EVIA European Venues & Intermediaries Association

LEBA London Energy Brokers' Association

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## Response of the European Venues and Intermediaries' Association and the London Energy Brokers Association to FCA Consultation Paper CP 24/2, "*Our Enforcement Guide and publicising enforcement investigations–a new approach*."

The European Venues and Intermediaries' Association[1] and the London Energy Brokers Association[2] [together here "EVIA"] welcomes the opportunity to respond to this consultation concerning potential changes to the FCA Enforcement Guide ["EG"] and notes that its comments are independent of any other industry views, albeit that it appears that most views form a consensus.

## Summary Comments

### i. Practicality

We do not agree with the proposed new approach in CP 24/2, despite appreciating that in this matter the FCA has embarked on a road paved only with good intentions. We do concur that with few or no exceptions, the Final Notices published over the last two decades have held no useful information or lessons for firms to learn despite their detail and candour. We appreciate that the FCA is setting out to address this failure, and support the diagnosis, but we believe the proposed remedy is miscast[3].

This failure is principally because of the time taken for Final Notices, especially in the wholesale sector, to be published; especially when taken together with the observed scope and pace of both regulatory and technological change over the period.

It is also due to the fact that many of the enforcement cases taken forward by the FCA have been related to specific matters and moments in time which have not been generic. This is especially the case considering the wholesale brokers sector:

a. For instance in case reference numbers 454814, 184801, 184786 the Final Notice concerning BGC Partners of 07 December 2022 related to a Relevant Period 3 July 2016 until 3 January 2018; some 78 months afterwards and well into a different era of rules and regulations.
b. Another instance, the Final Notice of 12 November 2021 concerning Sunrise Brokers related to a Relevant Period of 17 February 2015 to 4 November 2015, some 81 months afterwards and again well into a different era of rules and regulations.
c. Another instance, the Final Notice of 04 October 2022 concerning Sigma Broking Limited related to a Relevant Period of 3 July 2016 to 12 August 2016,

[1] EVIA - About us, Contacts & Memberships
[2] The London Energy Brokers' Association (leba.org.uk)
[3] Indeed, the FCA has existing powers to make public announcements relating to investigations under 6.1.3 of the existing FCA Enforcement Guide

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some 75 months afterwards and again well into a different era of rules and regulations.

d. Again, the Final Notice 206018 of 23 November 2020 concerning TFS-ICAP Limited related to a Relevant Period of 1 January 2008 to 31 December 2015, some 156 to 60 months afterwards and again well into a different era of rules and regulations.
e. Finally the Final Notice 188984 of 25 September 2013 concerning ICAP Europe Limited related to a Relevant Period of 17 October 2006 to 25 November 2010, some 85 to 35 months afterwards and again well into a different era of rules and regulations.

It is clear that on average the FCA takes approximately 6 years to publish a Final Notice in the wholesale market segment and it is equally evident that none of these notices bears any relevance or information to the market participants seeking to learn from the case history. Moreover the length of the process exacerbates the negative impacts the innovation and capital commitments of the firm in question whatever the outcome maybe.

This figure is much longer than that set out by the FCA to the House of Lords FSRC[4] which likely indicates that wholesale and cross-border cases are very different to domestic and retail facing ones. Currently it is unfeasible to imagine that firms are engaging in Libor infringements, in CumEx experiments or in pre-MiFID2 market practices. Equally it is impossible to imagine that any naming disclosures in all the available instances would have held any deterrent effects nor any public interest thresholds.

Whilst the problem statement remains true, the answer is to get the investigations process done quicker, rather that to bring forward the publication date. Indeed time and efforts spent by the FCA pondering and gaining approvals around publications would constitute a resource wasted. More effective process could be facilitated by: use of internal adjudicators and ombudsmen; better triage of cases; and formal time limit of guillotine.

Rather, it is evident that a more unequivocal reform should be introduced to add a guillotine time limit to enforcement cases, whereby if a Final or an Interim Notice is not able to be published inside two years from the commencement of an investigation then the enforcement should be ceased.

### ii. Competitiveness, competition and Global Standard Setting

The proposals would severely disrupt and undermine both competition between firms, but moreover the competitiveness of UK firms in the global wholesale markets. In the first instance the proposals should be confined to firms facing retail customers and closely aligned the scope of the UK "Consumer Duty."

