

## **FCA Consultation Paper CP24/2: Our Enforcement Guide and publicising enforcement investigations—a new approach**

### **Financial Inclusion Centre Submission**

#### **Summary**

Due to resource constraints, we are limited to a fairly high-level response to CP24/2. We very much support the proposals set out in the consultation.

We argue that much greater transparency is needed within the UK financial legislative and regulatory system. Far too much protection is given to commercial interests in financial legislation and, therefore, regulation. The extent to which commercial confidentiality is used to restrict transparency on corporate behaviour undermines the effectiveness of Freedom of Information legislation. This has a deleterious effect on the effectiveness of regulation and the ability of civil society to hold financial institutions and individuals to account for malpractice.

We appreciate that the protections afforded corporate interests in legislation is a matter for Parliament and government. The reasonable measures proposed here would at least tip the scales back a bit towards the public interest.

We note with growing concern the very vocal finance and legal lobbies who exaggerate the potential impact of these reasonable measures to try to stymie the FCA's efforts. Even more concerning is the intervention by the Government on this issue.<sup>1</sup>

The Financial Inclusion Centre and others warned that the new secondary growth and competitiveness objective could be used to try to compromise the FCA's operational independence and effectiveness. It is very disquieting that these arguments are now being publicly used to try to prevent the implementation of this new approach. This is a test of the FCA's operational independence. We urge the FCA to stand firm on this issue and resist attempts by the Government and industry lobbies to prevent the introduction of what is a set of reasonable measures.

Moreover, we are in no doubt that the financial and legal sectors will use their considerable financial and legal resources to try to hinder the application of any new approach. We urge the FCA to prepare for this.

We think that this approach could be further enhanced by a number of measures including:

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<sup>1</sup> [Jeremy Hunt warns FCA against 'naming and shaming' businesses under investigation \(ft.com\)](https://www.ft.com/content/2024/02/20/jeremy-hunt-warns-fca-against-naming-and-shaming-businesses-under-investigation)

- The FCA should announce that it has opened investigations on behalf of an overseas regulator. This would aid cross border regulatory collaboration, all the more important given the cross border nature of financial services.
- We agree with the FCA that these proposals could help the regulator gather evidence from consumers/ SMEs during investigations. But, consumers/ SMEs will need to be aware of an investigation and how they can contribute evidence. The FCA should publish very clear information on how consumers/ small businesses affected by an issue and whistleblowers with information on a potential case can provide evidence to the regulator. More generally, the FCA should also widely publicise that an investigation is underway.
- As a result of the secondary competitiveness and growth objective, the FCA is under pressure to publish metrics on operational efficiency from the perspective of regulated firms. We argue that any regulator should be judged on how well it makes regulated firms serve the interests of consumers/ SMEs, not on how well it serves the interests of the firms it regulates. Metrics on investigations and enforcement actions should form an integral part of the FCA's performance scorecard from the perspective of consumers/ SMEs. The default should be transparency. We would urge the FCA to publish clearly on its website comprehensive data and information on supervisions, investigations, and enforcement actions.
- More generally, we urge the FCA to make a public statement that greater transparency in the public interest is its default position and commit to publishing as much information as it is allowed in legislation. As mentioned above, the protection given to commercial interests in financial legislation undermines the effectiveness of Freedom of Information legislation in this critical sector. It is time that these protections for commercial interests are reviewed.
- As mentioned, we are in no doubt that if this new approach begins to have an impact the finance and legal sector lobbies will use their considerable financial and legal resources to try to stymie the FCA's effectiveness. On the other hand, civil society representatives will be concerned that the FCA does not become too risk averse in applying this new approach. We are very sympathetic to the FCA on this given the balance it will have to strike between promoting the public interest, protecting the interests of regulated entities and individuals, and protecting the FCA's reputation. Robust governance and oversight measures will be needed to ensure this new approach is deployed effectively and fairly. CP24/2 does not cover governance and oversight of the new approach. We would suggest that the Regulatory Decisions Committee (RDC) could be given a role in overseeing how this new approach is applied. Even better, we would suggest the establishment of a new committee with independent public interest representatives to monitor and oversee the FCA's new approach. This would help promote confidence in the new approach, help the FCA to exercise judgement on difficult issues, and give the regulator a degree of protection against attacks from the finance and legal professions.

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<sup>2</sup> In the interests of disclosure, MMCA is a former FCA/ FSA board member

**Question 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.**

Yes. We do agree with the proposal. As outlined above, commercial interests are already afforded far too much protection in legislation and regulation. This undermines regulatory effectiveness and corporate accountability. These proposals will at least redress, in part, that imbalance.

In particular, we think these proposals could encourage whistleblowers and other witnesses to provide evidence to the FCA.

