whether regular updates are planned to become the norm, or only when there are significant changes to the scope or nature of the investigation. There would be significant concern about the potential "drip-drip" of negative publicity in relation to on-going announcements, which would negatively affect our clients[3], but would have, in our view, limited public interest benefit to the FCA or its objectives.

(vi) It is also unclear from CP24/2 what will be announced at the conclusion of an investigation and how. Where the opening of the investigation has been publicly announced and disseminated (e.g. by way of a press release), it seems obvious that at least a similar level of publicity should be given to the discontinuance in normal circumstances. At present, the practice is that there is a mere (private) statement that the investigation is closed with no further action, but usually with a reservation that this decision is based on the regulator's current knowledge, and reserves the right to re-open the investigation if new facts emerge. There is usually no "exoneration" or positive finding in favour of the firm. We understand the reasons why this is the FCA's current practice where investigations are private. But the imbalance between the damage done by an early public announcement of an investigation, and the bland nature of a typical discontinuance notice is

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was overstated. This has resonance with the FCA's proposed approach at paragraph 3.9 of CP24/2 of including a caveat in its announcements emphasising that no conclusions have been reached by the FCA that there has been a breach of misconduct. The Supreme Court rejected this line of argument. The Court cited Mann J in *Richard v BBC* with approval where he said: *"If the presumption of innocence were perfectly understood and given effect to, and if the general public were universally capable of adopting a completely open and broad-minded view of the fact of an investigation so that there was no risk of taint either during the investigation or afterwards (assuming no charge) then the position might be different. But neither of those things is true. The fact of an investigation, as a general rule, will of itself carry some stigma, no matter how often one says it should not."*

[3] These negative consequences may also continue for an extended period of time, given the average duration of an FCA investigation was 41 months for cases closed in 2022/23 according to the FCA's Enforcement Report 2023: Table 5 in **FCA operating service metrics 2022/23 | FCA**

marked, and in no way addresses the harm that has been caused. This again is of concern to our clients.

(vii) Early announcement is likely to require many of our clients to make disclosures to other third parties, either proactively or in response to requests for information. This can arise, for example, in the context of overseas regulators, or in response to customer or counterparty due diligence. At present and in many cases, the confidentiality of investigations means that such disclosures are often not required until the outcome of the investigation is known. However this will no longer be the case, and the information which may need to be provided in respect of the detail of such investigations (potentially going well beyond what has been provided by the regulator in the public domain) will be potentially very damaging and may cost firms business and opportunities, or may even cause problems raising capital or other such significant activities affecting the viability or, even, the survival of firms. As noted above, where an investigation is subsequently closed with no findings, firms are unlikely to be able to obtain redress for these losses.

(viii) For firms, early announcement of an investigation risks a whole range of other adverse consequences which will have a significant negative effect on the investigation. Depending on the circumstances, an early announcement – at a stage where no findings of fault have been, or ever may be, made - may well trigger customer complaints, litigation, attention from claims management companies, questions from overseas regulators, press enquiries, information requests from various sources (such as data subject access requests), political enquiry and challenge (in larger cases), and so on. It may well also trigger negative commentary on social media, or in the financial markets, leading to rapid loss of confidence in a particular firm by investors or counterparties[4]. Whilst we acknowledge this can and does happen to an extent at present, it will clearly become more common with early announcements. Where (as explained further below) there are acceptable alternative ways by which the FCA can achieve its stated goals, it seems unnecessary, in our view, to subject firms to such additional risks.

(c) **Impact on FCA investigations**

In our view, the proposal for early announcement will also cause significant complications and challenges for the FCA and may negatively impact the effectiveness of FCA investigations, contrary to the intention of accountability through transparency that the FCA has proposed.

(i) In our view, the aggressive approach proposed by the FCA in announcing the opening of an investigation is likely to require a firm to provide a public statement of its position at that early stage (and perhaps in response to any FCA update announcements). While, historically, firms might simply have confirmed that they were cooperating with the FCA's investigation, that may no longer be sufficient, and the firm may need to go further, potentially

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4 The impact of FCA's public comments has been demonstrated in relation to the recent announcement in relation to its work in relation to motor finance. See for example **Insurers' premiums and 'double-dipping' under the spotlight - Investors' Chronicle (investorschronicle.co.uk)** – *"These days it does not take much more than a few negative comments in a trade journal for the Financial Conduct Authority (FCA) to make waves in the public markets. A few quoted remarks from the FCA's head of insurance to the Insurance Post stating that the premium financing provided by car insurers was a "poor product", was enough to send shares in both **Admiral (ADM)** and **Direct Line (DLG)** down by nearly 6 per cent each on 10 January".*

resulting in positions being polarised at an early stage. This, in turn, may reduce the possibility of resolving the investigation (see further below), especially if this leads to an outcome of "litigation by press release"[5].

