Private & Confidential

COMMENTS ON FCA CONSULTATION CP24/2 PART 2

Before we come on to our response to Question 1, we would like to set out a general introduction and summary. As the questionnaire did not provide for this, we are including it here, before turning to Question 1.

1. INTRODUCTION AND SUMMARY

This is our response to the Financial Conduct Authority's ("FCA") consultation CP24/2 Part 2 ("Part 2"), which followed the FCA's consultation CP24/2 (the "Initial Consultation"), which both concern the FCA's proposals for greater transparency of its enforcement investigations.

We welcome many of the changes that have been suggested by the FCA in Part 2 which have significantly softened and adjusted the original approach suggested in the original consultation paper.

Having attended in-person presentations and consultations conducted by the FCA in relation to its proposals, we are of the opinion that there are various further clarifications and additions that could usefully be made to reflect the comments and intentions expressed at these events which could make the FCA's intentions much clearer – assuming what was expressed in these meetings reflect direct FCA policy intentions.

However, where this all leads us, is to question the entire premise of the present exercise. In our view, everything that the FCA now seems to challenge in terms of its present ability to make the public announcements it appears it would like to make, seems to flow from the present approach that the FCA has adopted in relation to its definition of "exceptional circumstances" (i.e. the present test for when publication of an Enforcement Action may be desirable, as set out in the FCA's Enforcement Guide ("EG"), Chapter 6).

So far as we are aware, the FCA's interpretation of this test has never been expressly articulated before in the way it has been during this consultation. For the reasons explained below, we now see this as the core problem which needs to be addressed. We consider that the FCA could quite easily adjust and relax the approach to this definition to achieve its intended aims. Such an approach would leave the FCA able to do what it professes it wants to do, while leaving intact the overall balance of fairness between interests of privacy of investigations and the need for the FCA to achieve its objectives.

The FCA cites preventing consumer harm, supporting public confidence, helping industry improve their processes, encouraging witnesses and whistleblowers to come forward and improving the FCA's own accountability to Parliament as reasons for - and objectives of - a shift in its approach (Part 2, paragraph 1.9) but these aims can be achieved without naming firms under investigation, such as through the publication of a generic Enforcement Watch, as we discuss further below. Specifically with regard to the last reason listed – the FCA's own accountability to Parliament – we consider that the FCA is giving undue weight to this consideration.

While many of the objectives expressed by the regulator in Part 2 are on their face unobjectionable, there is a fear generally amongst our clients that this is the "thin end of the wedge" and the main agenda in play is designed to help the FCA portray in the public domain and to the Treasury Select Committee, that it is an active and effective regulator, at the expense of fairness and the legitimate interests of regulated parties who may at that time be under investigation (whether guilty or innocent).

A further factor that has eroded trust and confidence is the way in which the FCA has gone about the process. Its Initial Consultation in February 2024 came as a total surprise to the market, without

any forewarning (as is customary, via the FCA's Regulatory Initiatives Grid). We note that the FCA appreciates that it "should have introduced them in a better way" (Part 2, paragraph 1.17).

In other words, as a result of this process, there is a significant shortage of trust in the process and the intentions of the regulator at this point, and firms are understandably exercising caution.

2. ASSESSING WHAT IS IN THE PUBLIC INTEREST

Staged decision-making process (see paras 4.1 – 4.10)

If we were to take our proposals forward, we anticipate taking a decision in stages, focusing on what is reasonable and proportionate at each step.

1. Do you have any comments on the proposed staged decision-making process to announce investigations?

We have no particular comments on the high level, staged approach articulated in paragraphs 4.1-4.10 of Part 2 which sets out a fairly basic and sensible approach to deciding whether to make an announcement centred around a "whether", "when" and "what" approach. These, of course, are the right questions to ask. They are also highly inter-linked. These questions are, however, ultimately, underscored by the revised public interest assessment, on which we comment below.

The revised public interest assessment (see paras 4.1 – 4.10)

We have identified potentially relevant factors to consider when deciding if an announcement could be in the public interest.

