1 OVERVIEW

1.1.1 We write in response to CP24/2, Part 2, the FCA's reformulated proposals to announce enforcement investigations at an early stage. We refer to our previous response, dated 29 April 2024, to the original proposals in CP24/2. We do not repeat our previous response here, but rather focus our comments now on our ongoing overriding concerns with the reformulated proposals.

1.1.2 We welcome the clarification of, and changes to, the original proposals in CP24/2, Part 2, and appreciate the engagement with industry around the reformulated proposals. We specifically recognise the two events that Therese Chambers has attended at our offices to engage with us and our clients on these issues.

1.1.3 We have read and agree with the House of Lords Financial Services Regulation Committee's (**FSRC**) report (the **FSRC Report**) published on 6 February 2025[1]. The FSRC's Report reflects the serious concerns held by numerous law firms, including BCLP, and other industry stakeholders regarding both the original and the reformulated proposals.

1.1.4 Our previous submissions have not gone into detail as to the extent to which the proposals to announce enforcement investigations early risks positioning the UK as an outlier internationally. We note the detailed submissions on this referenced in the FSRC Report. We agree with these submissions and concur that this proposed change appears at odds with the FCA's secondary competitiveness and growth objective. It is also at odds with the Government's wider growth agenda, particularly with the Government having announced in October 2024 that the financial services sector is one of eight "growth-driving" sectors that it has identified.

1.1.5 We are also not satisfied that the move away from announcing only in "exceptional circumstances" to announcing pursuant to the proposed new "public interest framework" is necessary. Nor do we believe the considerable risks of doing so have been appropriately acknowledged and addressed within the reformulated proposals in CP24/2, Part 2. We focus our comments in Section 2 below on our ongoing overriding concerns here.

1.1.6 Unfortunately, given these concerns, we are of the view that the current proposals should not be progressed. Further, we consider that there are viable options that better balance the FCA's aspirations and the rights of firms and individuals (see Section 3). We would also make the observation that the whole point of there being a consultation process is to enable better decisions to be made and where there has been such an overwhelmingly negative, and consistently negative, response to the proposals, the only proper course is to have a fundamental rethink.

2 OVERRIDING CONCERNS

2.1 The shift from "exceptional circumstances" to a "public interest framework"

Is this shift necessary?

2.1.1 At a threshold level, we, like many others including the FSRC, are not satisfied that the move away from announcing only in "exceptional circumstances" to announcing pursuant to the proposed new "public interest framework" is necessary.

2.1.2 We agree with the FSRC that the FCA has misinterpreted the "exceptional circumstances" test set out at EG6.1.3. It appears that the FCA interprets this as requiring an investigation to be exceptional in *type*, as compared to the type of investigations in its overall investigations portfolio. This is apparent from Nikhil Rathi's comment to the FSRC that "*investment fraud is not exceptional*". It is

[1] Naming and shaming: how not to regulate

also apparent from a number of the case studies set out in CP24/2, Part 2 – for example, the FCA states in respect of Case Study 1 that: "*[w]e did not announce these investigations under our present policy as investigations into poor investment advice aren't exceptional*."

2.1.3 This, however, is a fundamental misunderstanding of the "exceptional circumstances" test, which does not contain any requirement for the *type* of investigation to be exceptional. Instead, the more natural and obvious interpretation of the test at EG6.1.3 is that it permits the early announcement of an investigation if, following the balancing of factors set out in the test, exceptional circumstances in favour of announcing are considered to have arisen. As to the balancing exercise itself, this involves weighing any "potential prejudice" to the investigation subject(s) against the interests of:

(a) maintaining public confidence in the financial system or the market;

(b) protecting consumers or investors;

(c) preventing widespread malpractice;

(d) helping the investigation itself, for example by bringing forward witnesses; or

(e) maintaining the smooth operation of the market.

2.1.4 Returning to CP24/2, the FCA's proposals were described as being necessary to further its operational objectives of "*securing an appropriate degree of protection for consumers and protecting and enhancing the integrity of the UK financial system.*" In our view, however, these operational objectives are clearly capable of being advanced by the FCA under the existing "exceptional circumstances" test when correctly interpreted. Indeed, as can be seen from the above, that test does not in any way restrict the FCA to only being able to announce exceptional *types* of investigations (as the FCA seems to think it does), but specifically permits the FCA to take into account consumer protection and market integrity issues[2], whilst also offering an appropriate degree of protection to firms.