(ii) There is a risk that investigations will in fact become longer rather than shorter as a result of these proposals, contrary to the FCA's objectives. We can see that conducting an investigation in the glare of publicity creates its own additional pressures on both the regulator and the target firm. For the regulator, it risks setting inappropriate expectations from the public, press, politicians etc. for the regulator to "get a result". In turn, this may inhibit the regulator's ability to discontinue an investigation or to settle the matter in a pragmatic way, even where this is the appropriate course of action. There is a risk of positions becoming more entrenched, with the FCA needing to justify the investigation it has started and the damage caused to the firm, and so needing to undertake ever more work to find something to support the actions taken and the investment of time and resource made.

(iii) From our clients' point of view, there is a risk that, having suffered the damage of an announcement early in the process, there is much less incentive to settle. Instead the position of the parties is likely to become more adversarial and defensive, leading potentially to more cases having to be resolved ultimately by the Upper Tribunal.

(iv) It is also unclear to us what the impact of these proposals will be on the current RDC process. At present, this is an opportunity for firms to challenge the FCA's enforcement case and the evidence that has been gathered in a private context before the RDC. Again, if the damage of an early announcement has already been done, firms may see less value in the RDC process, and be more willing to avoid the cost and delay of this process and leapfrog directly to the Upper Tribunal process. The FCA's proposal thus has the effect of undermining one of the key protections for firms that was provided by FSMA in the enforcement process.

2.3 **Legality of the FCA Approach**

(a) **FSMA Section 348**

(i) The FCA appears to have concluded that the mere announcement of the fact of an investigation into a subject is not a breach of s348, even (presumably) if that conclusion is based on information that has been provided by the firm and is otherwise protected by s348.

(ii) However CP24/2 does not explain the legal basis for this position. This position contrasts with the FCA's (previously FSA's) stated position in previous consultation papers, where s348 has been cited as one of the key reasons why it was precluded from announcing new investigations. For example we refer to the discussion of this issue at paragraphs 4.3-4.11 of DP08/3 ("Transparency: A Regulatory Tool"). The debate in DP08/3 appears to proceed from the opposite premise to that which the FCA now appears to be adopting and treats s348 as preventing announcement of investigations, absent an appropriate "gateway". The discussion paper then

[5] We also note that in the past, the FCA have deployed confidentiality and s348 in response to questions and interviews with the Treasury Select Committee (in our view rightly) in response to intrusive and inappropriate questioning. However if the new "public interest" test is to be adopted, then this defence to disclosure may be more difficult for the FCA to maintain. This may lead to additional public disclosure and interest which will not assist the FCA's interests or the public interest in efficient investigation.

goes on to analyse the "self-help" gateway, highlighting the restrictive scope of that particular gateway. In light of this, it would be useful if the FCA, as part of the present consultation, could explain its reasoning as to why and on what basis, it has now changed its position on this legal issue.

(iii) Relevant here also is the decision in *Financial Services Authority -v- Information Commissioner*[6]. In that case the issue was whether s348 prohibited disclosure of information which by itself would not breach s348, but which when read in the context of other information already in the public domain, would have the effect of disclosing information in breach of s348. In that case, Munby J stated that the substance or effect of any disclosure must necessarily and in the nature of things be affected by the context of the disclosure and in particular that "*the true substance, meaning, effect and significance of the answer to a question can only be ascertained by reference to the question to which it is an answer*"[7]. Context is therefore everything. It follows that, depending on the circumstances, the mere announcement of an investigation, based as it inevitably will be on materials provided by the subject of the investigation, and taking into account the relevant context, is capable of being itself a breach of s348. This is therefore a factor which the FCA will need to consider in each case, and may well prevent the sort of announcements envisaged in CP24/2.

(iv) With regard to the likely content of any announcement by the FCA, we note the intention to include a "*summary of the suspected breach, failing or other misconduct being investigated*"[8]. Despite this description, it is unclear exactly to what level of detail such a summary will go. However we presume, given the stated rationale of the FCA (i.e. to rapidly disseminate best practices and concerns, increase deterrence, drive positive behavioural change and encourage witnesses and whistleblowers[9]), there will necessarily need to be a fair amount of detail to achieve these outcomes. We would welcome further clarification of the FCA's intention in this regard as part of the consultation process, perhaps with some worked examples from previous cases to illustrate the likely approach. But clearly the more information that is provided, the more likely it is there will be a breach of s348, taking into account the contextualised approach of *FSA -v- Information Commission* (above).

(v) We note and welcome the FCA's commitment to consider carefully in respect of each announcement whether it would breach this restriction[10], although of course it would have to do that anyway, given the serious criminal consequences of a breach. Any conclusion with regard to breach of s348 in any particular case will of course be subject to the circumstances of each specific case, including the details of that announcement and the exact information that it relays.