2. Do you have any comments on the factors we have identified, or further factors we should consider?

We welcome the somewhat belated recognition by the FCA that the consideration of the impact of any public announcement on the firm concerned is now to be taken into account. Given this is such a fundamental consideration, it is highly surprising this has only been recognised explicitly as such an important point at this late stage. In our view, this has always been one of the most significant factors in any decision making process of this type.

Indeed, even under the current "exceptional circumstances" test, in deciding whether to make an announcement the FCA is obliged to consider the "potential prejudice" that it believes may be caused to any persons who are, or who are likely to be, a subject of the investigation (EG 6.1.3). We note the move to considering whether publishing would have a "severe impact" on the firm (as one of the factors within the public interest test) raises the threshold over and above the existing test.

It is therefore not clear from Part 2 that the importance of this factor has yet been fully taken in by the FCA, nor that due weight is being given to it. We refer the FCA back to our submission to its Initial Consultation for our full analysis on this. The legal analysis that we set out in our submission will inevitably form the basis of any legal challenge in the event that the FCA fails properly to take into account the interests and impact on any firm affected by any such public announcement.

We are concerned that Part 2 still remains silent on certain key issues:

- Part 2 does not explain in any detail the process or thinking that would lead the FCA to conclude that an announcement or publication would be in the public interest:

- Where exactly does the FCA see the balance lying between something being in the public interest (and therefore, we presume, making a public announcement – although see our comment below) and not being the public interest (and therefore not making an announcement)? Where does the "burden of proof" lie? And who has to show that the balance lies for or against an announcement?

- At present, the FCA needs to establish there are "exceptional circumstances". This language emphasises that the balance is in favour of not announcing *unless* there is some "exceptional circumstance" which persuades the FCA that an announcement is appropriate.

- We have heard reassurances in informal consultation meetings etc. that the intention of the FCA is that very few additional cases would be announced, and that in effect nothing much would change. We also note that Part 2 makes this point a large number of times (paragraphs 1.15, 1.17, 2.9, 3.13, 3.18, 3.21, 6.1 and 6.18). This therefore calls into question why this entire exercise has been undertaken by the FCA. Why such a wholesale change for such a small intended result? Why could this result not have been achieved under the current test?

- The replacement is the "public interest" test. However there is no such clear line of where the tipping point lies in the test as set out in Part 2. We note the FCA has set out, at Part 2, paragraph 4.10, factors for and against publication or naming. But how do these factors interplay? Are they equally weighted or do some trump others? How do they *work*?

- And is the default to be that no publication should take place unless the new "public interest" test is met (however that is)? So, even if the FCA determines that it is in the public interest to publish, does that mean it will publish or does it retain overall discretion as to what to do? Or is it the other way around - that the default will be to announce unless there is some public interest reason not to announce?

- And will the FCA explain in each case why it is that such a test has been passed? Or is it for the firm to be presented with the decision, and to challenge the conclusion based on the factors set out in the test?

- The paper is effectively silent on these core issues. However the detail of the approach and thinking needs to be articulated clearly by the FCA as soon as possible.

- Similarly, Part 2 is silent on the standard required in order to meet the factors set out in the public interest test.

  - We and our clients note the general and vague language used in the factors (set out in Part 2, paragraph 4.10) to be considered by the FCA in determining whether publication or naming is in the public interest, which afford the FCA great discretion: "Publishing *could* cause serious market or sector impact…"; "Publishing *is likely to* be in the interests of potentially affected customers…"; "Publishing *would be likely to* have a severe impact on the firm…"; "Publishing *is likely to* prevent direct or indirect consumer harm.."; "Publishing *could* hamper an FCA investigation…."; "..public trust and confidence *is likely to be maintained…"*; "Publishing *is likely to* have an operational benefit…". We appreciate that the FCA says, at the outset, that its focus is on what is "reasonable and proportionate" at each step (Part 2, paragraph 4.2). However, this talks about its overall approach, but yet the reasonable and proportionate exercise of discretion is not baked into the test itself. Whilst we appreciate the need for the FCA to retain flexibility given the vagaries of life and uncertainties as to what may be thrown

up in the future, our clients would welcome as much certainty as can be given in terms of guidance for the future exercise of this discretion.

