AFB Association of Foreign Banks

AFB Response to FCA CP24/2 'Our Enforcement Guide and publicising enforcement investigations–a new approach'

The Association of Foreign Banks (AFB) notes the publication by the FCA of CP24/2 'Our Enforcement Guide and publicising enforcement investigations–a new approach'.

AFB represents non-UK headquartered banks operating in the UK. With around 170 members from across the world, we represent 75% of the UK's foreign banking market. Our members (operating via branches and subsidiaries) employ over 110,000 people across the UK.

Introduction

In our response to CP24/2, we first discuss AFB member concerns with the FCA's proposals to publicise enforcement investigations, including the potential damage to the UK's international competitiveness and the subject of an investigation, together with concerns about the practical inefficiencies of the proposals. We then highlight the approach of some other regulatory authorities. Finally, we make recommendations for the FCA to consider.

Overall, AFB members support the FCA's aims to improve transparency and update the Enforcement Guide. However, we believe that the FCA should not proceed with its proposals to publicise the name of an institution at the opening of an enforcement investigation. The proposals will not advance the FCA's statutory objectives and are inconsistent with its secondary objective to facilitate the international competitiveness and growth of the UK economy.

The proposals permit the FCA to announce publicly the opening of an investigation before it has concluded – meaning an investigation will likely be made public even if the conclusion results in no regulatory/enforcement action. This concern is heightened as the proposals do not include an evidential threshold and the statutory threshold for the FCA opening investigations is low.

AFB members have been unanimous in their feedback that the proposals on firm and individual disclosures should therefore not move forward. Instead, the FCA should continue to use its existing tools (such as Dear CEO letters, supervisory intervention, and thematic reviews), increase the speed and efficiency of its investigations, and only publicise details of enforcement investigations at an early stage on an anonymised basis in an 'Enforcement Watch' document.

AFB endorses the note published by Herbert Smith Freehills (HSF) (**here**), which was published on 26 March 2024. Our response expands on the comments made by HSF

focusing on the specific concerns of non-UK banks. AFB urges the FCA to reconsider its proposals in light of the universal industry criticism.

The comments below collectively form our response to questions 1-6 in CP24/2. The response also takes into account the discussion between AFB members and Steve Smart (Joint Executive Director, Enforcement & Market Oversight) and Anne Cosserat (Head of Department for Legal in Enforcement & Market Oversight), on 3 April 2024.

AFB Concerns/Issues Raised by Members

1. ***Damage to the UK's International Competitiveness***

AFB members believe that the FCA's proposal to publish the name of the subject of an investigation before any wrongdoing has been proven, and when it considers that its own 'public interest' test has been met, will cause considerable damage to the reputations of the affected firms as well as to consumers' trust in the UK's financial markets. Firms should be entitled to the legal concept of 'innocent until proved guilty'. However, even though the FCA proposes to include a statement that the publication "*should not be taken to imply that we have reached any conclusion that there has been a breach or other misconduct or failing nor determined what resulting enforcement action, if any, is appropriate*", it is highly likely that consumers and other market participants will believe that the FCA has only made the investigation public because it believes that the firm appears to be guilty of significant wrongdoing. In many cases this would be expected to lead to consumers and counterparties taking action to reduce their exposure to the firm under investigation, for example by withdrawing funds – thereby creating a prudential risk. It would therefore be extremely difficult for those firms affected to re-gain lost customers/business in a situation where the investigation was later closed after several years with no finding of wrongdoing. There is a real possibility that the firms' counterparties will cease to conduct business with them, which will have a damaging impact on the firm and its ability to operate. This harm will continue even in the event that no action is taken at the end of an investigation.

The FCA should note that the UK branches/subsidiaries of international firms undertake largely wholesale activity in the UK. Although many firms' presence in the UK may be smaller than in their home markets, they are an important part of UK financial services infrastructure. Any negative consequences of the FCA proposals – such as prudential risk – could therefore damage UK markets.

The negative effects of early publication will also be felt across the group. International banks often hold market leading positions in their home markets and are subject to a much higher degree of public and media scrutiny there. Since most AFB member home state regulators do not publish information about ongoing investigations into firms, the publication of such by the FCA is likely to get picked up by home state media and receive significant local attention, potentially resulting in a disproportionately negative impact

on firms' reputations in their home markets (and share prices if the firm has listed securities on a home state venue).

AFB members have advised that the heightened risk of reputational and prudential damage, and the lack of a clear strategy by the FCA to deal with enforcement cases efficiently and effectively will result in parent entities deciding not to expand their UK business and the diversion of investment away from the UK.

The FCA's proposed approach to enforcement would add to existing concerns regarding the attractiveness of the UK for non-UK headquartered firms. All these factors would be considered when their strategies for the UK are being reassessed. If the negative impact of these factors on the overall organisation is seen as disproportionate compared to the benefits of maintaining a UK presence, then these could result in changes to a firm's presence in the UK.

2. Damage to the UK's Domestic Competitiveness

AFB members have also highlighted the effect the FCA's proposals could have on competition within the UK. Publicly naming a firm under investigation could lead to consumers switching to a different firm even though the allegations have not been proven, which could be highly detrimental to the firm. Ultimately, should more firms fail as a result of publicised investigations, there would be a negative effect on consumer choice which would work contrary to the FCA's objective to promote effective competition in the interests of consumers.

3. Damage Resulting from Naming the Subject of an Investigation

In the context of the proposed public interest framework in paragraph 3.5 of CP24/2, the publication of the name of the subject of an investigation will not have a positive impact on the factors listed. There is an argument that publication may encourage potential witnesses to come forward and it could protect consumer interests in exceptional cases. However, in the overwhelming majority of cases, the potential benefit will be heavily outweighed by the negative impact on the subject of the investigation.