(vi) However, in proceeding in this way the FCA is obviously putting itself at significant risk of committing criminal offences, possibly along with its senior individuals personally, who may have authorised such a breach of the criminal law. Arguably by proceeding in this way, the FCA is breaching at least the spirit of the protection for firms and individuals that is intended by

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6 [2009] EWHC 1548 (Admin)
7 At para 52.
8 CP24/2 paras 3.19-23
9 CP24/1 para 1.1
10 CP24/2 para 3.22.

s348, and is thus opening itself up to challenge in the future. At the very least, we would expect that firms should be consulted before any disclosure and allowed adequate time to take action if the firm considers that there is likely to be a breach.

(b) **Exposure to legal challenge/judicial review**

(i) **Introduction**

We consider the FCA's policy as proposed in CP24/2 to be susceptible to legal challenge on public law grounds. Specifically, we consider that the FCA's proposed approach in CP24/2 to not to include within its public interest test the rights of the regulated person or their interests in their reputation and commercial standing is both irrational, and indicates a failure properly to take into consideration all relevant circumstances. The FCA notes that it will apply its public interest test when determining whether to announce and publish updates into investigations. It is therefore of paramount importance that the public interest is properly assessed. This assessment requires balancing competing factors: which factors are relevant are, of course, in part up to the FCA's discretion. However, there are some considerations that it would be manifestly unreasonable to omit or to discount, including in particular the impact on the reputation and commercial standing of those under investigation. As we demonstrate below, this also appears to have been the long held view of the FCA and its predecessor, and thus the legitimate expectation of firms. We deal with each of these issues separately.

(ii) **Reputational interests of firms: FSMA**

(1) FSMA itself very clearly recognises the reputational interests of firms who are the subject of investigations or disciplinary action and the need for them to be protected. The Act seeks to strike a careful balance between the reputational interests of firms who are subject to enforcement action, and the regulator's interest in enforcement. This is reflected for example in s205, which provides that

> "*If the [FCA] considers that an authorised person has contravened [a relevant requirement imposed on the person, it may] publish a statement to that effect*".

This power to publish is then restricted by the due process requirements of a Warning Notice and Decision Notice procedure (s387 onwards) and the right to make representations.

(2) In the debate in Parliament during the passage of the Financial Services and Markets Bill, the following passage (relating to publicity to be given to disciplinary proceedings) illuminates the approach which was intended:

> "*Perhaps I may outline the overall intention of the changes that we seek to make, which are twofold. First, we seek to enhance the rights of persons who are subject to disciplinary-type action, including market abuse and the other powers to impose penalties or make public statements about misconduct, or whose livelihoods are threatened by a proposal to cancel permission under Part FIV, or to withdraw approval or issue a prohibition order*

under Part V. Secondly, we seek to ensure that these protections, which considerably enhance those that exist currently, apply only where appropriate and not generally to routine supervisory actions. We do not want a regulatory system that is too hamstrung by its procedures to respond in a timely fashion to market developments"…"*We attempt to strike a careful balance between the need for effective regulation and the legitimate expectations of those involved in the industry*."[11]

(3) Further statutory changes in 2010 and 2012 were subsequently implemented specifically to allow for earlier publication of Decision Notices and Warning Notices (which had been prohibited under FSMA as originally enacted), again subject to protections for the firm subject to proposed disciplinary action (including consultation) but again the need for careful balance of the respective interests was recognised and maintained.

(4) We consider that the proposal for early announcement of investigations ignores and upsets that balance.

(iii) **Case law**

(1) English case law has confirmed that, in certain circumstances, there is a reasonable expectation of privacy in relation to investigations. Further, the case law confirms that announcing the commencement of an investigation into a subject can and does have a direct impact on their reputation, despite caveats referring to the presumption of innocence, or that no conclusions on misconduct have been arrived at. The FCA's decision to not include the impact of the announcement on the firm under investigation as one of the core elements of its public interest test (as set out in the proposed Enforcement Guide (Amendment) Instrument 2024 ("New EG") at paragraphs 4.1.2-4.1.3), is therefore at odds with the current direction of travel of the case law.

(2) In the criminal sphere, it is now well established that it is a "*general rule*" or "*legitimate starting point*" that there is a reasonable expectation of privacy in relation to a criminal investigation. We refer for example for the judgment of Mann J in *Richard v BBC*[12], in which the Court determined that:

"*On the authorities, and as a matter of general principle, a suspect has a reasonable expectation of privacy in relation to a police investigation…. As a general rule it is understandable and justifiable (and reasonable) that a suspect would not wish others to know of the investigation because of the stigma attached".*

(3) This line of authority has now been endorsed at Supreme Court level in *Bloomberg v ZXC*[13]. In both *Richard* and *Bloomberg,* the Court

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11 *Financial Services and Markets Bill, this passage illuminates the approach which was intended: Volume 611: **Monday 27 March 2000, Column 624***:

12 [2018] EWHC 2505 (Ch)