- Additionally we note the language used in the table of factors in Part 2, paragraph 4.10 appears to be skewed against the ability of a firm to demonstrate (or the FCA to recognise) the harm likely to be caused by an announcement. The right hand column ("Factors mitigating against publication or naming") uses language such as "*serious market or sector impact*", "*systemic disruption*", "*seriously disrupt public confidence*", "*severe impact*" etc. This language suggests a very high bar to demonstrating or recognising the factors against publication. At the same time, as noted above, the left hand column ("Factors in favour of publication") uses the words "*likely*" or "*could*" throughout as being the standard which the FCA is looking for in terms of the bar to demonstrating the factors in favour of publication.

- How will the FCA go about assessing all these factors? For example, how will it ascertain if publishing would be likely to have a severe impact on the firm? The FCA itself admits that "*it is difficult to isolate the impact of a regulatory announcement on share prices as there are other factors that will cause share prices to move on a given day, completely unrelated to the regulatory announcement*" (Part 2, paragraph 6.5) and that, "*Any impact generally depends very much on the context, including broader market conditions on the day*" (Part 2, paragraph 6.11). (See our comments on burden of proof below).

- We have heard passing assurances in consultation that publication will "not be done lightly" and there is now (a very short) consultation period with the firm (see further below) so that views and submissions can be taken. But there is nowhere stated what the standard will be as to when the test will be met.

- Given the likely catastrophic effects that announcement will have (as has been made clear to the FCA in many of the consultation responses to its Initial Consultation) on many firms (existential, maybe, for smaller firms, and significant share price impact on larger firms) we would have expected some significant reassurance around the need for the FCA to have clear evidence that the public interest test has been met.

- Instead, the suggestion seems to be that the FCA is looking for firms to provide forensic evidence of direct harm that might be caused by an announcement – i.e. that the burden of proof is reversed. This clearly is very difficult to do in the abstract and it is not an appropriate exercise for the regulator to expect firms to have to undertake, in particular in just ten business days.

- In our view, the obvious assumption should be that harm will be caused by such an announcement, and therefore a high level of public interest in that announcement needs to be shown in order to justify it and to overcome the assumption of harm to the firm. We would therefore suggest that the balance of the factors and the language used to describe them should be entirely reversed.

Further, we challenge some of the factors which the FCA has included within its public interest test. While there is no universal definition of public interest, it is generally considered to equate to the public good – and is not the equivalent of what is *of interest* to the public, and further, should not take into account the private interests of the publisher. On this basis we take issue with the following factors which the FCA includes as being in favour of publication:

- Publishing would help improve the FCA's accountability to Parliamentary committees by enabling it to share more information in response to significant queries about its involvement in

particular issues. However, as we set out further below, it is not essential to name firms in a public way in order to achieve such accountability, since further information can be provided to such committees privately if it is essential to do so. Announcing an investigation into a named firm should not be done with the main aim of making it easier for the FCA to respond to Parliamentary questions about its work (i.e. an entirely private interest of the FCA, as opposed to the public interest), and certainly not if it is to the potential detriment of that firm and the wider financial services market.

- Information about matters under investigation are already in the public domain through various means. Here the FCA has conflated information being public, to it being in the public interest. The two are not the same. The FCA has to decide, irrespective of whether information is already in the public, whether publishing it itself would be in the public interest (i.e. for the public good), bearing in mind that an announcement by the regulator is likely to draw further and increased attention to the information.

We also, fail to see how, in most cases, "publishing would provide an educational benefit for firms", which is listed as a factor in favour of publication. Specifically, we fail to see how a high-level announcement that the FCA is investigating a firm for, say, market abuse or financial crime systems and controls, has any educational benefit. There are myriad of issues that could arise within either of these areas. The educational benefit comes when the FCA has published a final notice at the end of the enforcement action, setting out the firm's failings and the FCA's expectations – and these specific points can then be reviewed by firms in the context of their own operations.

