THE FRAUD
LAWYERS ASSOCIATION

Review of enforcement decision-making at the financial services regulators: call for evidence

This response is filed by the Fraud Lawyers Association ("the FLA"), an organisation established in 2012 to educate and train its members in all matters relating to their practice as fraud lawyers. Its membership consists of solicitors and barristers who practice mainly in the area of criminal and civil fraud: www.thefraudlawyersassociation.org.uk/.

Question 1: ***Do concurrent enforcement processes and supporting institutional arrangements provide credible deterrence across the spectrum of firms and individuals potentially subject to the exercise of enforcement powers by the regulators? If not, what is the impediment to credible deterrence and where does it arise?***

We see no reason in principle why the bifurcated nature of the enforcement process should, in itself, impede deterrence; provided that the regulators abide by their intention to "*seek to avoid taking regulatory actions that are incompatible or even in conflict*" (para.45 of the MoU).

Deterrence is in our view more likely to be undermined if either regulator's approach to enforcement were seen to be arbitrary – for example, if enforcement decisions were not consistent with past decisions or with stated policy.

Question 2: ***Are the criteria for referring a case from the FCA supervisory function to the enforcement function clear and used appropriately? Are all key criteria identified? If not, what improvements could be made? Should the FCA give certain factors more weight than others?***

We consider the FCA enforcement referral criteria to be reasonably clear.

We suggest that fairness in the application of the criteria to individuals and to firms might be improved if Criteria 2 and 11 expressly required consideration of the likelihood of parallel criminal law enforcement by a body other than the FCA and/or (where the suspected misconduct involves an overseas jurisdiction) parallel regulatory enforcement overseas. In some of our members' experience there is a lack of co-ordination between regulatory and law enforcement agencies in practice. For example, one of our members has been involved in a case which was being pursued by the CPS with FSA involvement, in which neither body had considered, for disclosure purposes, the material being held by the other.

Taking account of the potential impact of other forms of enforcement action, at the earliest stage, would in our view also further the objective of enforcement efficiency.

Referrals have potentially grave consequences for both firms and individuals, but perhaps particularly so for individuals. Whilst we would not support the application of different referral criteria to individuals, we would like to see more emphasis on ensuring fairness for individuals in the enforcement process generally.

Question 3: ***Should the PRA say more publically about its enforcement processes? In particular, should the PRA publish enforcement criteria?***

We see no reason in principle why the PRA's enforcement criteria should not be published in the same way as the FCA's enforcement referral criteria are. Publication of enforcement criteria could help to demonstrate that the regulator's approach is consistent.

Question 4: ***Are the enforcement sections of the FCA/PRA MoU being applied in practice? If not, please give specific examples of implementation deficiencies.***

We are not in a position to comment on the application of the MoU in practice but we do not foresee any obvious "implementation deficiencies" if both regulators approach their enforcement functions in accordance with the MoU, beyond the potential for duplication of effort in separate investigations.

Question 5: ***Is the MoU the most effective way to deliver effective co-ordination? If not, what alternative mechanism should be developed for enforcement cases?***

The effectiveness of the MoU will be borne out in practice and the question will need to be revisited once its operation can be properly assessed. We would not, at this stage, like to propose any co-ordination mechanism as a more effective alternative than the MoU.

Question 6: ***Do any suggestions for improvement or reform relate to the referral stage, the investigation stage, the decision making stage or all three stages?***

The length of the investigation stage is a particular concern for us. The potential for the length of investigations to operate as the reason why firms and individuals choose to settle (as discussed below in response to question 12) is not, in our view, fair and is potentially open to abuse by the regulators.

Of further concern is the general lack of disclosure during the investigation stage. If decisions to settle are not informed decisions, they cannot be considered fair. More importantly, if representations are to be of any value they need to be based on a reasonable understanding of the regulator's position.

In the interests of fairness we would like to see more willingness on the part of the regulators to engage with firms and individuals throughout the investigative stage, by disclosing not just any changes to the scope of the investigation but also by disclosing sufficient information and material to enable firms and individuals to understand their positions. Enabling representations to be made on an informed basis could also improve enforcement efficiency, in that it could assist the regulators to focus their investigations and to target investigatory resources.

Publication at the Warning Notice stage has altered the dynamic of the process and disclosure obligations on the part of the regulators should therefore also be triggered at an earlier stage in order to avoid information being published in a Warning Notice which might be damaging and misleading.

Although it is too early to test whether the system has led to a change, it appears to us that, where the Warning Notice has been published the FCA are less likely to agree to an alternative set of facts or, indeed, that they were wrong.

Finally, disclosure obligations on the part of the regulators may ultimately be of limited value as a means of ensuring fairness in the enforcement process unless there are clear penalties for non-compliance.

Question 7: ***Is the scope of investigation made sufficiently clear to those subject to them?***

We understand that the experiences of those subject to investigations by the FCA vary considerably in this regard. Indications of the initial scope are in any event of limited value, given that the scope is liable to change during the course of the investigation with little notice or reason given.

In our view, transparency is the key way in which the regulators can demonstrate the fairness of the enforcement process. Keeping firms and individuals informed of the scope of the investigation is a necessary, but not sufficient, aspect of transparency.