13 [2022] UKSC 5. See, for example, paragraph 81, where the Court concludes that "*publication of information that a person is under criminal investigation will cause damage to reputation together with other damage, irrespective of the presumption of innocence. This has led to a general rule or legitimate starting point that such information is generally characterised as private at stage one."*

concluded that the fact of an investigation will of itself carry an unfair stigma, despite the presumption of innocence. The FCA proposes at paragraph 3.9 of CP24/2 to include a caveat in its announcements emphasising that no conclusions as to breach have been reached. Given the judgment of the court in *Richard* and *Bloomberg*, this is not sufficient to mitigate the potential "*reputational and other damage to the claimant given the public's ability and propensity to observe the presumption of innocence".*[14]

(4) While these cases refer to criminal investigations in relation to individuals, which may be less relevant in the corporate sphere (although of course many of the FCA's investigations may engage alleged criminal conduct), the impact that the proposed announcements would have on a firm's reputation and commercial standing are crucial considerations for the FCA to take into account. What the case law appears to us to demonstrate is the need, in FCA regulatory cases, for a careful balancing in each case between the reputational rights of the subject of the investigation on the one hand and the various competing aspects of the public interest in transparency (as set out in the proposed FCA factors in CP24/2 para 3.5) on the other. In our view, it is only if these competing interests outweigh the reputational interests of the subject of the investigation that publication is justified. It is only by conducting such a balancing exercise that the public interest can be properly assessed.

(5) We consider this approach to be in line with the FCA's longstanding practice of only making announcements of investigations in exceptional circumstances. The proposed approach in CP24/2, which appears to significantly demote the reputational interests of those under investigation, and is therefore in our view, legally flawed.

(6) It is presumably this line of cases which also dictates the present approach of the SFO, which is not to announce new investigations unless they are already obviously in the public domain, and not to provide updates to on-going investigations except in exceptional circumstances. Their policy is expressed in the following terms[15]:

> *"Before the Director decides whether to open an investigation, the SFO does not normally confirm or deny interest in allegations made against either companies or individuals. If asked, we would normally say no more than that we are aware of the situation and that we are monitoring it.*
>
> *Once the Director has formally opened a criminal investigation, the position will change in the following circumstances:*
>
> *(a) the company under investigation itself makes the information public. This normally happens when a publicly listed company is informed of our investigation and considers this fact to be market-sensitive information of which it must inform the market. In such cases the SFO will (usually in co-ordination with the company's lawyers)*

[14] See footnote 2 above.
[15] https://www.sfo.gov.uk/our-cases/

confirm the fact and focus of the investigation after the market has been informed, or

(b) there are operational reasons for announcing the investigation (such as a call for witnesses). Or,

(c) there is some other substantial reason why the announcement of the investigation would be in the public interest.

SFO investigations follow the evidence, and their focus or scope often changes as the investigation advances. In these circumstances we will not normally update these pages, which should be regarded simply as a record of our statements at the time they were issued. The investigation may have changed in material ways".

(iv) **Views of FSA in CP17 and DP08/3**

(1) Further, the expectation of privacy also appears to have been the long held view of the regulator (then the FSA).

(2) We refer for example to the view published at the time of the passage of the Financial Services and Markets Bill in CP17 in which it was stated:

"We propose that, as a general policy, the FSA will not make public the fact that it is (or is not) investigating a particular matter. Publication of the fact that an investigation has been commenced by the FSA may prompt unwarranted public concern about the matters and persons within the scope of an investigation. It may put consumers' funds at risk or do unwarranted damage to the reputation of firms, issuers or individuals involved"[16]*.*

(3) This was repeated more recently in DP08/3 in which it was stated, in the context of consideration of the provisions of FSMA referred to above:

"In short, significant procedural safeguards were specifically built into FSMA in order to prevent the casual, rash or unchallenged use by the regulator of public statements that could damage a financial services firm's reputation and commercial standing. This in turn reflected the lengthy discussion and debate in Parliament during the drafting and passage of FSMA on the balance between the regulator's enforcement and other powers and the rights of the regulated."

It continues: "*calls by some for us to 'name and shame' firms as a matter of course is not the approach envisioned by Parliament and is not one we can readily meet under FSMA*."[17]

(4) DP08/3 contains a long, detailed and thoughtful analysis of the balance between transparency and publicity in relation to enforcement actions, drawing on academic papers and research.

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16 CP17 at para 59

17 DP08/3 at 4.12-14.

However, it is notable that no reference is made to this discussion paper, nor its CP17 predecessor, in CP24/2. No explanation has been given by the FCA in CP24/2 as to the reasons behind abandoning its views of the last two or more decades, and suddenly adopting an entirely different stance[18]. The lack of any reasoned explanation for this is disappointing. We hope that in the FCA's response to the consultation, some recognition will be given to the previous consultation and discussion papers that have been published on this issue. In the event that the FCA nevertheless pushes forward with its CP 24/2 proposals, some explanation should be provided as to what has changed in the interim to justify why that established view has now been departed from.