2.1.5 Two other possible explanations are also put forward in CP24/2, Part 2 for the need to depart from the "exceptional circumstances" test, but neither really withstands proper scrutiny:

(a) First, it is suggested that the FCA intends to "potentially double" the small number of investigations into regulated firms that it *proactively* announces. However, in circumstances where the FCA calculates that it had only proactively announced 14% of its open cases into regulated/listed firms as at 28 November 2024 (typically around 1 or 2 cases per year), it seems that, even if that figure were doubled, this could still be accommodated within the "exceptional circumstances" test.

(b) Second, the FCA asserts that it intends to *reactively* announce details of investigations that have already been announced by firms. It is not clear, however, how gaining the wide-ranging ability to make public announcements to confirm information *already* in the public domain would advance the FCA's operational objectives of achieving protection for consumers or enhancing market integrity (i.e. because consumers and markets will already have the benefit of that information) . Moreover, even if there were some marginal benefit to this, then the better approach would be for the FCA to consult on a separate gateway for enabling such reactive announcements (for example, to enable those limited announcements where necessary to clarify information already in the public domain), whilst retaining the "exceptional circumstances" test for proactive announcements.

[2] I.e. the factors described at paras. 2.1.3(a),2.1.3(b) and 2.1.3(e) already enable the FCA to take these issues into account.

2.1.6 Considering the above, the FCA has, in our view, therefore failed adequately to justify why departing from the "exceptional circumstances" test is necessary.

Our concerns about the public interest test

2.1.7 Moreover, as well as disagreeing that it is necessary to move away from the current test, we also still have serious concerns about the new public interest test that is proposed by the FCA.

2.1.8 We welcome the additions to the original public interest framework proposed in CP24/2, notably to include the impact on (a) the firm involved and (b) public confidence in the financial system or the market. However, the nebulous nature of the factors to be weighed-up in the test poses a significant risk to investigation subjects – i.e. it remains unclear to us how the respective factors within the public interest framework will be balanced and whether certain factors will be given more weight than others.

2.1.9 We also specifically note that, at paragraph 4.10 of CP24/2, Part 2, the factors in favour of publication generally appear to have a lower threshold for satisfaction than the factors mitigating against publication. For example, factors mitigating against publication include where this is "likely to have a severe impact on the firm or on third parties", or where "*publishing could cause serious market or sector impact, financial instability, wider systemic disruption or impact, or seriously disrupt public confidence in the financial system or the market.*" On the other hand, factors in favour of publication include where this is "*likely to prevent direct or indirect consumer harm*" or where "*there has been public concern about the matters under investigation*" (i.e. there is no requirement for such harm or concern to be "severe" or "serious")." A firm's interests, therefore, appear subservient to the interests of consumers and tipping the scales in this manner is not appropriate.

2.1.10 The most concerning element of the FCA's proposed test is, however, the overarching shift in language from "exceptional circumstances" to "public interest". Whilst, as summarised above, the current test requires the weighing-up of factors for and against announcing, firms have significant protection from the fact that the outcome of that exercise may only lead to announcements in exceptional circumstances. Replacing that safety cap with the alternative overarching concept of "public interest" offers firms very little protection in the application of the nebulous factors in the FCA's proposed test. Indeed, it leaves firms exposed to the possibility that where there is significant outrage in the press or Parliament about a particular issue, the FCA's proposed test will inevitably result in a decision in favour of permitting it to make a proactive announcement.

2.1.11 The FCA seeks to present its public interest framework as an "*incremental shift in current practice*". In particular, it places considerable reliance on its concurrent plans to significantly reduce the number of enforcement cases to 10-12 cases a year and the small number of additional cases within that already small number that would be announced under the new public interest framework. However, for the reasons described above, the reality is that the new public interest test is much more than an incremental shift from the "exceptional circumstances" test. Furthermore, there is no limit to the number of cases to which it could be applied if the FCA decides to take a more expansive approach to enforcement in the future - indeed, the FCA has no way of knowing how many cases it might need to refer to enforcement in future and it obviously cannot offer the industry any meaningful guarantees on this issue.