We note that the FCA itself recognises, within the factors to be considered as part of the public interest test, that "*Firm size may be particularly relevant, with the impact* [of an announcement] *on smaller firms potentially greater*" (Part 2, paragraph 4.10). This risks creating an uneven playing field, with larger firms more at risk of being subject to an announcement. In fact, this could have a counterproductive effect such that, the more serious the issue within a smaller firm, the greater the potential impact of an announcement on it, and hence, the less likelihood of publication.

The table in Part 2, paragraph 4.10 also elides the considerations in respect of "publication or naming". However, this is not appropriate since the factors are very different for the two approaches. In our view, naming of firms under investigation should only be considered in exceptional circumstances, or - in the event of a move to a public interest test - as a last and necessary resort in order the achieve the public interest identified (when balanced against the inevitable harm caused). The balance may look different where an announcement is anonymised and/or is in general or generic terms about a particular issue. Part 2 does not draw this distinction properly, and in failing to do this, renders the factors laid out in the table at paragraph 4.10 much less useful as coherent guidance as to the FCA's intentions.

We explained in our response to the FCA's Initial Consultation our concerns about the position of individuals. We welcome the FCA's retained position that announcements about individuals will not be made. However, there is nothing in Part 2 to address the concerns that we and others have raised, that in many cases announcements which name firms will carry the likely inference that individuals, in particular senior managers in the relevant part of the business, will themselves be under personal investigation. We think this risk should be a key consideration in the list of factors in the FCA's proposed public interest test, and where there is a risk that individuals may be inferred to be under personal investigation, this should be a powerful factor against publication.

Finally, we note the FCA attempts to give comfort to the industry by referring to its intention to increase its supervisory activity and the rigour of its pre-investigation triage process such that it will bring less Enforcement Action: we assume this is intended to address the unfairness highlighted previously that at the time of the previous consultation, some 67% of investigations ended with no disciplinary outcome. However this new stance from the FCA is double-edged. It follows from this

more focused and streamlined approach that it is much more likely that cases where an investigation is announced will result ultimately in wrong-doing being found and disciplinary action taken. This will therefore feed the public perception that there is "no smoke without fire" when an investigation is announced, regardless of the FCA's standard disclaimer language. Ultimately, the negative impact of an announcement is therefore exacerbated in this new environment. It is also of course the case that the FCA's present intentions may change in the future: over time the FCA has gone through phases of either many investigations or fewer more focused investigations. We think the logic of when announcements are made should be more objective and future-proofed and approached at the level of principle rather than by reference to how many cases may or may not be announced or the proportion they form of the FCA's portfolio.

Applying our proposals to our existing investigations (see para 4.12)

We are amending our proposals to make clear that we would only announce or update on existing investigations where the announcement would be reactive.

3. Do you have any comments on this suggested change?

We welcome the FCA's revised position on this.

However, we continue to think that the default in existing investigations that were opened before this consultation, should be a continuation of the existing regime of "exceptional circumstances". And we also refer to our point made above that the fact that an investigation is already in the public domain does not necessarily mean that it is in the public interest for the FCA to publish it.

In the event that the FCA takes up our suggestion that the way forward should be a revision to the "exceptional circumstances" test, then once that has been properly formulated, it may be that it would be appropriate to apply this retrospectively.

Giving firms time to respond (see paras 4.14 – 4.16)

We would generally share a copy of the proposed announcement and provide firms with at least 10 business days to make any representations to us. This may also give firms time to consider whether they want, or may be required, to make an announcement themselves. If, after considering the firm's representations, we still decide to publish an announcement, we would share our reasons and give firms a copy of the final text at least 2 business days before we publish it.

4.Do you have any comments on these proposals?

Again, we welcome the FCA's movement on this. However for many large organisations, ten business days will still be very challenging, and two business days between decision and publication is also extremely tight.