(v) **Conclusion**

(1) CP24/2 appears to recognise the need for the FCA to consider and take into account all the relevant circumstances of each case before arriving at each decision to publish and to consider each one on a case by case basis - this is stated explicitly in paragraph 3.8 of CP24/2 and proposed new paragraph 4.1.4 of the new EG. This, in our view, reflects the correct legal approach: it is well established law that public authorities such as the FCA have a duty to take into account all relevant matters (and not to take into account irrelevant matters) when exercising their regulatory powers and responsibilities.

(2) However, we consider the proposed approach outlined in paragraph 3.8 of CP24/2 to be flawed as a matter of law, in that it fails its own test of considering all relevant circumstances, and in properly assessing the public interest, which requires an effective balancing of competing factors. Based on the case law (and supported by our analysis of the existing provisions of FSMA above), the reputational interests of the subject of the investigation cannot be disregarded or demoted in the way that the FCA proposes. The case law makes clear that these interests, along with the expectation of privacy, are key considerations that must be taken into account when making decisions. What is then required is a balancing exercise to determine whether the public interest considerations that the FCA has laid out in CP24/2 in fact outweigh the expectation of privacy in any given case. It seems clear both that this is not the proposed approach the FCA wishes to adopt, and that the current proposed approach is therefore potentially irrational in a public law sense.

(3) We would therefore suggest that the FCA should fundamentally reconsider its approach. It follows from this analysis that we consider the present approach of announcing investigations only in exceptional circumstances to be the correct legal approach (i.e. situations where the legitimate expectation of privacy is outweighed by the public interest in disclosure).

(4) The consequences for the FCA will be that the policy itself, if implemented in its current form without amendment, will be potentially unlawful and capable of challenge by way of judicial

[18] Although we note that belatedly, some further explanation has been given by the FCA in its letter of 25 April 2024 to the House of Lords Financial Services Regulation Committee.

review. Further, any individual firm for whom it is proposed that an announcement of investigation will be made may be entitled to challenge the legality of the FCA's approach, and seek an interim injunction preventing such announcement pending a full review of the FCA's decision-making.

2.4 **Policy considerations and alternative approaches**

(a) To the extent that the FCA's proposal is genuinely suggested as a means to promote rapid dissemination of best practices and concerns, increase deterrence, drive positive behavioural change and encourage witnesses and whistleblowers[19] there are much better ways of doing so which do not involve naming those under investigation.

(b) Indeed, there is an inherent logical tension between the FCA's proposed caveat (no conclusions as to misconduct or wrongdoing) and the use of this proposed methodology – which, to be effective, would normally involve actual and proven examples of bad behaviour which the FCA has punished. Logically there is no deterrent or educational effect from the FCA's naming firms at an early stage who have not been proven to have done anything wrong at all, unless the FCA is relying on the "no smoke without fire" implication that there has indeed been wrongdoing (which would clearly be in direct contradiction of the proposed caveat).

(c) If the FCA has enforcement-related concerns about a particular issue, sector, or type of behaviour, it already has a variety of methods through which it can address these, or new methods could be developed, without the need to identify particular individual firms. Already available are FCA publications (such as MarketWatch – or new similar ones could be developed), Dear CEO letters, senior FCA manager level speeches, and other such publications, announcements and warnings: it is not clear to us why the FCA is disregarding the impact of these channels since, in our experience, the financial services industry takes these publications and pronouncements extremely seriously and does action the points coming out of them. Further, there is no reason why bespoke press releases could not be made to focus on proposed or actual enforcement areas of the FCA while not identifying particular firms.

(d) The FCA seeks to justify its additional "transparency" to try to improve scrutiny and accountability and thereby improve the FCA's own performance. This is a very odd justification for something so intrusive and damaging to firms (and, from a public law perspective, may represent an "irrelevant" matter, as noted at paragraph 2.3(b) above). The FCA already produces statistics in its annual reports and the Enforcement Annual Reports (which clearly demonstrate its performance overall in terms of the length of time taken for investigations to reach a conclusion). If transparency and awareness is really what the FCA wants, it would be possible to produce more and regular such performance reviews, along with many other statistics which are no doubt available to the FCA.

(e) We understand the FCA's concern and frustration about the time lag between starting an investigation and being able, under the current approach, to announce the result. However, it seems to us that the preferable approach would be to address this at source within the FCA itself by means of steps to speed up the investigation process and make it more efficient. Alternatively the FCA could consider the recent approach of the PRA to provide firms with an incentive to

[19] CP24/1 para 1.1

provide their own early account of issues that have arisen, which could potentially improve the speed and efficiency of achieving a final result for the FCA.

(f) It is notable that all regulators in the world no doubt share the same objectives as the FCA in terms of promoting market confidence, early insights for consumers, education and deterrence. However, as set out further below, the FCA is making itself an outlier internationally in adopting this approach as the solution.

2.5 International perspective and competitiveness

The FCA seeks to give the impression in CP24/2 that its proposal is in line or consistent with other international and domestic regulatory authorities in adopting the approach it is suggesting[20].

