

## **WhistleblowersUK – Written evidence (EGC0002)**

### **Background**

I am writing to you in my capacity as the Chief Executive of WhistleblowersUK (WBUK). WhistleblowersUK is a not-for-profit organisation set up to provide help and support to whistleblowers and organisations to help resolve disputes at the lowest level and to provide information and education to the public. The organisation is also the secretariat to the APPG for Whistleblowing.

The impact of our work has had a significant impact on the development of policy, laws and regulations. Many of our whistleblowing cases have resulted in the exposure of significant criminal and regulatory breaches, this evidence has assisted and resulted in successful investigations. Despite this the FCA has almost universally failed to take any action or engage with whistleblowers and their evidence to inform investigations. The FCA's own survey corroborated our experience reporting feedback as, "extremely dissatisfied, frustrated" and distrustful citing concerns of "bias" by the regulator"<sup>1</sup>.

It was therefore no surprise when the chair of our Financial Services Focus Group Ms Simran Bharaj and our partner Dr Mario Menz, Institute for Money Laundering Reporting Officers (IMLPO), brought to my attention the considerable concerns raised to Nikhil Rathi in the LFSRCs letter of 18th April and the FCA response of 25th April. The consultation is relevant to WhistleblowersUK because amongst many reasons for this proposal, it cites a need to increase openness and transparency, which is considered in the public interest<sup>2</sup>. It further states that as a measurement of success, the FCA will seek to monitor the reasons for whistleblowers/witness disclosures, and, that in its view, this approach will "encourage them [whistleblowers and witnesses] to come forward"<sup>3</sup> to assist FCA investigations<sup>4</sup>.

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<sup>1</sup> <https://www.fca.org.uk/data/whistleblowing-qualitative-assessment-survey-2022>

<sup>2</sup> CP24/2 Enforcement Guidance Consultation February 2024, under "Outcomes we are seeking" at 1.18

<sup>3</sup> Ibid, under "The public interest framework" at 3.5

<sup>4</sup> It is assumed investigations by the FCA is referencing both criminal and civil investigations

## **Engagement by the FCA**

We concur with the sentiment of your letter to the FCA dated 2 May 2024. Concurrently, all of our correspondence to the CEO has been delegated to his executive team including Steve Smart and Therese Chambers. This is irrespective of its significance or importance, and is something that remains ongoing. This is why we have written to the LFSRC to ensure greater accountability of the actions of the FCA to ensure it meets its statutory objectives.

Despite having a long standing relationship with the FCA neither WBUK nor the APPG were invited to consult on the proposals and we currently have no confidence that anything we contribute directly to the FCA will have any impact whatsoever. We reached this conclusion following a meeting on 6th February 2024, chaired by Steve Smart, in response to our letters to Nikhil Rathi. The FCA dismissed our concerns and our proposals for whistleblowing policy enhancements. As a result I believe there is no value in responding to a consultation, when in reality, there is no desire to engage with relevant stakeholders making the consultation nothing more than a tick box exercise. I firmly believe that we would have been able to provide detailed examples and present clear options that would enable the FCA to achieve the same outcome without causing market disruption.

## **Concerns regarding the Enforcement Consultation proposals**

I entirely appreciate the response of the LFSRC on 18 April 2024 to the FCA's CEO Nikhil Rathi, which raised several concerns in relation to proportionality, cost-benefit analysis, and the overall macroeconomic impact to the updates to the Enforcement Guidance. However, this is best addressed by other interested parties with relevant specialisms. I am addressing the specific points on whistleblowing given its reference within the consultation. This also accounts for the very helpful points you raised in the 18 April 2024 letter, including albeit not exhaustively:

1. Whether the proposals had been based on any representations, and if so from whom?
2. Whether there has been any analysis of the impact between the regulators and industry more generally?