We believe the FCA is incorrect to argue that the other factors listed (public concern/speculation, reassurance, deterrence and its statutory objectives) would be positively impacted by publication. In short, the FCA should utilise its existing power to publicise the name of the investigated in the exceptional circumstances set out in EG 6.1.1 to EG 6.1.4 of the FCA Handbook. Its focus should be on improving the efficiency of its investigations (e.g. by setting itself a target of completing an investigation within 12 months). The FCA would achieve the greater transparency that it desires by progressing more quickly with its investigations and therefore publicising details of the wrongdoing more frequently and contemporaneously with the alleged wrongdoing.

AFB members also believe that the proposals could deter individuals from becoming Senior Managers as there is a higher risk of being linked to an enforcement investigation, even though a high proportion of cases are closed without a negative finding. Staff may also leave a firm, and others may not commence employment at a firm, if the FCA has publicised the opening of an investigation of that firm. This will impact smaller UK entities, in particular, and will make it more difficult for them to recruit staff in order to strengthen internal functions.

We note that, for privacy, data protection and human rights reasons, the FCA is proposing that it will not usually publish details of the opening of an investigation where the subject is an individual. However, if the name of the firm is published, this would lead to the identification of individuals. For example, an investigation into anti-money laundering processes, could highlight the MLRO as an individual being investigated. Third parties may wrongly assume the identity of the individual involved and the information could be disseminated, which could impact negatively on that individual's reputation and their ability to obtain employment elsewhere. This risk would be particularly acute for smaller firms, where they have fewer SMFs and therefore members of staff could be more easily identified.

4. Prudential Risk

The FCA's proposals would also be damaging for a firm which is the subject of an investigation. AFB members believe that in some cases there would be a prudential impact on firms if an enforcement investigation against it is announced. Capital, liquidity and funding would all be negatively affected. The impact would be more severe for smaller banks and/or those with a large retail presence.

This risk is exacerbated by the use of social media. The effects of social media on banks' capital and liquidity are evident. For example, last year, social media strongly contributed to a run on Silicon Valley Bank in the US, causing the bank (and its UK subsidiary) to fail. A market run and a firm failure would negatively impact the UK's financial market, damage consumers, and reduce domestic competition.

Given the prudential risk for firms, the FCA should in any event consult the PRA before any publication is made relating to an investigation into dual-regulated firms. As the PRA is responsible for safety and soundness in the firms it regulates, it should have the opportunity to consider the impact an FCA public announcement on opening an investigation may have on a bank's liquidity, share prices, and to the market. The PRA should have the power to veto an early publication.

Practical Inefficiencies of the Proposals

1. *Naming a Firm that Committed No Wrongdoing*

The FCA has stated that, in 2023/24, it closed 67% of cases without further action. We understand that it has been stated by one of the Executive Directors of Enforcement that two out of three investigations within the FCA's current case load would satisfy the proposed public interest test. This means that, under the proposals, we would expect that a material proportion of the firms named publicly by the FCA will in fact have committed no wrongdoing.

By way of illustration, if the FCA opens 100 investigations into firms in a year, it expects (based on its assessment of current cases) to name approximately 67 of those firms at the outset of the investigation. Of those investigations into 67 firms, applying historical data, 45 firms (i.e. 67%) will ultimately be found to have committed no wrongdoing and yet may well have suffered irreparable damage as a result of being publicly named by the FCA. This approach can therefore be seen to be both unfairly prejudicial to individual firms but also damaging to the international competitiveness of UK financial services and potentially undermining public confidence in the financial system.

2. *Consumer Confusion*

AFB notes that the FCA will consider an announcement or update to be in the public interest if it will protect the interests of customers/consumers and address public concern/speculation. However, we believe the proposals would not protect consumers and could, in fact, engender greater public concern and speculation. Investigations are complex and may cause confusion among consumers – a problem which would be compounded by the lack of detail provided by the FCA when publicising an investigation that has not yet concluded. In the absence of legislative change, which we understand is not proposed, the FCA will be highly restricted in what information relating to the firm's activities it can include in a public announcement (by virtue of the s348 FSMA criminal offence) – and in terms of how it is able to respond to public statements concerning the investigation made by the firm itself. It would also be difficult for the FCA to provide clarity or reassurance to customers, whilst the investigation is ongoing, given these restrictions. The proposed early publication could also trigger a flood of complaints (some of which may be motivated by opportunism rather than a genuine claim) and create an opportunity for claims management companies to seek to benefit from this by potentially 'front-running' any remediation measures the relevant firm may itself offer down the line.

3. *Impact on FCA Processes*

AFB members also query how the FCA will be able to ensure that any public announcement would not prejudice any internal/disciplinary investigation the firm may be pursuing.

Further, the proposed disclosure rules may negatively affect firms' willingness to maintain an open and transparent dialogue with UK regulators, because of a fear of being 'named and shamed'. Firms will of course comply with the regulatory notification requirements and the FCA's Principles for Businesses, but most firms have an ongoing dialogue with their supervisory teams that goes beyond mandatory notifications and disclosures, deriving from a sense of trust and an expectation of fair treatment. This more informal dialogue is important for firms to understand better the regulators' evolving expectations. We believe this dialogue is also important for the regulators.

Separately, AFB members query how the FCA would ensure a consistent approach to early publication, given decisions are to be made on a 'case by case' basis. The FCA would need to establish a clear framework for its decision-making, supported by a review of all publication decisions made, and providing clear rationale for those decisions, to prevent inconsistency, and there must be sufficient senior management oversight to ensure a consistent and fair approach is applied. The reasons would also need to be shared with the firm in order that it can understand the basis on which the FCA has made its assessment.