(a) In our experience this is not accurate. Whilst we have not done an analysis of every jurisdiction, as a firm we have extensive experience of regulatory proceedings in the US, Continental Europe and the Asia Pacific region. We are not aware of any other mainstream jurisdiction in which the proposed approach from the FCA has been adopted. Certainly in the US, who have some of the most recognised and effective regulatory enforcement bodies in the world, this is not the practice.

(b) Indeed the paucity and inaccuracy of the short list of examples given by the FCA in CP 24/2 paragraph 2.18 tells its own story. So far as we are aware the practice of the MAS in Singapore is not to publish regulatory investigations other than in exceptional circumstances. Parallels with the Office of Communications or the Office of Gas and Electricity Markets are simply not appropriate comparators. The CMA has, of course, an entirely different statutory basis for its public communications[21]. None of the examples provide a fair or accurate comparison.

(c) This is important, given that the approach of the FCA will make the UK a complete outlier in terms of regulatory practice. The FCA now has a secondary regulatory objective, as part of its mandate, to facilitate (subject to aligning with relevant international standards) the international competitiveness of the economy of the UK, including in particular the financial services sector[22]. Being so much of an outlier on such an important issue is entirely unhelpful and not in line with this secondary objective. It would therefore be helpful for the FCA to explain how its proposals fit with that objective.

(d) Further, the proposal makes the FCA an outlier within the UK in respect of financial services regulation. As noted above, it is not the practice of the SFO to announce investigations or provide updates except in exceptional circumstances. Similarly it is not the practice of the PRA, and we have not heard of any plans to change the PRA's approach. Nor as we understand it, is in line with the practice or approach of the Financial Reporting Council, whose rules explicitly envisage the sort of balancing exercise we advocate above[23].

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20 CP24/2 2.18

21 We note that since getting Competition Act powers in 2015, the FCA has not identified parties at the opening oof any cases to date – see **Competition Act 1998 cases in the regulated sectors - GOV.UK (www.gov.uk).** We also note that the FCA's guidance on its CA98 powers (FG 15/8) is drafted much more in line with the FCA's existing FSMA approach (ie publicising names would be done more as an exception rather than a matter of course): para 3.16 states *"We may in some circumstances (eg if we consider that it may assist us in our investigation or is necessary for market stability) publish basic information about the investigation, in accordance with our powers under section 25A CA98."* So the current proposals would create internal inconsistency of practice within the FCA.

22 FSMA 1B(4)A and 1EB as inserted by the Financial Services and Markets Act 2023.

23 See Rule 10 of the Publication Policy for Audit Enforcement Procedure which states: "*The Conduct Committee will only decide to publish the fact of its decision to investigate if it considers: a) that such publication is necessary in all the*

(e) It would be helpful to understand the FCA's proposals, in its response to this consultation, as to what will happen where the FCA is jointly investigating a matter with the PRA, or the SFO, or with an overseas authority, almost all of whom will presumably not wish to have their investigation publicised at an early stage.

3. **DO YOU AGREE WITH OUR APPROACH TO ANNOUNCEMENTS AND UPDATES WHERE THE SUBJECT IS AN INDIVIDUAL? PLEASE GIVE REASONS FOR YOUR ANSWER IF YOU DO NOT AGREE.**

3.1 We agree that the FCA should not publicise the fact that it has opened an investigation into an individual. Indeed for the reasons mentioned above (*Bloomberg v ZXC*, etc) we think the FCA would in the normal course and absent exceptional circumstances be prohibited by English law from doing so. A careful balancing exercise would be required between the individual's rights under ECHR Article 8 (and English common law on misuse of confidential information to a similar effect, and the DPA) and other competing rights.

3.2 However we note the language of CP24/2 which refers to an intention not to refer to "*named individuals".* No attempt is made in CP24/2 to explain or define what is meant by this. There is clearly a well-developed body of case law around similar concepts in the context of third party rights in respect of warning and decision notices under FSMA section 393, but that does not depend on any concept of "*named individuals".* We would welcome further clarification as to what exactly this means.

3.3 We have further significant concerns which we know that our clients share. The FCA has for many years, and particularly since the introduction of the SMCR, been emphasising the importance of the accountability of senior individuals in respect of the businesses for which they are responsible, and have routinely been opening investigations into such senior individuals when issues have arisen in the areas for which they are responsible. We think there is therefore a very high risk that any early announcement of an investigation into a particular issue or business area at a firm will, against that backdrop, automatically have the effect of implicating the position of senior executives and staff in that area. For example, it is obvious that an announcement of an investigation of a trading issue on a specified desk of an investment bank would lead immediately to identification of the relevant management chain up to the Senior Manager for that desk; or an investigation into AML related systems and control failures at a firm will lead immediately to identification of the firm's MLRO; or an investigation into a relatively small business area or trading desk within a bank, where it will not be hard to identify (e.g. via social media/LinkedIn etc) who the key individuals or traders are, even at a more junior level; and this will then lead to these details entering into the public domain. This will be highly detrimental to those individuals, and potentially be in breach of their ECHR Article 8 rights to privacy. We would welcome hearing from the FCA as to how this problem will be addressed under the FCA's proposals.