2.1.12 For these reasons, we continue to have serious concerns about the proposed public interest test.

2.2 **Notice mechanism and safeguards**

2.2.1 We welcome the confirmation in CP24/2, Part 2, that firms will "generally" be provided with a copy of a draft announcement and 10 business days' notice to make representations, plus a further 2 business days' notice of the decision to publish.

2.2.2 We still have concerns that the provisions around notice remain vague and insufficient. Our initial response to CP24/2 requested a credible and fair mechanism for firms and any identifiable third parties to make representations prior to the FCA making any announcement and suggested a process like that used by the RDC in respect of Warning Notice statements. We reiterate this suggestion and ask that it is given due consideration.

2.2.3 We understand that the current proposal is that the decision to announce would be made by the FCA's Executive Director of Enforcement and Market Oversight. This decision would not (and could not) be independent and would not allow for firms (and affected third parties) to make representations and have these duly considered in an impartial manner. Given the strength of concerns raised about the proposals to announce, if the decision is nonetheless made to pursue them, the introduction of a robust mechanism for firms (and affected third parties) to make representations will be even more important. As an independent body of industry professionals and lawyers, the RDC is uniquely placed to assess and counterbalance the potential value of the proposed announcement and the potential adverse impact on the firm (and affected third parties).

2.2.4 We suggest that an RDC process governing decisions around announcing investigations would include:

(a) Sharing of a copy of a draft initial announcement (or update or closing announcement) with the firm (and any identifiable third party), specifying a time window within which the firm can make representations (normally 14 days, but, as noted below, with an opportunity for firms to ask for an extension).

(b) The RDC considering any submissions received and then deciding whether publication of the initial announcement (or update or closing announcement) should be permitted.

2.2.5 We also have some specific questions about the notice provisions currently proposed:

(a) Is 10 business days' notice sufficient? In practice, we have concerns that firms may not be able to prepare their submissions within 10 business days, including on what could involve complex, emerging facts as part of investigations in the early stages and robust evidence on the impact on firms and wider impact (including individuals, noting this is not part of the test, but firms will want to consider this). Will firms be able to request an extension and, if so, what process will govern this?

(b) We note the reference to at least 2 business days' notice of publication of any announcement. Who determines the length of time? Will firms be able to make representations on this? If the FCA determines to publish, firms will have to consider whether other disclosures are required, which could involve multiple disclosures to stakeholders within the UK and internationally, and the potential wider impact of the announcement.

(c) Will any third parties (firms or individuals) affected by announcement have a right to be notified (see section 2.3 below for further details of our concerns about the impact on individuals)? Will firms be able to notify them and will affected third parties have a right to make representations?

(d) What form will govern the reasons given by the FCA to publish? Will there be a prescribed form, with a minimum level of detail? We would recommend that the decision-making process, and recording of the decision, should be akin to a cost-benefit analysis.

(e) What circumstances will the FCA consider that no notice is required and, if there is dispute over this, does the impacted party (or parties) have recourse to appeal? What happens in the meantime pending the decision on appeal?

2.2.6 More generally, we would also be grateful for further details of other safeguards that the FCA intends to implement around its proposed new framework, if implemented. In particular, we are concerned that the framework could be open to abuse by FCA investigation teams as an additional bargaining tool to impose pressure on firms and individuals (who may separately be under investigation in relation to connected matters) to settle at an earlier stage, before the due investigative process has reached its natural end. How does the FCA intend to ensure that this does not occur?

2.2.7 For example, will there be an auditing process or review of investigations selected for consideration of announcement to ensure fairness and consistency between cases? As things stand, the onus will be on impacted firms and individuals to challenge this on a case-by-case basis. There has been much discussion on the disproportionate impact on smaller and more newly established firms. They are the very firms who will have less resource available to challenge the FCA's decisions.

2.3 **Risks for individuals**

2.3.1 We remain extremely concerned that individuals connected with investigations that are announced will be identifiable and in due course identified. Whilst we welcome the confirmation that individuals will not "generally" be named in announcements, we continue to believe that there is a serious risk that senior managers and other individuals within, and connected to, a firm under investigation will be identified through the Senior Managers and Certification Regime or otherwise.