AFB members also consider that the proposed process has the potential for bias during the investigation. An investigator who has decided that it is appropriate to identify a firm may be reluctant to acknowledge that the firm has not been guilty of the suspected misconduct, or may be more inclined to extend an investigation for longer than necessary hoping that the decision to publish can be justified.

AFB members also note the statements made by the FSA in CP17 (published in December 1998), which set out its approach to enforcement investigations. The paper states:

"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.

There may, however, be exceptional circumstances in which a public announcement that the FSA is conducting an investigation is desirable in order to maintain public confidence in the financial system, protect consumers or to facilitate the investigation itself. This may be the case, for example, where the matters under investigation have become a matter of such public concern, speculation or rumour that it is desirable that the FSA should

make public the fact of its investigation in order to allay concern and contain the speculation and rumour."

We believe, for the reasons set out in this response, that the factors against early publication are still applicable in 2024. AFB believes that the FCA should not alter its approach to the publication of enforcement investigations.

The Approach of Overseas Regulators

The FCA references other authorities which it claims follow a similar approach on the timing of announcements such as the Monetary Authority of Singapore (MAS).

However, in the case of MAS, it has a "Communications Policy" for enforcement investigations (note: the text of section 7 of the MAS Enforcement Monograph can be found **here**). It also has a public interest framework, but, as noted by HSF, MAS only publicises the opening of its enforcement investigations infrequently, and generally where the subject matter is already in the public domain.

No other G7 country has the approach to enforcement that the FCA is proposing. For example, the United States Securities and Exchange Commission and the United States Commodity Futures Trading Commission investigations are not made public, and they will only publicise the outcome of an enforcement action.

Further, the French Autorité des Marchés Financiers does not publicise the opening of enforcement investigations and the details of investigations are kept confidential.

The Italian Commissione Nazionale per le Società e la Borsa and the German Bundesanstalt für Finanzdienstleistungsaufsicht, also (rightly) treat ongoing regulatory investigations as confidential.

Additionally, the Norwegian Financial Supervisory Authority (NFSA) does not routinely publish information on investigations, and any details will not usually reveal the subject of the investigation. When an investigation is complete, the NFSA does routinely publish the final report. Prior to issuing its final report, the NFSA issues a draft report to the firm for it to review and comment. Following the firm's submission of its comments to the draft report, the NFSA will produce and issue a final report, which is also disclosed to the firm prior to publication to allow it to request final redactions (e.g. with regard to confidential/business sensitive information) – a process which can take several weeks. If the final report is deemed market sensitive for a firm with listed securities, the firm's investor relation team will normally engage with the process to ensure proper coordination of relevant market disclosures. AFB members believe that this approach is best practice.

Further, the Canadian regulators OSFI (Office of the Superintendent of Financial Institutions, the prudential regulator), the FCAC (Financial Consumer Agency of Canada,

the federal consumer protection regulator) and Fintrac (Financial Transactions and Reports Analysis Centre of Canada, the AML regulator) do not publicise the opening of their investigations, they only publicise once they have reached a final finding. Even in this instance, OSFI will not usually publicise any details.

The Australian regulators also do not routinely announce the opening of an investigation. For example, the Australian Securities and Investments Commission (ASIC) does have the power to comment on an investigation when it is in the public interest to do so, but we are not aware of any instances of this being used to announce the opening of an investigation into a specific named firm. Further, where ASIC confirms the existence of an investigation, it will not usually comment further until the investigation has concluded. Additionally, the Australian Prudential Regulation Authority (APRA) does not discuss announcements of investigations commenced against firms (except on one occasion, where the matter was already in the public domain).

We also highlight an analysis by the law firm CMS (please see Annex 1) of overseas financial regulators' approaches to publicly announcing the commencement of an investigation. The analysis demonstrates that regulators in 23 of the jurisdictions surveyed do not publicly announce the commencement of an investigation.

Given that the regulators in other jurisdictions do not, as a matter of routine as is being proposed, publish details of their enforcement investigations before they have concluded, the FCA would be a regulatory outlier if it went ahead.

The Approach of Other UK Authorities

The FCA also references the approach of the UK Competition and Markets Authority (CMA) and claims it follows a similar approach on the timing of announcements. However, the FCA's proposals are not consistent with the CMA's approach. The CMA only publishes information before the conclusion of an investigation about material breaches once a decision has been reached on whether the issue represents a material breach. The CMA may also publish details of its enforcement action, but this is once a breach has already been found to occur (CMA **here**). Whereas the FCA is proposing that investigations may be made public even if they result in no enforcement/regulatory action.

We also note that, where the CMA proposes to issue a public letter in informal enforcement cases, it allows two weeks for the firm to provide representations before reaching a final view (CMA **here)**.

Further, in the circumstances where the CMA is permitted to make interim measures (including publication), the CMA must give written notice and provide the opportunity to make representations (**Competition Act 1998, 35 (3)**) – which is in contrast to the one-day (maximum) notice period that the FCA is proposing. Further, the CMA may not make

interim measures if this could affect competition (the CMA's mandate) (**Competition Act 1998, 35 (8)**).

If the FCA, after reconsidering the proposals as requested by the industry, remains of the view that the regular early publication of information on enforcement investigations is desirable, it should look at the UK Office of Financial Sanctions Implementation (OFSI) approach. Where OFSI is making a disclosure to highlight lessons for industry, it does not generally name the firm, and instead opts for anonymous announcements, except in exceptional circumstances. It also has specific procedural requirements to be followed (**here**).