4. **DO YOU AGREE WITH THE PROPOSED CONTENT OF OUR ANNOUNCEMENTS? PLEASE GIVE REASONS.**

We do not think the FCA has so far given sufficient information or detail in the CP24/2 proposal for us to comment on this. Please see above for examples. In particular, the exact nature and level of detail of any announcement is as present unspecified, as is the nature of any updates or notice of termination of investigation. We have explained the nature of our concerns above, and for the present we will await to hear how the FCA proposes to deal with this before considering whether proposals for the content of announcements will be sufficient to address those concerns.

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circumstances; and b) any potential prejudice to the subject of an investigation is outweighed by the factors in favour of publication."

5. **DO YOU AGREE WITH OUR PROPOSED METHODS OF PUBLICISING AN ANNOUNCEMENT AND UPDATES? PLEASE GIVE REASONS FOR YOUR ANSWER IF YOU DO NOT AGREE FOR YOUR ANSWER IF YOU DO NOT AGREE.**

5.1 The FCA's proposal to give just one business day's notice for an intention to announce an investigation is not only unfair, but also entirely unrealistic in the context of the business of most of our clients.

(a) Many of our clients are large organisations, often multi-national businesses across various time-zones, often with senior management spread geographically. Any realistic engagement with the FCA on a matter such as this will necessarily require involvement of various stakeholders in multiple different areas of the business (Legal, Compliance, PR, senior management, client contacts in the relevant businesses, overseas regulators, as well as multiple others) in order to be able to ready the firm for such an announcement, and to engage effectively and in an organised fashion with the FCA.

(b) In the context of investigations which, on the FCA's current performance, mostly straddle multiple years, and often are in gestation months prior to any formal decision to issue a notice of investigation, we do not see the justification for such a short notice period. CP24/2 is silent in terms of reasoning and we would encourage the FCA to consider providing some further justification to support this in any future feedback. Such justification as we have heard so far merely deepens our concern that this is merely an inappropriate attempt to make it harder for firms to respond adequately, or indeed to challenge the FCA's decision to announce through legal process.

(c) Any attempt to draw a parallel to the position on issuance of a press release following settlement of a case (which we have heard in informal discussion of CP24/2 with the FCA) is not appropriate. The situations are not comparable, particularly where through a settlement process, the exact terms of a draft Notice have already been agreed and the parties have resolved their differences with a common understanding.

(d) It is also in the FCA's interests to engage in a proper and meaningful way with firms before issuing press releases which may have a significantly damaging impact on a firm's reputation, or indeed the reputation of an entire sector. The FCA's track record in respect of such releases is not good. We refer for example to the March 2014 pre-briefing of the Daily Telegraph of the FSA's intended Life Insurance Review. This caused significant falls in share values in life insurance companies and led to the Davis Review, which severely criticised the FCA. We hope that the FCA has well in mind the conclusions and recommendations from the Davis Report, in particular the recommendation that the FCA should avoid press strategies which generate "sensational headlines", and that it otherwise takes steps to avoid unintended consequences, particularly where the information concerned is potentially price sensitive[24]. We also refer to the criticisms of the FCA public announcements in the case of *Seiler -v- FCA*[25], in which the Upper Tribunal described the FCA's press release in that case as "*disgraceful and should never have been made".* We suggest against that backdrop the FCA should be proceeding much more cautiously and in proper and effective dialogue with firms rather than rushing in before fully understanding the implications of what it is

[24] Davis Report https://www.fca.org.uk/publication/corporate/davis-inquiry-report.pdf Paras 19.55-6

[25] [2023] UKUT 00270 para 158

proposing, which the firm itself is likely to have a much more detailed understanding of.

(e) In the circumstances, a reasonable period of time for consultation should be permitted, which should be an absolute minimum of 14 days' notice, and in many cases more, and that proper engagement during that period should take place. This is the approach of FSMA[26] in the context of statutory notices such as Warning Notices, and we do not think announcements of investigations should be different, other than exceptional circumstances.

5.2 As the FCA rightly recognises, on occasions, the information about an investigation may be price sensitive, either for that particular firm, or for an entire sector (see the recent announcements in relation to motor finance). The FCA is right to proceed with caution when this might be the case. Again dialogue with the firm is key. The decision on whether information is price sensitive or not is one for the board of the firm concerned, not for the FCA, and therefore close liaison with the firm in these circumstances is absolutely essential, including sufficient notice and time period for proper consideration of the situation.