We also think that the FCA providing more transparency on its actions will help reassure the public that the regulator is active in regulating markets. We appreciate the FCA is very active. But perception counts for much and greater transparency will help enhance confidence and trust in regulation.

We believe that regulation is more effective when it pre-empts and prevents harm and malpractice in markets. We agree this could act as an effective deterrent on malpractice and harmful behaviours.

Of course, the FCA will have to be careful to ensure that these new measures are deployed effectively otherwise the initiative could backfire.

Moreover, the FCA in the interests of natural justice has to ensure that individuals are treated fairly. However, in our view the proposals in CP24/2 are reasonable and strike the appropriate balance.

**Question 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.**

We do agree with the proposed public interest framework. As the FCA states, any assessment on whether to publish should focus on whether it helps the FCA's pursue its statutory objectives. We think the measures in CP24/2 would help the FCA more effectively pursue its statutory objectives.

As it stands, the default position is to limit transparency and disclosure to protect commercial interests. What the FCA outlines in its public interest framework at least tips the scales a bit back towards the promoting the public interest.

**Question 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.**

Yes, we do agree. We think the approach strikes the right balance.

**Question 4: Do you agree with the proposed content of our announcements? Please give reasons for your answer if you do not agree.**

Yes, for the most part. We would argue that it is likely to be in the public interest for the FCA to announce that it has opened investigations on behalf of an overseas regulator. Surely, if the FCA thinks that its proposals will lead to better domestic regulation, the same arguments should apply to

collaboration between jurisdictions. Given the cross border nature of financial services, more effective international collaboration ought to be promoted.

With regards to the content, it would be helpful if the FCA published very clear information on how consumers/ small businesses affected by an issue and whistleblowers with information on a potential case can provide evidence to the regulator. More generally, the FCA should also raise awareness that an investigation is underway.

**Question 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.**

Yes. But, to reiterate the point about engaging potential victims and whistleblowers, it will be helpful that any updates raised awareness of an investigation.

**Question 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.**

For the most part, yes. However, we would argue that updates should be published as a matter of course. We make a general point here. As a result of the secondary competitiveness and growth objective, the FCA is under pressure to publish metrics on operational efficiency from the perspective of regulated firms. We would argue that any regulator should be judged on how well it makes regulated firms serve the interests of consumers/ SMEs, not on how well it serves the interests of the firms it regulates. We would urge the FCA to commit to publishing as much information as it is allowed in legislation. Metrics on investigations and enforcement actions should form an integral part of the FCA's performance scorecard from the perspective of consumers/ SMEs. The default should be transparency. We would urge the FCA to publish clearly on its website comprehensive data and information on supervisions, investigations, and enforcement actions.

**Question 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.**

Yes.

**Question 8: Do you have any comments on the revised content of chapters 1-6 of EG?**

N?A

**Question 9: Are there any chapters set out in paragraph 4.17 that you consider should be kept in full as part of EG?**

We do not comment on the chapters. But, we do urge the FCA to produce a consumer/ SME facing version of this to promote greater awareness and understanding of the FCA's strategy.

**Question 10: Are there any chapters that you consider should be relocated elsewhere?**

N/A

**Question 11: Are there any chapters that you consider can be deleted altogether?**

N/A

**Question 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 are not quite clear why the FCA is proposing to move chapter 8. However, we have no strong views either way. Our main concern is that the FCA produces clear consumer/ SME facing information on the FCA's powers and new approach. This should include plain English explanations of cancelling permissions, imposing variations and so on.

**Question 13: Do you agree with the removal of the restitution chapter from EG? Please give reasons if you do not agree.**

N/A.

**Question 14: Do you have any comments on our proposal to retain EG 19 and 20?**

N/A.

**Question 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?**

We do not have any information which allows us to judge whether feedback on expectations has the same deterrence effect as a private warning. So, it is hard to assess what the impact of this might be on behaviours.

**Question 16: Do you have any comments on our proposed approach to future consultation?**

N/A.

## **About The Financial Inclusion Centre**

The Financial Inclusion Centre (FIC) is an independent, not-for-profit policy and research group ([www.inclusioncentre.org.uk](http://www.inclusioncentre.org.uk)). The Centre's mission is to promote a financial system and financial markets that work for society. The Centre works at two main levels:

### **Promoting system level change**

Research and policy development to promote sustainable, resilient, economically and socially useful financial markets that: benefit the environment; encourage responsible corporate behaviours and create a positive social impact; and efficiently allocate long term financial resources to the real economy.

### **Ensuring households' core financial services needs are met**

Promoting fair and inclusive, efficient and competitive, well-governed and accountable, properly regulated financial markets and services that meet households' core financial needs. We do this by undertaking research into the causes of market failure in the sector, formulating policies to address that market failure, developing alternative solutions where the market cannot deliver, and campaigning for market reform. We focus on households who are excluded from, face discrimination in, or are underserved by financial markets and services.

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