In summary, OFSI (under the umbrella of HM Treasury) does not name firms under investigation and treats 'naming and shaming' as either part of the process of enforcement (naming the firm at the same time as announcing the financial penalty for sanctions breach) or as a standalone punishment (naming the firm being sufficient without the need for a monetary penalty). It does however now have the power to make a disclosure solely to highlight compliance lessons for industry, which may focus on an individual case or deal with several cases of a similar nature, thus allowing OFSI to highlight specific risks as well as broader trends which may make it easier for industry actors to comply with financial sanctions (paragraph 10.3). It is suggested that this compliance disclosure may well meet the objectives set out by the FCA in the consultation.

As the FCA will be aware, OFSI's power to publish was conferred recently under primary legislation (the Economic Crime (Transparency and Enforcement) Act 2022 amended the Policing and Crime Act 2017) and is set out in s149(3) of the 2017 Act as follows:

"*The Treasury may also publish reports at such intervals as it considers appropriate in cases where—*

(a) a monetary penalty has not been imposed under section 146 or 148, but

(b) the Treasury is satisfied, on the balance of probabilities, that a person has breached a prohibition, or failed to comply with an obligation, that is imposed by or under financial sanctions legislation."

The procedural requirements to be followed by OFSI (Enforcement Guidance **here**) include:

• OFSI considers whether disclosure is fair and proportionate (paragraph 10.2 OFSI Guidance)

• If a firm is to be named, OFSI gives the firm 28 working days' notice (which can be extended) and the opportunity to make representations

• After representations, if OFSI still intends to name the firm, OFSI shares the written case summary with the firm to ensure factual accuracy

Further, OFSI will not always name firms:

• "*Where a Disclosure is made solely for the purpose of highlighting compliance lessons for industry and the breach is considered to be of lesser severity, OFSI will not usually identify who performed the breach*" (paragraph 10.10, OFSI Guidance, **here**). In this instance OFSI will inform the person of its intention to make a Disclosure but will not invite representations.

For OFSI, there is also an evidential test that must be satisfied before disclosure based on the civil liability test i.e. there has to have been, on a balance of probabilities, a breach before disclosure is made.

AFB is concerned that the FCA's proposals do not currently include an evidential threshold in conjunction with the public interest test – as per OFSI's approach. This concern is heightened as the statutory threshold for the FCA opening investigations is low – pursuant to the FCA's statutory test, there only needs to be circumstances suggesting that a firm may have breached one or more of the FCA's rules (including Principles for Businesses), or may be guilty of certain offences, in order to open an investigation. The FCA can also open more general enforcement investigations under s.167 FSMA where there is no suggestion of a specific breach or contravention, but the FCA has good reason to be concerned about a firm.

Absent an evidential threshold, there is the risk of malevolent actors / disgruntled employees / competitors making allegations to the FCA in an attempt to trigger the naming of a firm. Whereas the inclusion of an evidential threshold would ensure that publications are focussed on genuine, stronger cases thus ensuring that there is no early announcement of many of the 67% of cases which currently conclude without regulatory, civil or criminal action.

Recommendations

1. ***Retain Anonymity and Create an Enforcement Watch***

AFB recommends that the FCA retains anonymity for the subject of an investigation as a presumption. The FCA should also ensure that any publication does not allow the subject of an investigation to be identified.

AFB members believe that the FCA's aims could be achieved (without removing anonymity) in ways that would be more efficient and less damaging to the industry than the proposals within CP24/2.

It is unlikely that a short publication envisaged by the FCA, limited by virtue of Section 348 FSMA, will contain sufficient information to act as a deterrent or to educate firms.

Instead, we suggest that alternative approaches could be adopted to highlight areas of concern to the FCA in relation to conduct by firms, including issues that have been referred to Enforcement for formal investigation. These could be included in periodic portfolio letters that the FCA sends to all firms within particular sectors of the industry. We believe that this would be the most effective way of guiding the industry towards better standards and being impactful in deterring poor standards of conduct.

Alternatively, if the FCA wishes to focus only on matters that have been referred to a formal investigation, it could consider the creation of an 'Enforcement Watch' publication (similar to Market Watch). In this document (published on a regular basis), the FCA could publish the type of firm under investigation and the relevant product/service as a way of providing insight to consumers and industry of the areas under investigation. We believe that this would increase awareness of areas of concern and contribute to deterrence. The fact that the subject is not named (except in exceptional circumstances as is already the case) would allow the FCA to publish more details of the case in question than the limited amount envisaged under the FCA's proposals. This would be fair for all parties whilst supporting all of the policy drivers set out in CP24/2 (reassurance, educating and deterring, encouraging whistleblowers as well as driving the FCA's accountability). Specifically, (a) the FCA would be able to demonstrate that it is particularly focused on a specific issue; (b) it would encourage regulated firms to review their own controls in that area; and (c) it would be used as a tool to educate and establish awareness in an area of concern.

2. Utilisation of Existing Powers

The FCA already has broad powers which can be utilised, and we would encourage the continued use of these. It is not clear in CP24/2 why an early public announcement would be more effective than existing tools such as thematic reviews, supervisory intervention and Dear CEO letters.

3. Improve Efficiency of Investigations

In general, AFB is concerned that the FCA's proposals will increase the time spent on investigations – rather than improving efficiency. AFB also understands the FCA's concern that the delay between opening an investigation and a final determination means the opportunity to learn is lost or delayed. AFB members therefore recommend additional FCA resources are deployed to speed up investigations which would mean that information is published closer in time to the alleged wrongdoing. We recommend that the FCA adopts the target that investigations should be concluded within 12 months. This would ensure firms are able to learn lessons from investigations that have resulted in regulatory/enforcement action soon after the investigation was opened.