We can understand that in some exceptional circumstances, such tight timescales may be appropriate. But we cannot understand why this timetable should be the norm. Given that many investigations will have been going on for months, to suddenly impose a timetable like this on a firm seems entirely unjustified. Thus, we think that while the FCA may wish to reserve to itself a right to work on a tight timeframe in highly exceptional circumstances, the norm should be recognised as being longer and a longer timeframe than the norm could be either spelled out in the new rules, or in guidance. There can be little or no justification for such an imposition in routine cases.

We therefore think the default position in respect of the period for consultation should be expressed as an absolute minimum in urgent cases, but with an expectation that it would be longer depending

on the factual situation. As for the period between decision and announcement, this should be at least five business days in normal cases.

Safeguards (see para 4.17 – 4.19)

We have provided detail on our process when deciding whether to announce.

5. Do you have any comments on these proposals?

We note the proposed "safeguard" that decisions will always be made at "Executive Level". It is not entirely clear to us who exactly this is referring to. Given the implications of such an announcement we think there needs to be much more clarity around the decision-making process and the total independence of that decision. If this reference to "Executive Level" means an Executive in the Enforcement Division (i.e. the senior supervisors who have ultimate responsibility for the same investigations that are to be announced) then we think this lacks the independence of process that is needed for such an important decision.

In the case of publication of Decision Notices, this is something that is decided on by the Regulatory Decisions Committee ("RDC"). If it is truly the case that the FCA are planning on giving publicity to only an additional handful of new cases every year, our suggestion is that in order to give this approach a degree of independence and integrity and to address the issues that have arisen through this whole consultation process, it would restore a significant degree of trust to place the decision to publish in the hands of the RDC. This will not add unreasonably to the workload of the RDC, or if it does then additional RDC resource should be found.

This issue does tie in to the time limits issue discussed above. If there is to be proper and meaningful dialogue in relation to these issues, then time will need to be allowed for representations to be made and consultation to be undertaken in relation to any such announcements – certainly if the FCA is looking for firms to provide forensic evidence of direct harm that might be caused by an announcement (see our response to Question 2).

3. CASE STUDIES

We welcome feedback on these case studies, including on whether the public interest would be served in naming these firms while under investigation when we have indicated we might do so.

Case Study 1 – British Steel Penson Scheme (see para 5.4 – 5.12)

6. Do you have any comments on this case study?

We disagree with the FCA's analysis of this case. We have no knowledge or involvement in the detail of it, so base our comments purely on the description in Part 2.

However, the commentary on the case study seems to us to demonstrate the lack of weight and regard that the FCA is having in this consultation to the interest of individual firms and the harm caused by such an announcement. It would appear from this case study to be the FCA's view that consumer protection would be best served in this case by publishing the names of firms under investigation, presumably so that individuals who may have dealings with such firms can cut their ties with the firms concerned and that others who are considering dealing with such firms can be warned off: the exact nature of how consumers are protected by such announcements is otherwise not clear.

However, in this case there may be firms who have behaved entirely properly and given entirely correct advice – and who may in due course have been cleared by the FCA at the end of their

investigation from any wrongdoing. But the announcement that this case study seems to be envisaging as appropriate may well kill such businesses. By the same token, there may have been other firms not named by the FCA in its proposed notice who, it then transpired, gave misleading pensions advice to consumers – thus having the effect that consumers only believed that the firms named by the FCA were the unsafe ones.

We note the intention in this case and others that the FCA will follow a mantra to the effect that no decisions as to any misconduct have been made. However, in response to that we repeat one of the comments we made in our previous response to the Initial Consultation, which quoted from the case of *Bloomberg -v- ZXC* [2022] UKSC 5 . In that case, in the Supreme Court, it was argued 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 was overstated. 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."*

It seems to be envisaged by the FCA that it needs to respond to a wave of concern or public feeling about a particular issue by naming firms that are involved, with all the collateral damage that this will cause, and so far as we can see, no real articulation as to what precisely the consumer benefit of such naming actually is or how exactly it helps. There has to be a better way of dealing with such issues with a more generic announcement in relation to the FCA's involvement without the level of detail that the FCA seems to be suggesting, and the extra-judicial collateral damage to individual firms that this approach involves.