[4] Financial Services Regulation Committee - Summary - Committees - UK Parliament & https://www.fca.org.uk/publication/correspondence/fca-response-lfsrc-april-24.pdf

Indeed the Letter from the Joint Trade Associations to RH Jeremy Hunt, HMT Chancellor of the Exchequer correctly sets out:

- *At present there is no other G7 country that currently takes the approach on enforcement that the FCA is proposing. This would therefore make the UK an international outlier in terms of its enforcement guidance. This would have real and tangible consequences as investors are likely to be dissuaded from considering the UK in future, diminishing our attractiveness to business.*
- *The FCA has argued that the Monetary Authority of Singapore (MAS) also name firms they are investigating. However, this is only done in very exceptional circumstances.*
- *We know that the FCA's proposals have raised serious concerns at the executive level within firms, including those headquartered in the US. Given the US does not name firms at the start of investigations, if the UK were to adopt such an approach it would put us at a disadvantage against a key international competitor.*
- *It is also debatable how this approach meets the secondary objective on international competitiveness and growth that financial regulators now have to advance. Further,*
- *where different financial services regulators are taking different approaches to enforcement (the PRA does not publicly name firms), it risks creating a patchwork of regulation that increases the regulatory burden on firms and further dampens the UK's competitiveness.*

The FCA should rather seek to standardise its approach to supervision and enforcement to global, or to G20 generally accepted practice standards. Indeed in its business plan the FCA seeks to champion and shape such standards rather than gold-plate them. Worryingly, we have recently seen and commented on the FCA diverge from global standards in its December 2023 proposals for D&I[5]. We disagree with the advocacy for gold plating made on page 3 of the response to Lord Forsyth of Drumlean and the House of Lords FSRC and would suggest that the FCA reserve substantive changes such as these until global standard setting bodies such as the FSB and IOSCO have built a standard and generally accepted set of principles in order to avoid regulatory migration and arbitrage.

We note that the FCA readily admits that neither within the UK agencies nor more pointedly, across the relevant wholesale financial market NCAs, is there any similar or comparable approach. Notably the FCA has argued that the Monetary Authority of Singapore (MAS) and the Australian securities & Investments Commission (ASIC) also name firms they are investigating, but we could find no wholesale market case history and the FCA itself has admitted subsequently that this is only done in very exceptional circumstances if at all[6]. The FCA has not offered up any other peer reviews, and

[5] EVIA Response to the FCA DI Consultation; 18 December 2023.pdf

[6] *The MAS approach rather more in line with the current EG framework of only announcing cases in "exceptional circumstances;" indeed it has only announced two open investigations out of approximately 104 listed formal regulatory and enforcement actions in the last five years, these being joint investigations closer to fraud together with the Singapore Police Force.*

should perhaps have added in that of the UK the Office of Financial Sanctions Implementation ["OFSI"] who deploy the position whereby, "*public disclosure may be published where 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*."

We note that both here and in the December proposals towards Diversity and Inclusion the FCA appears to be seeking a "trailblazer" posture. We consider these measures would be better first trialled in a sandbox or a purely domestic aspect of the regulatory perimeter. Any "trailblazer" posture should be subject to more discussion ("Green Paper") prior to proposals and in conjunction with both Treasury and Parliamentary support. None of these approaches have been adopted here.

### iii. Regulatory categorisation and segmentation

We believe that the FCA should more closely consider both categorisation and scale in its approach to any revisions to the "EG." Specifically the objectives and cases made in CP 24/2 relate to retail facing outcomes in a purely domestic perimeter. The scope of the proposals should be constrained to those firms with retail facing or client money permissions who are subject to the Consumer Duty. It has been noted that the BOE/PRA have not made any parallel proposals, and it is self-evident from both the competitive and complexity arguments that these disclosure proposals are ill suited to firms who operate in many countries and seek to compete in the global capital markets which the UK substantively hosts[7].

### iv. Regulatory scale and rightsizing

It has been widely pointed out, notably in the comments from the House of Lords FSRC as well as within the Joint Trade Association letter to the Chancellor of the Exchequer[8] that the impact of the proposals would have very different effects on large firms compared to smaller ones. Specifically, large firms and dominant platform services for whom clients have less opportunity to shop around and who employ more and less identifiable senior managers or code staff, would be better able to cope with disclosures than small firms. The implicit or explicit identification of individuals would appear to challenge both the confidentiality obligations pursuant to section 348 FSMA as well as firms' and individuals' right to privacy pursuant to Article 8 of the European Convention on Human Rights ["ECHR"]. Large firms would also be able to shift business overseas more effectively. Indeed, in respect of the recent Diversity Consultation[9] the FCA proposed a scale threshold at 250 employees.

### v. Resurrecting the Regulatory Decisions Committee

It is relevant that the FCA has scaled back and diminished the scope, the availability and the independence of the Regulatory Decisions Committee ["RDC"] over recent year.