4. *Implement Tests and Objective Criteria*

If, in spite of industry feedback, the FCA decides to proceed with the proposal to publicly announce the opening of an investigation, and the naming of the subject of that investigation, the FCA should implement further tests and criteria, in addition to the public interest test, as follows:

- The FCA's decision-making should be fair, transparent and reasonable but it is not clear how that can be achieved if decisions are taken by reference to a broad and subjective public interest framework, which seems to exclude a number of important factors, such as the nature and degree of detriment to the firm or individuals indirectly named through the publication. Accordingly, similarly to OFSI, there should be an exhaustive list of objective criteria that the FCA should take into account before making a public announcement.
- The FCA should, similarly to OFSI, include an evidential test, to ensure fairness and consistency, alongside a revised public interest test.
- The FCA should also take into account (as a primary factor) the potential detriment to markets, firms and consumers. No publication should be made if there is potential for damage in these areas.
- Further, the FCA should also undertake a reasonableness/proportionality test i.e. the public announcement must be a reasonable and proportionate response taking into account the severity of the alleged and the sufficiency of the evidence.

Without the above additional tests, the FCA's new proposed 'public interest' criteria would be vulnerable to judicial challenge, as would individual assessments made by the FCA in particular cases. There would also be a significant increase in the number of cases referred to the Upper Tribunal, as firms are more likely to contest cases (rather than settle at an early stage) if an investigation that was unsubstantiated had entered the public domain some time ago and had become 'old news. If their name has already been publicised they have little to lose by referring the matter to the Tribunal. This would result in regulatory resources being spent on Upper Tribunal cases and a longer period for firms to wait before the FCA reaches an outcome.

5. *Allow Sufficient Time for Representations*

The proposal to provide the subject of the investigation with *"no more than 1 business day"* notice is extremely short and does not allow time for representations and meaningful discussion on the publication. Further, this would not allow sufficient time for the branches and subsidiaries of non-UK headquartered banks to liaise with their parent entities. We would also remind the FCA of the statutory limitations on how it can act. Namely, it cannot publicise a warning notice without the opportunity for the recipient to make representations. Warning notices are published following an investigation. Not

having the same protection for publications at the beginning of an investigation, when it could be closed with no action, is concerning. AFB therefore recommends that the notice period should be a minimum of 28 days (in line with the notice period given by OFSI). This would allow the subject of an investigation time to prepare and make representations. This notice period should have the possibility of extension (as permitted by OFSI). After representation, if the FCA still intends to name the subject of an investigation, a written case summary should be shared with the subject in advance of publication.

6. ***Consider the Detriment to Individuals Being Named***

AFB members are concerned that, under the proposals, there could be circumstances where the FCA would decide to name an individual. However, the risk of prejudice to internal disciplinary proceedings against an individual will be greater if he/she is named. We would therefore recommend the FCA also consider, before any publication of the name of an individual, the detriment individuals can suffer, the impact of Article 6 (right to a fair trial) and Article 8 (right to privacy) of the ECHR, as well as GDPR.

Conclusion

The feedback in this response demonstrates how the FCA's proposals would damage the international competitiveness of the UK. The increased likelihood of reputational damage and prudential risk will add to firms' existing concerns regarding their operations in the UK and could result in a reduction in the presence of international firms in the UK.

Further, as set out above (and in Annex 1), overseas regulators do not take the approach the FCA is proposing. Accordingly, the FCA would be a regulatory outlier and not a front runner if the proposals were adopted.

For these reasons, based on the comments made above, we would urge the FCA to revisit its proposals and consider the recommendations we have put forward.

We would be happy to arrange a further roundtable with AFB members to discuss our response.

April 2024

Rebecca Simons

Senior Associate, Policy & Regulatory Affairs

Rebecca.simons@foreignbanks.org.uk

Andrew Brooke

Director, Policy & Regulatory Affairs

Andrew.brooke@foreignbanks.org.uk

Annex 1 – CMS Analysis of Overseas Financial Regulators' Approaches to Publicly Announcing the Commencement of an Investigation.

FCA ENFORCEMENT PUBLICITY CP24/2

JURISDICTIONAL RESPONSES

Note: this information has been compiled from CMS offices worldwide (or from other firms where there is no CMS office) who were asked to respond to the question whether the financial regulator in that jurisdiction publicly announced the commencement of an investigation.		
Jurisdiction	**Public announcement of investigation?**	**Additional information provided with the response**
1. Austria	No	The Austrian Financial Market Authority ("**FMA**") would not routinely announce that it commences investigations against an institution under its supervision. As a general rule (and unless there is a specific basis for acting otherwise), the FMA would rather be restricted by law from making such announcements. The following exemptions to this rule seem to be noteworthy: • Information of the public about certain (rather severe) regulatory measures adopted, e.g. where the distribution of profits or capital has been prohibited, where the continuation of business has been prohibited or where a receiver-type manager has been appointed. This is a right (not an obligation) of the FMA and will usually refer to situations where severe irregularities have been detected that represent a threat to bank creditors and/or where the bank is close to resolution or a withdrawal of its license. By its very nature, this would not refer to the beginning of an investigation,

		but implies that certain regulatory measures have already been taken in reliance of the results of previous investigations (but may of course be at the beginning of further investigations, taking account of the new circumstances). • The right of the FMA (of which it frequently makes use) to warn investors about unlicensed service providers (informing about the fact that a certain person or entity is not entitled to conduct a certain licensed financial services activity). This would, however, concern unlicensed and unsupervised entities, not entities already under supervision; • "Naming and shaming" provisions (most commonly having an EU law background). Those provisions, however, would mostly apply *after* a certain sanction has been imposed on that institution (i.e. representing the result rather than the beginning of an investigation).
2. Australia	No	Regulators take slightly different approaches in relation to the publication of information around investigations commenced against firms, but other than the Australian Transaction Reports and Analysis Centre ("**AUSTRAC**") do not routinely or regularly publish such investigations. **ASIC** The Australian Securities and Investments Commission ("**ASIC**") is Australia's integrated corporate, markets, financial services and consumer credit regulator. ASIC's Information Sheet 152 ("**Info 152**") indicates that ASIC may comment on an investigation when it is in the public interest to do so. Info 152 also sets out the factors that ASIC will consider in determining whether it is in the public interest to comment. Info 152 also indicates that: • where ASIC confirms the existence of an investigation, it will generally make no further comment until the investigation is concluded; and • ASIC will only provide updates on the progress of the investigation if it is in the public interest to do so. We note that Info 152 does not deal with the announcement of an investigation (as opposed to commenting in relation to an ongoing investigation), but in our view the same principles will apply.