Question 8: ***Should the regulators offer the opportunity for regular progress meetings during the investigation?***

We would welcome regular progress meetings as an improvement to the fairness of the enforcement process, provided that such meetings would involve proper disclosure of the state of the investigation. Furthermore, scoping meetings and similar meetings are only effective if those representing the regulators are also decision-makers.

We also see a real benefit to the regulators, if progress meetings improve enforcement efficiency by focusing minds on the progress of an investigation and enabling all relevant information to come to the fore at the earliest possible stage.

Question 9: ***Are there sufficient opportunities for individuals and firms to make representations?***

There are currently, in our view, insufficient opportunities for informed representations to be made at the stage at which they could potentially be of the most assistance. The regulators should in our view be more prepared to provide disclosure, whether at regular progress meetings or otherwise.

Question 10: ***Does the time allotted for making representations strike the right balance between fairness and speed?***

The reasonableness of the 28 days allotted for making representations in response to a PIR, and the reasonableness of the deadlines imposed during settlement negotiations or in response to Warning Notices, will vary from case to case. Although potential unfairness could be addressed by the grant of

extensions, it should perhaps not be left to the discretion of the regulators without proper assurance that the discretion will be exercised responsibly. The 28 day timetable should also be assessed in light of the often very lengthy investigations that have gone before. In many cases it is impossible to test the FCA's case within the permitted time period – in particular for individuals, who may not have access to relevant material or the resources to challenge the findings within the time available.

Question 11: ***Should the regulators publish factors they will take into account when considering whether to grant extra time?***

In our view, publishing these factors would help to demonstrate consistency in regulatory decision-making.

Question 12: ***Settlements are faster and more efficient than exhausting the decision making process. They often deliver fairness to consumers by providing earlier opportunity for redress. Is it appropriate to give a discount for early settlement? Should there be any types of case where such discounts are not available? Could the settlement process be changed to offer clear incentives to settle after the time limit for receiving a 30% discount has expired? Do you agree with the incentives given?***

In our view there are no cases where the discount should be withheld as being inappropriate.

We agree with the offer of a discount as an incentive to settle early, whilst mindful of the fact that it may not always operate as the most significant incentive – for example, the anticipated length of the process might in certain circumstances operate as effectively as an incentive to settle early. We also note that the 30% settlement discount leads to commercial decisions rather than fair ones.

There are of course still incentives to settle available after the expiry of the time limit for the full 30% discount – including, in an exceptional case, the full 30% (for example, where the nature of the FCA's case has fundamentally changed). We consider this to be a sensible scheme and would be wary of altering it.

Question 13: ***Do the current approaches to settlement also deliver fairness to firms and individuals subject to enforcement action, bearing in mind that settlement is a voluntary process? If not, what improvements could be made better to balance the interests of all parties?***

Whilst settlements might achieve deterrence, a negotiated outcome will not necessarily be perceived as fair by those subject to enforcement action, and/or by interested third parties and consumers. As already noted above, the incentives to settle may be unrelated to the merits of the regulator's case. In our view, the potential unfairness of the outcome in settled cases makes it all the more important for robust disclosure obligations and other safeguards to be in place at the investigatory stage in order to ensure the fairness of the enforcement process overall.

In this context we also note that settled cases may not be the best sources of guidance to individuals

and firms on the content of their regulatory obligations. It might be considered unfair for individuals and firms to settle based on the regulator's interpretation of the law, which has ultimately not been tested by the courts. It might, equally, be considered unfair for other regulated individuals and firms to base their compliance efforts on what may be a misleading picture of the underlying facts. This is not, in our view, an argument in favour of dispensing with settlements but rather an argument for more careful wording in Decision Notices where a case has settled.

Question 14: ***Since the changes made by the FSA in 2005, FCA executives make early settlement decisions and the RDC takes the decisions on the issue of statutory notices in contested cases. How does this compare with the PRA's executive-based approach? Could further changes be applied to either regulator's processes to improve the balance between fairness, transparency, speed and efficiency?***

Our assessment of the PRA's enforcement will have to await PRA enforcement action. We see no reason to amend the FCA's current approach to enforcement decision-making at this stage.

Question 15: ***Should the composition of the RDC/DMC be changed? If so, why and how?***

We do not see a need to change the current composition of the RDC/DMC at this stage.

Question 16: ***Almost 40% of cases considered by the RDC are subsequently referred to the Upper Tribunal. Does the RDC process duplicate too much the Tribunal process for firms and individuals who are likely to refer a Decision Notice to the Tribunal? What changes could be made to make the process more proportionate and/or efficient, consistent with the delivery of the regulatory objectives?***

We believe that measures to demonstrate the fairness of the enforcement process for individuals and firms subject to investigation – for example, by enabling informed representations to be made during the investigation stage – could potentially reduce the likelihood of a referral to the Upper Tribunal.

Question 17: ***What more could the UK learn from international practice?***

We would oppose the introduction of financial incentives for whistleblowers, in light of the disclosure obligations imposed on regulated firms and individuals.

Question 18: ***Are there specific features of other jurisdictions' enforcement processes which might be introduced in the UK?***

We have not identified any specific features of overseas enforcement processes which we would suggest introducing in the UK.