5.3 The FCA also provides no justification for applying this policy to existing cases when the new policy comes into force. This appears to us to be an unjustified retrospective application of a new rule. We would welcome further explanation behind the thinking on this, and how exactly this will work in respect of such cases as are on-going at that time. Will these cases all be publicised at the same time? And if so how with the process of advance notice and consultation work in practice, since clearly the FCA will be in no position to consider representations on all the cases it is currently handling and/or to deal with challenges it may receive in respect of any firms who wish to challenge such a decision?

6. **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.**

6.1 We are not in a position to agree or disagree in relation to this question since very little practical information of any use is provided in CP24/2 as to how this will work in practice. Our clients are concerned about the prospect of a drip feed of negative information about on-going investigations, especially if this is also to be done on minimal notice to the firm and with little practical opportunity to engage.

6.2 The proposed approach is contrary to the approach of most other international regulators in our experience, and contrary to the practice of the SFO and other domestic regulators who do not provide regular updates on on-going investigations.

7. **DO YOU AGREE WITH OUR PROPOSAL THAT MOVING OUR STRATEGIC POLICY INFORMATION TO THE WEBSITE WILL MAKE INFORMATION MORE ACCESSIBLE? PLEASE GIVE REASONS IF YOU DO NOT AGREE.**

We have no strong views on this, so long as the material is easily accessible, and is efficiently and effectively cross-referenced. It should be possible for a stranger to the Enforcement Guide, or to the Enforcement webpage, to read the necessary material in each location, and then be properly cross-referred with appropriate links to related material in the their other location, so as to easily build a comprehensive overview of all of the material from each of the sources.

[26] FSMA section 387(2)

8. **DO YOU HAVE ANY COMMENTS ON THE REVISED CONTENT OF CHAPTERS 1-6 OF EG?**

8.1 Based on our review of the changes to EG, these changes merely reflect existing changes to the practice of the FCA Enforcement Team over recent years. In that sense the changes are non-controversial[27].

8.2 However (and see further below in respect of consultation) this does raise the question of consultation and discussion with the industry when the practice of the Enforcement Team does change and whether these changes should be signalled more clearly at the time, and discussed/consulted on. We are aware of some discussion and consultation on an informal level that does from time to time take place, but nothing of a more structured nature that we are aware of. The appropriateness of a more structured and formal process for significant changes of process should be considered.

9. **ARE THERE ANY CHAPTERS SET OUT IN PARAGRAPH 4.17 THAT YOU CONSIDER SHOULD BE KEPT IN FULL AS PART OF EG?**

No comments.

10. **ARE THERE ANY CHAPTERS THAT YOU CONSIDER SHOULD BE RELOCATED ELSEWHERE?**

No comments.

11. **ARE THERE ANY CHAPTERS THAT YOU CONSIDER CAN BE DELETED ALTOGETHER?**

No.

12. **DO YOU AGREE THAT THE PRESENT CHAPTER 8 OF EG SHOULD BE MOVED FROM EG AND INCLUDED IN SUP 6? PLEASE GIVE REASONS IF YOU DO NOT AGREE.**

We have no strong feelings, but clearly there is a need for clear and explicit cross-referencing with appropriate links, so that a fresh reader knows where to find the relevant material that used to feature in the EG.

13. **DO YOU AGREE WITH THE REMOVAL OF THE RESTITUTION CHAPTER FROM EG? PLEASE GIVE REASONS IF YOU DO NOT AGREE.**

As above.

14. **DO YOU HAVE ANY COMMENTS ON OUR PROPOSAL TO RETAIN EG 19 AND 20?**

No comments save in relation to our comment above about appropriate cross-referencing.

15. **DO YOU AGREE THAT WE SHOULD NOT USE PRIVATE WARNINGS AS AN ALTERNATIVE TO TAKING FORMAL ACTION AND REMOVE ANY REFERENCE TO THEM FROM EG?**

15.1 Yes, we agree, and we welcome the fact that the FCA no longer uses private warnings as an alternative to formal action. In our experience, the recipient of a private warning, from which there was no realistic right of challenge or appeal (but which then formed part of the disciplinary record of the firm or individual) always put the recipient into a potentially very unfair position.

15.2 We agree therefore that where there are residual regulatory concerns at the end of an investigation but where no further disciplinary action is to be taken, those issues should be

[27] Although we note that no "tracked change" version has been provided so our comments are limited to the points highlighted in CP24/2.

dealt with through the supervisory process, which is a more appropriate way of addressing them.

16. **DO YOU HAVE ANY COMMENTS ON OUR PROPOSED APPROACH TO FUTURE CONSULTATION?**

As above, we consider that where there are substantive changes to the Enforcement practice of the FCA, consideration should be given to some form of formal consultation process to draw attention to the changes proposed and justify the reasons for them. This will allow firms and other interested parties the opportunity to engage and provide comments and feedback, which hopefully with enrich the process and thinking and lead to better outcomes. This is separate from the formal status or otherwise of the EG in the regulatory framework.

HOGAN LOVELLS INTERNATIONAL LLP
30 APRIL 2024