		For the sake of completeness, we note that ASIC indicates the number of investigations commenced and ongoing during a 6 month period as part of its summary of enforcement actions, but we are not aware of ASIC announcing the commencement of specific investigations against specific firms as a general practice. They will from time to time indicate that they are undertaking industry-wide surveillance on particular issues. **APRA** The Australian Prudential Regulation Authority ("**APRA**") is Australia's prudential regulator of banks, insurance companies and most superannuation funds. APRA's Enforcement Approach ("**APRA Enforcement Approach**") indicates that APRA will publicise the enforcement actions it takes on a case by case basis. However, APRA will typically make public announcement in the following circumstances: • administrative enforcement actions taken by APRA, such as formal directions and licence conditions or infringement notices; • acceptance of an enforceable undertaking received from a regulated entity or an individual; • disqualifications of accountable persons under the Bank Executive Accountability Regime, or other responsible persons under the prudential framework; and • court-based enforcement actions commenced by APRA. While the APRA Enforcement Approach does not specifically discuss announcements in relation to investigations commenced against firms (and which generally initiates a potential enforcement action), it has on at least one occasion announced the commencement of an investigation and have also commented on it as ongoing investigation. However, we note that this related to a matter which AUSTRAC had already announced that it was conducting an investigation so this does not reflect APRA's normal practice. **ACCC**

		The Australian Competition and Consumer Commission ("**ACCC**") is Australia's national competition, consumer, fair trading and product safety regulator. The ACCC Media Code of Conduct ("**Code of Conduct**") outlines the ACCC's approach in relation to publication of enforcement actions (including investigations). According to the Code of Conduct, the ACCC will refrain from commenting on its investigations, unless it is in the public interest to do so. The ACCC will take a range of factors (specified in the Code of Conduct) into account when considering whether making a statement about an investigation is in the public interest. Although the ACCC publishes the inception of public inquiries (for example the public inquiry into telco services) we are not aware of any specific publications made by the ACCC in relation to an investigations commenced against firms in the sense referred to in your email below. **AUSTRAC** AUSTRAC is the Australian government agency that oversees anti-money laundering and counter-terrorism financing laws and regulations in Australia. AUSTRAC has not published its enforcement approach, however it will from time to time announce the commencement of investigations, see for example this media release.
3. Belgium	No	The details of investigations started against firms are not announced.
4. Brazil	No	Financial and payment institutions are regulated and supervised by the Central Bank of Brazil ("**BCB**"), and the capital (stock) market, by the Securities and Exchange Commission of Brazil ("**CVM**"). Some institutions, such as securities brokers, are supervised by both authorities. According to Supplementary Law No. 105/2001 (Banking Secrecy Act), neither the BCB nor the CVM may disclose the information they obtain during the supervisory work, regardless of type, except when justified by law/regulation or through a court order. Thus, these authorities will not disclose to the general public when they start investigating an institution. However, they can and often do mention to the public that they are

		investigating specific themes, without mentioning any institutions or individuals by name. Law No. 13.506/2017, which regulates administrative penalty procedures conducted by the BCB and CVM, does allow for the decisions handed down in the sanctioning proceedings to be published, along with the final judgment, and including general dispositions when institutions choose to enter into a term of commitment to avoid heftier fines. Details of the investigations that led to the decision/term, however, as well as the documents annexed to the procedure, are kept confidential. It must be noted that the penalty procedures start only after the investigative procedures finish. Thus, in most cases, the general public will not even know that an institution was investigated, because most procedures do not end in prosecution.
5. Canada	No	There are a number of regulators that could be in play, and they have different approaches. **OSFI** (the prudential regulator), the **FCAC** (the federal consumer protection regulator) and **Fintrac** (the AML regulator) do not publish anything until they have reached a final finding (and in OSFI's case, usually not then either), whereas the Competition Bureau and securities regulators might or might not announce an investigation, depending on the circumstances.
6. Czech Republic	No	The Czech National Bank ("**CNB**") does not publicly announce details of investigations started against firms. CNB has its internal plan of on-site inspections, but this is not publicly available. Usually the respective firm is notified a few weeks before the on-site inspection, but this is not publicly available information. After the inspection is finished, the inspections results are published by the CNB on its websites.
7. France	No	The **AMF** does not advertise this. In extreme cases, it may leak to the market that it is in fact investigating but there are no public announcements.
8. Germany	No	1. The BaFin (Federal Financial Supervisory Authority) publishes certain measures it imposes on institutions or managing directors. It publishes on its website every unappealable fine decision and every measure, that has become final and that has been issued due to an

