

Dr. Kevin A. Moss – Written evidence (EGC0001)

Introductory Comments

I am submitting this evidence in a private capacity, given that I am now semi-retired and most current regulated firms are generally too fearful of critiquing the FCA's approach in any public way. My entire professional life, commencing in 1983, has been lived out through the sequence of various regulatory regimes, concluding with the FCA. My concerns over CP24/2 are born out of an awareness of how individuals and regulated firms are *already* being treated. We should have attained sufficient awareness from the Sub-Postmasters scandal to avoid feeling complacent about enabling an excessively powerful and unaccountable organisation to adopt the kind of approach outlined in this paper.

The following notes refer directly to the paragraph numbers within CP24/2, and draw heavily upon the actual 'lived experience' of a practitioner who has been subject to regulation through the successive oversights of PIA, FSA and FCA. CP24/2 represents a predictable 'next stage' in the evolution of unaccountable power, of a scale and nature which resists effective critique and which therefore ought to concern politicians who still hold to a belief in some kind of liberal democracy.

As is now customary with the FCA's output, CP24/2 depends very heavily upon the repetition of unattributed, unreferenced aphorisms, most of which are open to question. This seems to be a device intended to predispose the reader towards an acceptance of a position which is not validated by an appeal to data, or by historical precedence. The following notes attempt to raise some obvious questions about these repeated assertions.

Foreword (pp. 3-4)

This brief piece contains several questionable statements, which are worth highlighting before we get into the meat of CP24/2:

p. 3 - *'Transparency about what we are investigating further helps reassure, educate and drive our own accountability...'*

This is an exercise in ambiguity, which suggests one thing whilst (indirectly) confirming another. It would have some epistemological value *if* the FCA was actually driven by accountability, but actually quite the reverse is true. Anything other than total transparency, is simply an exercise in curated opacity - and therefore a tactic designed to enforce a calculated impression.

Then, the foreword lists 'three significant benefits':

1. *'...it builds trust in the system and the public knows we're on the case'*. It is far from obvious to any of us that 20+ years of direct regulation have actually built any trust in the system. There might be a valid argument, if the regulator and its representatives were always *truthful*, but that also is far from apparent. If anything, the escalation of regulatory interventions have correlated closely with the widespread disintegration of public trust;
2. *'By being clearer about the types of misconduct we think warrant a formal investigation, it allows other firms to learn lessons, raise their standards and think twice...'* That cannot possibly be a serious comment: after all, after multiple decades of regulatory evolution, and the development of a monolithic rule-book, combined with the proliferation of a legal and compliance industry to translate this impenetrable jargon into practical guidance, no regulated firm or individual could possibly be unaware of these matters. This is, instead, a rather disingenuous excuse for

creating a culture of fear, directly akin to the practice of public shaming during the Chinese Cultural Revolution;

3. *'And it will support our accountability by shining a light on the efficiency and pace of our investigations'* Efficiency and pace cannot be proxies for accuracy, thoroughness and truthfulness - all of which are in short supply within the conduct of regulated activity. Given that there is little light currently shining within the FCA's own arcane practices, it is doubtful that a one-way model of 'accountability' will add anything to the sum total of human insight when it comes to enforcement. At least not in a constructive way.

Commentary on Numbered Paragraphs

1.1 *'It reassures the public...'* - where is the evidence for this? This idea is repeated in 2.21, but it is far from clear what this increased 'public confidence' is actually *in*. In the FCA? In the financial sector itself? The latter is cumulatively less probable as an outcome.

1.2 *'Our commitment to transparency, and our obligations to have regard to transparency in performing our functions...'* This is simply not the case, in practice. 'Subject Access Requests' (SARs) are never straightforward and subject to extensive redaction. FSMA s.348 is routinely used as an excuse to avoid disclosing relevant information about an individual. These are not the behaviours of an organisation with a commitment to transparency.

1.10 *'To make sure we are transparent about how we operate...'* But this not the context here: the focus is on 'transparency' only when it comes to naming and shaming, in the hope that this will have some kind of deterrent effect.

1.12 *'In future, we want to proactively publish more information*

about our enforcement investigations including their opening and progress.' This seems to be more about how a particular narrative is being constructed, than about the usefulness to either consumers or participants within financial markets. In para 2.12, the FCA laments that a later publishing of investigations 'significantly reduce[s]' the benefits to consumers and industry. That kind of statement should be challenged, especially when an *early* publishing of incomplete/partial case information will have the effect of influencing public perceptions before the full truth is known. If we compare this proposal (CP24/2) with the evidential standards enshrined within the UK's legal system, this feels like a retrograde step.

1.13 *'...taking all relevant facts and circumstances into account.'* The evidence is that FCA personnel are working off scripts when interrogating those they take issue with. The scripts necessarily limit the scope of the enquiry and focus only on those matters that the FCA has predetermined it wishes to focus on. This means that 'all' relevant facts are not being taken into account.