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[7] Global Financial Centres Index 35; GFCI_35_Report; 21Mar2024.pdf
[8] FS-TA-joint-letter-2-enforcement-guidance-26-April-24.pdf
[9] CP23/20: Diversity and inclusion in the financial sector – working together to drive change

This body served a valuable route for firms to seek arbitration around conduct matters that is now closed off in favour of either legal appeals to the judiciary or contested enforcement cases. In its response to question (6) from FRSC Chair Lord Forsyth of Drumlean, the FCA notes that it does not want, nor would it welcome any appeals mechanism other than a judicial review or an injunction. We believe that many of the outcomes being sought within the objectives of CP 24/2 could be otherwise better achieved through internal arbitration and a formal appeals process. Litigation, as proposed by the FCA is expensive and burdensome for all firms, but especially for smaller entities. Moreover, the context, the argumentation and the outcomes of such an independent RDC could form an anonymous basis for published information and an enforcement parallel to the Market Watch publications.

vi. Independence and Accountability of the "Public Interest Test".

Many of the proposals in CP 24/2 turn on the FCA exercising a "Public Interest Test". However a formal and external definition of such a Public Interest Test Is not provided, leaving the FCA to set the terms and definitions whilst at the same time deploying the test and prosecuting the outcomes. Whilst this appears conflicted in the retail domain, clearly the wholesale market activities of firms are disconnected or arm's length from those of a consumer, reinforcing the need for a segregation between wholesale supervision and aspects covered by the Consumer Duty. This mitigates for the installation of a "Ringfencing" type division between domestic and wholesale supervision by segregating point [a] from points [b] & [c] of Section 1B FSMA: General Duties.

vii. Improving FCA Process, Dialogue, Openness and Green Papers

More generally, CP 24/2 has not demonstrated an adequate level of governance. it's clear that these proposals have taken both the industry and the UK legislators by surprise. Principles of good regulation should lead the FCA to take discussions into a Green Paper and more exploratory process prior to tabling contentious changes. We also note that the FCA has not engaged with Trade Associations in the period after CP 24/2 was published. Moreover, no cost-benefit nor analysis on competitiveness has been made. It may be the case that more formal process stages should be set out when considering handbook changes.

## Answers to questions

### 1: Do you agree with our proposal to announce our investigations, including the names of the subjects, and publish updates on those investigations, when in the public interest?

No, EVIA disagrees with the proposed announcements on the basis that in the first instance, any regulatory interventions should do no harm.

Clearly this procedure risks harm to innocent firms and to individuals employed by them. We note that in its response to question (2) from FRSC Chair Lord Forsyth of Drumlean, the FCA sets out 2023/24 data such that only 28 out of 153 investigations have resulted in

enforcement action, with two thirds of all investigations resulting in no further actions whatsoever.

Whilst investigations ought to be completed much more quickly, we do not see why the scope and focus of enforcements could not be set out in a standing publication without the need to publish the names of the subjects involved prior to the decision notice. We wonder if the FCA is attempting to build a general rule from one or two high profile domestic cases, rather than establishing high-level principles and setting out its framework under those practice standards.

The very real potential for the FCA to inflict significant harm to firms being named in investigations has not been effectively addressed in the proposals in which there is a lack of evidence or supporting data to justify the proposals. It is most likely that firms may suffer from being publicly named in disproportion to the FCA's objective of increasing the transparency of its enforcement function.

It is also clear that the potential for significant harm is inversely proportionate to a firm's size or to that of its UK footprint. Given that firms with monopoly services or more vertical integration would be more resilient than smaller firms and startups, we understand that this policy would harm open access and level playing field provisions in addition to the innovation and risk taking we see championed by the European Commission in its Capital Markets Union project. Borrowing the Hippocratic Oath would perhaps serve as a helpful core principle.

Should the FCA opt for a size threshold in the manner of the D&I approach, we caution both the unfair playing field outcomes along with the distortions from threshold cliff-edges, corporate group structures and attempts at right-sizing. Outcomes here would be complex regulatory convolutions and cost impositions for no clear reasons.

2: Do you agree with the structure and content of our proposed new public interest framework, including the factors proposed, and the other features of our proposed new policy described in paragraphs 3.5 to 3.12 above?

No. EVIA disagrees with the FCA proposed approach and considers that the public interest framework should be developed at arms' length from the FCA enforcement process and targets, but closely aligned with general accepted and adopted international standards. Parliament should set out the scope and meaning of the public interest test and this should be then aligned with a global standard before deployment by the regulator, and even then solely to consumer focused activities.