Even more concerning – and a theme in the Initial Consultation and in Part 2 generally - is the seeming deference of the FCA to the Public Accounts Committee and the Treasury Select Committee, and the FCA's apparent need or wish to provide further information to them over and above what the law and practice currently requires.

In our view, the proper approach should be to remind these various Parliamentary Committees that they also need to be aware of the need for procedural fairness in individual cases, and that public disclosure of material that may prejudice the fairness of an investigation or an individual's right to privacy should not happen. This is no different to cases in the criminal context or other analogous situations.

To the extent that various Parliamentary Committees may need to hear more about various FCA activities, including in individual cases, that is not in the public domain, it is perfectly possible for such proceedings to move into private session and for Committee members to be briefed in this way. Other Parliamentary Committees conduct their business in this way (e.g. in relation to issues of national security). We do not see why the fundamental principles of privacy need to be abandoned to accommodate the FCA's wish to go public with its various Parliamentary and other supervisors.

We therefore do not understand the feature of this consultation which suggests that the need for openness with the various Parliamentary Committees to which the FCA is accountable to should be driving this process since there seems to be many different ways to address this other than the one now being proposed.

<u>Case Study 2 – Citigroup Global Markets Limited (see para 5.13 – 5.20)</u>

7. Do you have any comments on this case study?

This was a highly public problem and it was of course widely assumed at the time that the FCA (and indeed Prudential Regulation Authority were scrutinising the problem, as they were. It would also be assumed that this would be the case in any past or future problem of this sort. We are not quite sure therefore why the FCA thinks that any announcement at the time would have made any difference either way to the situation, other than to try to portray itself in a positive light.

Given the way this case arose and the firm's proactive engagement in public, it has to be doubted that any neutral confirmation that the FCA was investigating would have been particularly controversial and would most likely have been agreed to by the firm had there been appropriate consultation as to the terms of such announcement. It is also not clear to us in this case why it would have turned the dial on public confidence in the regulator - we heard nothing negative at the time in relation to regulatory (or lack of) scrutiny in this case.

We note that the FCA's case study appears to take no account of the involvement of individuals at all levels within the organisation and their interest in privacy in respect of a case such as this. This is a classic case where it would not be hard for the press or other outsiders to work out who in the organisation would have been involved. This is particularly so given the FCA's focus on Senior Manager Certification Regime issues and holding individuals to account when issues emerge within a large organisation such as this.

Thus, when applying a "public interest test" in its narrowest way, it is hard to see what the public interest is in any such announcement. The only benefit seems to be to ensure the FCA is seen to be reacting to an issue that has emerged in the public domain.

Case study 3 – PricewaterhouseCoopers LLP (see para 5.21 – 5.28)

8. Do you have any comments on this case study?

The same comments as above apply here.

We do not think that the FCA's policy should be driven by a small minority of regulators or other authorities who do announce their investigations early.

We have strongly disagreed with the Financial Reporting Council ("FRC") in the past on previous investigations, where public and entirely unjustified early announcements have been made in relation to investigations into accountants (including individuals), but where the evidence has subsequently shown (many months, or even years, later) there is no case to answer - but the damage to professional reputation has been suffered with no recourse and no apology, and then a scandalous refusal to publish the outcome of the abortive investigation to try to reverse the damage suffered. This is not the precedent the FCA should be following. It is not a good argument to say that just because the FRC do this, the FCA ought to follow suit.

Moreover, given the widely known knowledge of the fraudulent scandal that occurred within London Capital & Finance, a high level announcement by the FCA that it is investigating an accountancy firm "in connection with its role as auditor of London Capital & Finance" carries with it the high risk that the average member of the public will draw the inference that the accountancy firm was also implicated in the fraud – which was not the case. This is misleading, rather than educating, the public.

Case Study 4 – CB Payments Limited (see para 5.29 – 5.40)

9. Do you have any comments on this case study?

This is an example of where the FCA wants to make a public example of a particular issue, and a particular entity that it has in its sights.