2.4 *'We want to be as open and accountable as possible...'* This is simply not representative of the culture within the FCA. In 2.5, the CP states that *'Our existing approach to transparency sets the context.'* This should give all of us a very great cause for concern.

2.6 *'We have been transforming to become a more innovative, adaptive, assertive and proactive regulator.'* This seems to be an internal narrative, the kind of story which the FCA tells itself. It seems doubtful that the targets of regulation would use those kinds of words to describe their experience of the FCA's activities.

2.7 *'As part of this, we have looked at how we can maximise the benefits of transparency by disclosing more information about our enforcement activities...'* What does that even mean? Who is it who gets to 'benefit' from this kind of one-way 'transparency'? It's

certainly not the regulated community. The same kind of aphorism is repeated again in 2.8, *'...have regard to the principle that regulatory activities should be carried out in a way that is transparent, accountable, proportionate and consistent.'* This is just playing with words. If these values are a 'principle', then (by definition) they apply to *everyone* involved in regulatory interactions - but that is manifestly not the case.

2.11 *'...we have previously been clear that publishing timely information about our investigations is a robust and effective way of raising consumer awareness.'* Evidential basis? Consumer awareness of *what*, precisely? That question becomes especially critical when we are being asked to accept early-stage disclosures where evidence is incomplete.

2.17 *'Our proposed approach to not normally announce an investigation into a named individual, unless it is in the public interest and lawful...'* It is far from certain how this might play out in practice. There is a mixed and well-documented track-record in terms of the FCA's enforcement announcements, where a consistency of approach is difficult to detect.

2.19 *'...in particular securing an appropriate degree of protection for consumers and protecting and enhancing the integrity of the UK financial system.'* It is far from clear that this proposal actually achieves that objective. 2.21 suggests that a great deal rests on the FCA's 'beliefs' about reality, rather than anything resembling hard facts. This sounds like a kind of ideology.

3.5 Here the FCA enumerates what it feels are a number of benefits from the proposed disclosure regime, all or most of which are debatable. Conspicuously, it fails to address the quite probable downsides. Indeed, para 3.8 flags up a kind of cultural avoidance of that kind of consideration: *'We recognise that this more transparent*

approach may raise concerns about potential impact upon our investigation subjects. We have, however, not included such impact as a specified factor in our proposed framework.' Now, that is a profoundly revealing and troubling statement, especially given the elevated claims for their approach listed in para 2.8. What the FCA is espousing is a kind of "I was just following procedure" approach, which disdains any responsible consideration of the ethical implications (the possibilities of regulatory error or overreach, a misreading of complex circumstances, a person's right not to have his integrity and reputation dismantled on a public stage without due legal process, the destruction of a livelihood prior to the full facts becoming evident etc). This is a shocking admission, and any reader should rightly take the 'fair and proportionate' reassurances (3.11) with a pinch of salt.

3.24 *'Normally we will give the subject no more than 1 business day's notice.'* Given the potentially destructive impact of this regime, one day's notice feels brutal.

3.27 *'...we may also publish updates on the investigation...However, we will not publish details of the information we have gathered or our conclusions...'* Given the current practice of 'pushing' information out continually via social media, and given the propensity for such revelations to impact negatively upon the livelihood of multiple individuals, as well as upon client service, this kind of approach holds too many risks to be credible within a culture defined by a liberal democracy.

3.29 *'Publishing case closure announcements is a way of increasing the visibility of our completed work...'* This is really all about the FCA, how it thinks that it is perceived within the marketplace, and all about its own visibility at the expense of everyone else. Is this evidence of a kind of institutional narcissism? The best possible argument for regulation would be that it worked whilst the regulator

remained largely invisible. This is *all* about profile.

4.4 '*FSMA does not require us to have an enforcement guide.*' That is a rather shocking discovery. Given that the FCA clearly believes that enforcement is such a big deal, so big that it wants to demote the rights of individuals, firms and customers, shouldn't there be an enforcement guide?

Conclusion

On one level, certainly for anyone who is used to the self-justifying tone of the FCA's published genre, CP24/2 represents 'business as usual'. A regulatory body which has been given so much power almost inevitably ends up believing that it is deserving of more. We would be better off if we did actually seek to learn the lessons of history.

On another level, the FCA's proposals represent a frightening step in the direction of a soviet-style culture where individuals may be held up to public opprobrium and personal detriment without the safeguards of the rule of law. It is notable that this proposal may be viewed against the backdrop of a drastic reduction in public access to affordable legal representation, and indicates that the likelihood of effective checks and balances is vanishingly small.

In FCA-speak, 'transparency' doesn't mean what the rest of us conceive it to be. What is being proposed in CP24/2 is the kind of one-way trade that has become, increasingly, a cornerstone of the FCA's mode of operation, to the detriment of those who are directly impacted. Within a civilised society, such proposals have no place and they ought to be resisted. What is already happening is a reproach to historic British standards of legal rigour and fair play, and Parliament ought to be most concerned about the trajectory represented in CP24/2.

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