		infringement of certain regulations. The type and nature of the offence are also published. Anonymous publication of the decision may be necessary for reasons of data protection or proportionality. 2. If and as long facts justify the assumption or it is established that a company is conducting unauthorized banking business or providing financial services, the BaFin informs the public of this suspicion or this finding, stating the name or company. Investigations against the suspected companies are also published in this context. Additionally, the BaFin publishes its formal prohibition orders on its website. However, the company must be heard prior to the decision to publish the information in order to verify the claims. These publications are intended to uncover fraudulent banking transactions and serve, among other things, to protect consumers.
9. Hong Kong	No	It is not the practice of the Hong Kong Securities and Futures Commission ("**HKSFC**") to publicly announce an investigation. In fact, there is a statutory provision in the Securities and Futures Ordinance which requires all persons assisting a HKSFC investigation to maintain secrecy (secrecy provision here). Sometimes the HKSFC do publicly announce the fact that an investigation has been commenced / is ongoing. This is mostly done in cases where there is a keen public interest (for example, because there is a large number of fraud victims) or where the investigation is already public knowledge (for example, because a high profile raid has been conducted or related enforcement actions have already been taken). A recent example can be found here against two former directors.
10. Hungary	No	As a general rule, the financial regulator does not announce neither the mere fact of starting an investigation against a regulated entity, nor the details of any such investigation. The only exception is that in a market surveillance procedure (i.e. when unauthorised services or any market abuse is suspected) the regulator may order, as a temporary measure, to prohibit access to electronic data. This measure will be published on the website of the regulator and it may imply to the public the starting of an investigation.

11. Italy	No	There is no such rule or practice and we note it may give rise to a lot of issues including possible claims for damages by investigated firms against the regulator in case such announcements cause reputational issues or even loss of business or decrease of their shares value and eventually no violations are found. Normally the result of investigations (and relevant sanctions) is disclosed only once they are concluded.
12. Ireland	No	The Central Bank of Ireland (the "**Central Bank**") does not publicly announce details of investigations commenced against firms. We are not aware of any intention of the Central Bank to change its approach. The Central Bank regards all investigations as confidential, and all information and material related to an investigation as confidential information. When an investigation is commenced by the Central Bank a notice of investigation is issued to the firm or individual who is the subject of the investigation. Once the investigation phase is complete, and a decision is made to hold an inquiry, the details of the notice of inquiry (which includes details of the suspected prescribed contravention), however, are made public and are published on the Central Bank's website. Where there is an early resolution by way of settlement, the details of the enforcement actions concluded by way of settlement will also be made available on the Central Bank website.
13. Israel	No	There is no provision in the law which imposes an obligation on the Israel Securities Authority ("**the ISA**") to publish information to the public as soon as it opens investigative procedures against entities. However, the ISA is obliged to publish on its website information concerning enforcement measures it has decided to impose on entities, and information regarding Arrangements (as will be detailed below). As a general rule, according to Section 9B of the Securities Law, 1968 (the "Law"): "*The Authority [ISA] will publish its decisions which it believes are of fundamental importance*". The ISA has an Administrative Enforcement Committee, consisting of six members, whose role is to discuss and

		decide how to treat violations relating to securities. According to section 52 of the Law, if the chairman of the ISA has reasonable grounds to believe that an act or omission has been committed, for which a criminal investigation or administrative investigation can be held, it will decide on holding such investigations in accordance with specific considerations listed in the Law. According to section 52ma, if the chairman of the ISA believes that a violation has been committed, it may decide to open an administrative enforcement procedure and appoint a panel of the Administrative Enforcement Committee to discuss that violation. According to section 52na of the Law, the decision of the panel at the end of the enforcement procedure will be in writing and will be sent to the violator. Under Section 52nb of the Law, if a panel finds that a violation has been committed, it may impose on the violator one or more of the enforcement measures specified in the Law (for example, a financial sanction, payment to the victim of the violation, taking actions to cure the violation and prevent its recurrence, canceling or suspension of a license or permit, etc.). Subject to certain limited exceptions, under section 54c of the Law, the ISA is required to publish on its website each of the following cases: (i) Notice of entering into an arrangement to avoid taking proceedings or to stop proceedings, subject to conditions ("Arrangement"); (ii) Notification of the violation of an Arrangement by a suspect; (iii) Notice of taking proceedings against a suspect who violated a condition of the Arrangement.
14. Luxembourg	No	The regulator would definitely announce a theme for investigation (e.g. internal governance, AML, MiFID, ESG) but would not announce that it will be investigating X or Y firm on a specific subject. This would not be public information. However, the investigated firm would be forewarned in case of an on-site inspection as to the subject of this on-site investigation.
15. Monaco	No	The Monaco Financial Regulator (the "**CCAF**") does not disclose information to third parties about pending enquiries. The only information disclosed is the CCAF

		decision (sanction) against entities (nothing automatic about it). This is published on the regulator's website.
16. Netherlands	No	The Dutch financial regulators (**DNB** and **AFM**) do occasionally announce market-wide investigations they commence (so for example an investigation under all payment services providers in the Netherlands or under payment services providers randomly picked whether they comply with certain AML/KYC requirements), but the Dutch financial regulators do not announce investigations it commences against a specific financial institution. Normally publication by the Dutch financial regulators will in principle take place as soon as an enforcement decision following such specific investigation has become irrevocable.
17. Norway	No	The Norwegian Financial Supervisory Authority ("**FSA**") (the sole financial regulator) does not routinely announce details of investigations started against firms. The FSA is subject to freedom of information-related regulations which in practice make the *existence of an investigation* public. The details will usually be subject to a relevant exception, making only the title, date and recipient (and certain other metadata) public. There are exceptions to this, but in general the metadata is published in the electronic repository of all official correspondence a few business days after sending a letter, and the metadata will usually reveal the initiation of an investigation. While the details may vary, the metadata will usually not reveal *any details on the subject matter of the investigation*. The FSA routinely publishes the *report* of an investigation in full (with certain details redacted) when the investigation is complete. The press will from time to time through freedom of information requests receive intermediate documents and focus on the investigation before completion.
18. Peru	No	The banking regulator (**SBS**) and also the capital markets regulator (**SMV**) do not make public statements in regards of ongoing investigations, those are treated with reserve. Once there is a final resolution, they issue the statement and published the corresponding sanctions, etc.
19. Poland	No	Such proceedings are – as a rule – covered by the professional/administrative secrecy (i.e. the Polish FSA is not informing the whole market about such proceedings