The FCA is able to deliver the substantive messages it needs in a very speedy way by publishing alerts and guidance. If it needed to deliver this message in a way which revealed the Enforcement implications of such failures, this could be done in future via the suggested new Enforcement Watch or similar publication.

We do not understand the logical leap in Part 2 paragraph 5.35 which suddenly suggests that because Coinbase was a big and important target of investigation, that a generic disclosure was not enough. The FCA could, presumably, have drafted into its more generic guidance something which conveyed the messages it wanted to, without the need to a specific firm-related announcement.

We note that the FCA lists, as factors when considering whether to announce in this case, the fact that this was its first case under the Electronic Money Regulations 2011 and its first action against a firm enabling crypto asset trading. We do not see how these facts fit into the factors set out in its proposed public interest framework. (We note that that FCA's fine on PwC was the first time in which it has fined an audit firm for breaches of relevant reporting regulations, yet this was not cited amongst the factors, suggesting an inconsistent approach). Again the focus seems to be primarily about ensuring the regulator is publicly seen to be taking action.

4. WHERE WE MIGHT ANNOUNCE BUT NOT NAME THE FIRM (SEE PARAS 5.41 – 5.48)

10. Do you have any comments on the examples provided of when we might announce but not name the firm?

We support the idea of descriptions in a generic way of Enforcement investigations that may be under way into particular issues so that the educational benefit of this can be conveyed to other firms in their Compliance efforts (i.e. via a new Enforcement Watch publication). In many ways this type of publication will be the best and more timely way of conveying the messages and "impactful deterrence" that the FCA is seeking to all those firms it is looking to influence. It would also go some way to demonstrating to witnesses and whistleblowers that action was being taken – which is one of the reasons the FCA has cited in support of its proposals.

We also think there is merit in any such publication being wider than focusing just on the cases currently in active enforcement action within the FCA. The FCA Enforcement team has very publicly stated it is moving to a different approach of triaging the cases it is looking at, and focusing on fewer cases for active Enforcement activity. However, this must leave a significant number of cases where there has been enough cause for concern such that it has triggered a referral to Enforcement for consideration. Similarly, given the FCA is being more active and assertive in its supervisory stage, there may be issues which arise here which would warrant generic publication of a quasi-Enforcement type. It would seem that these may also be fruitful areas to be covered by such a publication, where the FCA can highlight these areas of concern to the industry and create awareness and learning opportunities even where this no active Enforcement case being taken forward.

5. IMPACT OF PROPOSALS ON FIRMS (SEE PARAS 6.1 – 6.15)

We propose including impact as a factor in our public interest framework with a 10-day window for representations.

11. Do you have any comments, data or evidence on the potential impact of our proposals on firms?

It is difficult to provide any empirical evidence of the potential (or specific) impact of an announcement on a firm. As the FCA itself observes, even just predicting the impact on share price, is difficult – almost impossible. Much depends on the specific context and facts at the time.

We refer to our submission in response to the FCA's Initial Consultation where we set out the consequences of early announcement of investigations for firms, drawn from our, and our clients', experience. We gave examples of the very significant impact that announcements by the FCA can have on the markets. For example we referred at paragraph 5.2 to the market impact of the FCA's announcement in relation to motor finance in January 2024. We also quoted the observation from the Investors Chronicle in January 2024 relating to a comment by the FCA about a motor insurance product, which said: "*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".* And we also referred to the March 2014 pre-briefing of The Daily Telegraph of the (then) Financial Services Authority's intended Life Insurance Review which, as we explain at paragraph 5.1(d), caused significant falls in share values in life insurance companies and led to the Davis Review, which severely criticised the FCA and which recommended that the FCA should avoid press strategies which generate "sensational headlines".

What these instances show is that clearly the FCA has enormous power to impact markets and the share price or prospects of individual firms about whom it is considering making an announcement. This much seems to be self-evident, and the implicit suggestion in this question which doubts this is surprising.