We would again highlight that the subject of the UK public interest as being, "*affected customers, or consumers or investors*," together with "*the integrity of the UK financial system*" which together constitutes retail customers' and domestic product distribution. It therefore remains tangential and at arm's length to ongoing day-to-day activities in wholesale markets which are remote from consumer finance and retail distribution. We recall that it was high profile cases involving retail facing fund structures which formed the genesis of this review. It is inappropriate for consumer duties or public interest tests to be pivotal for wholesale markets businesses for whom systemic risks, conflicts of interest, and prudential matters are more relevant and important. As demonstrated in recent cases concerning wholesale markets, the FCA risks presenting "victimless crimes."

We remain concerned that the FCA approach, based upon a-priori presumption, both contravenes the ECHR whilst failing to provide evidence that "naming and shaming" contributes to the raising of standards. Indeed there is no appreciation that it could likely lead to the outwards migration of leaders and standard setters otherwise beneficial to a deep and diverse economic ecosystem.

3: Do you agree with our approach to announcements and updates where the subject is an individual? Please give reasons for your answer if you do not agree.

Yes. EVIA agrees that the FCA should not usually announce the investigation of a named individual.

We hold concerns that where firms hold only a small number of Material Risk Takers, Code Staff or Significant Influence Functions, which is the case for the entirely of the wholesale broker supervisory portfolio, the FCA provision is incompatible with the wider proposal. Considering the recent five cases set out above, a simply and cursory search of the FCA register will disclose the relevant individuals.

4: Do you agree with the proposed content of our announcements?

No. EVIA disagrees with the FCA proposed content in announcements simply because firms will be generally presumed to be guilty at any point from commencement until an investigation has been completed, and for wholesale brokers that period has historically been between 50 -150 months and garnered sufficient media coverage. This appears to tread over the presumption of innocence and may conflate with ongoing business aspects including the KYC processes, the 'Proceeds of Crime Act,' whistleblowing and employment tribunals.

We remain puzzled by paragraph 3.23 setting out that the FCA would make an exception where they have opened an investigation on behalf of an overseas regulator in so far that the entire wholesale markets broker portfolio operate across the globe and so any investigate would contravene the corollary statement, whilst the FCA proposed approach to branches, either in the UK or overseas, remains entirely unaddressed.

5: Do you agree with our proposed methods of publicising an announcement and updates?

No. EVIA disagrees with the FCA proposed methods of publications, in particular the notion of 24 hours' notice which draws into issue the effect on living wills and wind-down plans in the first instance. In actuality, rather than seeking to length notice periods, the whole approach to naming disclosures should be reconsidered.

Whilst the FCA rightly retains emergency powers to issue names and to announce in real time; these are separate from the practice standard under consultation in CP 24/2 and these should provide for adequate time for a firm to make representations and all relevant preparations. For instance, considering the wholesale broker and trading platform sector, the impact on significant liquidity pools operated by the firm should be taken into account.

Again we would support the issuing of proactive announcements where all firm and other specific details capable of being reverse engineered are redacted are not published. This includes thematic discussions.

6: Do you agree with our proposed approach to publicising investigation updates, outcomes and closures?

We would support the FCA proposed approach towards updated only where all firm and other specific details capable of being reverse engineered are redacted are not published. Moreover, noting that lack of value in existing Final Notices, there is an opportunity for more thematic and case led discussions at the update phase where anonymity is preserved, or where the firm under investigation provides their express consent for publication.

7: Do you agree with our proposal that moving our strategic policy information to the website will make information more accessible?

Yes, we agree. In as far as we can tell, all stakeholders access the FCA via the website or associated portals .

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

We disagree with the content of the proposals, and would like to see the EG provide for the incorporation of an empowered and independently staffed Regulatory Decisions Committee to provide for a rapid triage for enforcement cases where appropriate.

We would also like to see the EG set out up-front prescribed time limit and guillotine for regulatory investigations at 24 -30 months.

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

No.

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

No.

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

No.

12: Do you agree that the present chapter 8 of EG should be moved from EG and included in SUP 6?

Yes EVIA does agree that supervisory measures, which are anyway confidential, such as the imposition of a variation, the cancellation of a permission, or other FCA own initiative impositions should reside in SUP and not in the EG.

13: Do you agree with the removal of the restitution chapter from EG?

No comment concerning the Consumer Credit Act 1974.

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

No comment concerning the Consumer Credit Act 1974.

15: Do you agree that we should not use private warnings as an alternative to taking formal action and remove any reference to them from EG?

Yes EVIA does agree that private warnings are not enforcement matters once that threshold is crossed; but we strongly encourage their use as a tool prior to any thresholds for enforcements and would therefore add that they would be more appropriate under SUP

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

It is clear from the publicity surrounding CP 24/2 proposals that amendments should be tabled by HMT such that the EG be covered directly by FSMA. This would better facilitate the process to be principles led, as well as re-establishing and greater role for a more independent RDC.

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