		in order to avoid the situation where the rules on the professional/administrative secrecy would not be followed; sometimes – i.e. in the cases where the Polish FSA is of the opinion that the criminal offences may be involved – the Polish FSA is not even informing the financial institution being directly engaged about the PFSA`s actions and the proceeding itself). At the same time the situation when there would be the public disclosure about the investigation is permissible but it is used very rarely (there was one case in which such public disclosure has been made in order to protect the Polish capital market).
20. Singapore	Yes  Enforcement Monograph Final Rev	While the MAS routinely announces enforcement actions following the conclusion of investigations, its approach to announcing investigations which are yet to be concluded is more nuanced. The abiding principle appears to be whether it is in the public interest in making an announcement of an investigation, and it will also consider whether an announcement will jeopardise the investigation or prejudice court proceedings. The MAS' approach to announcing investigations is set out in section 7 of the attached *Enforcement Monograph*. There is no publicly available data (as far as we are aware) on the number of investigations which have been announced by MAS prior to their conclusion, although these will generally be on the "News" section of the MAS website. In the ten years from January 2014, MAS announced the start of nine separate investigations into individual firms, groups or connected individuals. In relation to enforcement actions, MAS' enforcement monograph states that MAS will not announce *every* enforcement action (s. 7.10 of the monograph). Empirically, the announcement of investigations which are ongoing and not yet concluded is rare, and is not something which the MAS routinely does. MAS does publish an Enforcement Report every 18 months (or so). There have been four reports issued to date, and the latest two reports contain status reports of "Major Ongoing Cases", so will supplement any announcements of investigations which are yet to be concluded. MAS mentioned four ongoing investigations in its Jul 2020 – Dec 2021 Enforcement Report as "major" ongoing cases, suggesting what type of investigations are announced.

		Further, MAS' latest Enforcement Report states that 136 cases were opened between January 2022 and June 2023, of which we see that only one was announced. None of these nine investigations is solely MAS-led but is a joint investigation with the Police or with the Commercial Affairs Department (CAD) which is a department of the Singapore Police Force.
21. South Africa	Yes	The financial services regulator, the Financial Sector Conduct Authority ("**FSCA**") takes the approach of announcing the investigations that it commences against entities. In addition, it provides periodic updates on the status of its investigations. Investigations are announced on this webpage as well as public warnings. However, there is only one investigation commencement announcement since the start of 2020 (link). A similar approach is followed by South Africa's data privacy regulator, the Information Regulator of South Africa.
22. Spain	Yes	Yes, the Spanish securities regulator (**CNMV**) is entitled to announce the enforcement proceedings it has initiated, to the extent there are reasons for doing that. Article 336 of the Spanish securities markets law reads as follows (Deepl translation into English): **Article 336. Publication of resolutions to initiate sanctioning proceedings.** The CNMV may make public the resolutions to initiate sanctioning proceedings once they have been notified to the interested parties, after deciding, where appropriate, on the confidential aspects of their content and after dissociating the personal data referred to in article 4.1 of Regulation (EU) No. 2016/679 of the European Parliament and of the Council of 27 April 2016, except with regard to the names of the offenders. Publication shall be decided after a sufficiently reasoned balancing of the public interest, taking into account the overall favourable effects on the improved transparency and functioning of securities markets and the protection of investors, against the detriment caused to the offenders. Announcements • 11 January 2024, CNMV disclosed that they were investigating Deutsche Bank for some mis-selling of

		complex financial products to Spanish clients (please find attached the English language statement in case helpful. Copy in column to the left). • 8 November 2023, CNMV disclosed they will bring disciplinary proceedings against Miolo Desarrollos, stating this has been announced as it is the first disciplinary case to be opened for non-compliance regarding regulating the advertisement of cryptoassets. • 11 July 2023, CNMV issued proceedings against two individuals – not named – part of Grupo Ecoener for financial assistance in Group's floatation. • 23 February 2021, CNMV agreed to initiate disciplinary proceedings against Abengoa and the members of its Board of Directors.
23. Switzerland	No  fedlex-data-admin-c h-eli-cc-2008-736-20	As a general principle, FINMA is bound by law to keep official matters secret (art. 14 FINMASA, attached). However, art. 22 FINMASA provides for the rules related to information, to be made available to the general public by FINMA related to "proceedings". Furthermore, FINMA has published the following related thereto: (i) General Information (ii) On enforcement proceedings (iii) Rulings (iv) Case Reports and (v) Court Decisions.
24. UAE	No	None of the main UAE regulators (Central Bank, DFSA or FSRA) routinely publish details of ongoing investigations.
25. Ukraine	No	Normally, such investigations are not announced publicly, unless the issue is of particular public importance and/or was initiated by a public association or group. It is quite a rare practice for the Ukrainian financial services regulator – the National Bank – to publicly announce its investigations of alleged violations. At the same time, it is worth mentioning that the regulator publicly announces its intentions and specifies the financial institutions it will inspect annually to ensure regulatory compliance on the financial market, applying a risk-oriented approach.
26. USA	No	Generally, **SEC** and **CFTC** investigations are non-public. The SEC, for instance, may call or send an email, asking

		for documents or to speak. They may also send a subpoena, which will be non-public / confidential. Generally, the public will find out only if someone leaks the information or if there is an action filed or an announced settlement. They will publicise the outcome of an enforcement action on their websites.