6. COMPETITIVENESS (SEE PARA 6.16 – 6.29)

We will continue to consider carefully evidence on growth and competitiveness as we decide on our approach and welcome further feedback.

12. Do you have any comments, data or evidence on the potential impact of our proposals on growth and competitiveness?

We have no scientific or evidence based analysis to add. However we have anecdotal evidence and feedback from clients that major banks, particularly in the US, are highly surprised by these proposals, and are negative towards them. These proposals have typically reached high, if not even the highest, levels within these banks. Certainly in the US, with a focus on due process, these proposals have been met with very considerable resistance.

We note that the FCA now recognises that, in terms of financial regulators across the globe, its proposal does make it an outlier in terms of naming firms under investigation. The previous comparisons with regulators in other sectors was always misplaced. The FCA now appears to try to justify its approach by reference to the breadth and scope of its regulatory responsibilities, which it says is wider that other financial regulators (Part 2, paragraph 6.23). We have not seen the FCA present the exact logic of why that makes a difference, including in Part 2, and we do not see any justification for this statement. The areas regulated by the FCA are regulated in all developed economies around the world, albeit often by separate regulators rather than one single regulator as in the UK. But in sum, the position is entirely comparable, with none of the applicable regulators following the proposed publication approach. It therefore remains the case that the proposal will put the FCA and the UK out on a limb in terms of its practice in this area.

The impact of this is clearly negative in relation to the government's agenda of competitiveness and growth, and the statutory duties that the FCA has in relation to competitiveness.

7. OTHER COMMENTS

13. Do you have any other comments in response to our paper?

We reiterate the observation made at the beginning of our submission that we see the core problem the FCA is currently facing as self-made, and centred around what we now understand, as a result of this whole consultation process, as being the interpretation given to the FCA's test of "exceptional circumstances".

What has emerged is that the FCA's approach to the "exceptional circumstances" test appears to be dependent on a comparison to the FCA's current and/or past cases and whether any particular case or announcement is therefore on that comparison "exceptional". The FCA says that it determines whether a case is exceptional by comparison it to cases "within its portfolio" (Part 2, paragraph 5.15) or "when placed against its cases generally" (Part 2, paragraph 5.30).

We think this is too restrictive an approach. There is significant scope to change the test while retaining its purpose.

In our view the test should not be focused purely around the existing workload or past history of the FCA, which is ultimately subjective and governed by the FCA's own past and present case load and experience. It should instead be an objective test focused on what, objectively, is truly "exceptional". Some aspects of what the FCA has proposed in its public interest test are clearly within that category and we would support that. In fact, the current test already includes consideration of the following similar factors to determine if an announcement is desirable (EG 6.1.3):

- Maintain public confidence in the financial system or market; or
- Protect consumers or investors; or
- Prevent widespread malpractice; or
- Help the investigation itself, for example by bringing forward witnesses; or
- Maintain the smooth operation of the market.

And in deciding whether to make an announcement, the FCA will consider the potential prejudice that it believes may be caused to any persons who are, or who are likely to be, a subject of the investigation.

Further guidelines as to what the FCA might consider "exceptional" could be developed and published.

As we say at the outset, it is our view that the FCA could have achieved its stated aims within the confines of the current test, albeit with a different approach to its interpretation, in particular given it is only seeking to increase its announcements by a "small, incremental number" (Part 2, paragraph 3.13). Instead it has overcomplicated the issue and, in the process, alienated the financial services industry and invited challenge from parliament.

As a concluding remark, we strongly feel, given the significant impact of these proposals, the FCA should undertake a cost benefit analysis ("CBA") to demonstrate to the financial services sector the costs of the proposed changes. We appreciate that the FCA is technically only obliged to produce a CBA where it introduces new rules or guidance, and that this situation does not fall into either of

those categories, but we also bear in mind the recommendations of the FCA CMA Panel in its interim annual report which recommends that the FCA consider have it might expand the scope of its use of CBA in policy making – and that, under the FCA's current CBA policy, it is possible for very impactful policy changes not to undergo CBA at all.

Hogan Lovells LLP

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