2.3.2 We highlight the following specific risks:

(a) As the FCA readily acknowledges, individuals have rights pursuant to the ECHR and UK GDPR which the FCA is prohibited from infringing.

(b) Section 393 FSMA grants individuals "third party rights" if they are prejudicially identified in an FCA warning or decision notice. As stated above, the FCA's proposals currently do not appear to offer individuals any rights to make representations in respect of a proposed announcement.

(c) The impact on individuals could be significant. The proposed announcements may fuel speculation about individuals among their colleagues, in the press and across the market generally. This could have a serious impact on their ability to stay in post, their future employment prospects and their mental health, all in circumstances where they may not even be under investigation by the FCA or may be subject to an investigation that is discontinued.

2.3.3 We note the FCA's confirmation in their letter to the FSRC dated 25 April 2024[3] that their "*proposals also recognise that there are specific legal considerations when publishing information about individuals, and so we propose to maintain our policy of not usually announcing that we are investigating a named individual. This will also be part of our consideration where naming a firm would almost certainly result in the naming an individual.*" CP24/2, Part 2, confirms that the FCA "*will not generally announce when we have opened an investigation into a named individual*"[4] and that factors mitigating against publishing that may be considered include "*severe impact on the firm or on third parties, in particular, the firm's current or former directors and/or employees*"[5] We welcome this clarification, but maintain that the proposals need to be built out in more detailed and express terms given the severity of the risks for individuals. We are disappointed that the case studies provided in CP24/2, Part 2, do not provide worked examples of the FCA's approach to

3 FCA response LFSRC

4 CP24/2, Part, 2, para. 1.14

5 CP24/2, Part, 2, para. 4.10

assessing the likelihood of the market correctly (or indeed incorrectly) identifying connected individuals.

2.3.4 In addition to the above, we are also mindful that the announcement of investigations into firms by the FCA may prompt other bodies, such as parliamentary select committees, to conduct their own investigations into the same matters. The risk of the names of any individuals that the FCA is investigating coming into the public domain also becomes heightened, given the UK GDPR exemptions that apply when responding to questions from such select committees.

3 WAY FORWARD

3.1.1 The statistics quoted in the FSRC Report are that the "*average duration of investigations is around three to four years*" and that in 56 per cent of cases (down from 67 per cent) no further action was taken[6]. We note that the FCA has reported recent cases being concluded within 16 months. However, as things stand, the data are stark. If the proposals are adopted, investigations into firms could be announced years before a decision is ultimately made on the outcome and in more than half of those investigations the likelihood is that there will be no outcome against the firm. On this basis alone, we fail to see how expanding the cases that are publicised pursuant to the proposed public interest framework can possibly be justified.

3.1.2 At this juncture, we request that the FCA withdraw its current proposals. They are both unnecessary and pose significant risks to firms and impacted third parties.

3.1.3 Instead, we urge the FCA to consider alternative ways to meet the core aims of its proposals – i.e. advancing its operational objectives of preventing consumer harm and enhancing market integrity through greater levels of transparency. In particular:

(a) We believe that the current "exceptional circumstances" test can, if interpreted correctly by the FCA, be used to advance these objectives;

(b) We welcome the FCA's confirmation that it is open to exploring an "Enforcement Watch" publication, providing information on themes, topics and trends in the FCA's enforcement work[7] (although we agree that further work and consultation is needed to develop this proposal);

(c) More generally, we are wholly supportive of the FCA's aims of expediting its investigation process. We wish to see the FCA prioritising these efforts, which will, we believe, have the greatest impact on increasing transparency around the FCA's enforcement work and preventing consumer harm.

3.1.4 Finally, we note the recommendation in the FSRC Report that a full cost-benefit analysis is undertaken. If the FCA remains insistent on taking its proposals forward, we agree that, although it is not legally obliged to, the FCA should undertake this exercise, given the levels of industry concern and the significant implications of its proposals.

Bryan Cave Leighton Paisner LLP
17 February 2025

6 FSRC Report, para. 57

7 CP24/2, Part, 2, para. 5.42