Whistleblowing is being used by FCA to promote public interest as the rationale for publication of these investigations, in the wrongful belief it

will resolve the concerns arising from within the financial services sector. Yet the WBUK inbox is inundated by very concerned Chief Risk Officers, Chief Compliance Officers, Money Laundering Reporting Officers, Heads of Compliance and Fraud repeatedly raising severe concerns about misconduct and criminality. They explicitly express concern about the lack of regulatory engagement/response and are fearful to raise directly with the FCA. This is despite having Senior Management Regime (SMR) responsibility under the Individual Conduct Rules and Principle 11 obligations.

It is our firm view, which we have repeatedly articulated to the FCA, that publication of enforcement investigations alone is not the silver bullet to encourage potential witnesses and whistleblowers to come forward to support criminal and civil investigations. In fact, I am surprised this is being said when the FCA signposts whistleblowers to the Employment Tribunal despite the content of the protected disclosures being a regulatory matter that the FCA needs to opine on<sup>5</sup>.

### **Encouragement of Whistleblowers and witnesses**

To encourage witnesses and whistleblowers to step forward, the FCA requires a clear framework of how to assess protected disclosures and once deemed a whistleblower, how they would **protect** individuals that step forward to provide critical information to civil/criminal investigations.

- In the past 10-15 years, I have observed only **1 enforcement case** against Barclays' CEO Jes Staley on 11 May 2018 where a paltry financial penalty of £642,430 was awarded against him after he failed to heed warnings about his multiple attempts to identify a whistleblower. Following this Barclays were placed under special conditions<sup>6</sup>. If the FCA wishes to encourage whistleblowers/witnesses to come forward, then it needs to act promptly on the intelligence it receives, take necessary supervisory/enforcement action, publicise this to the market and create clear industry guidance. I can see no evidence of the FCA

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<sup>5</sup> 4% of whistleblower cases succeed in the Employment Tribunal whose powers only extend to making a determination and an award of compensation for detriments arising from the making of Protected Disclosures. There is no statutory obligation to investigate or intervene in relation to the allegations. Furthermore in our experience in over 24 years the ET has failed to escalate the evidence of wrongdoing to a regulator.

<sup>6</sup> <https://www.fca.org.uk/news/press-releases/fca-and-pra-jointly-fine-mr-james-staley-announce-special-requirements>

taking these, or any other logical steps.

The new phraseology being used by the FCA also raises a number of issues. It conflates two different things, whistleblower and witness. However, the existing legislation is unforgiving when it comes to affording legal protection so the wording designated in formal policy is critical. This is another example of how proper engagement might have avoided terminology confusion before the consultation was published.

Whistleblowers can originate from an operational team up to the Senior Leadership, yet the evidence we have collected consistently consists of complaints about poor engagement, long delays, poor communication and no reportable action. The tension between the regulator and industry is not being addressed and it does not act as a deterrence for non-compliance without reconsideration of the framework. We believe that this is the ideal opportunity to bring forward the proposals contained in the Whistleblowing Bill<sup>7</sup>. It provides a clear framework to support existing regulatory obligations, the regulators and provide clarity to the financial service and across all sectors where the law (and its implementation) in this space is not fit for purpose. In fact, the Office of the Whistleblower was previously supported by Andrew Bailey (Governor for the Bank of England and former FCA CEO) as a “welcomed instrument” supporting change.

Adopting these proposals would reduce the need to publicise investigations of regulated firms if critical evidence sourced from potential witnesses/whistleblowers were adequately managed. It would focus the investigations with the evidence required, speed them up and move them towards a final conclusion i.e. a decision notice/fine rather than sit in stagnation on a “public investigations list” causing “professional reputation damage until exoneration” as you state. A clearer approach to manage whistleblower detriment has resulted in successful outcomes by multiple overseas regulators setting precedent in this space.

### **Whistleblowing and alignment to the UK Economy**

If the above were to be followed, it would clearly identify the bad actors within the market which must be addressed for breach of regulatory misconduct and criminality. Consequently, a risk based approach can be

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<sup>7</sup> [The Whistleblowing Bill](#)

appropriately deployed for the rest of the market. Invariably this approach ensures balance and proportionality in achieving market competition and economic growth whilst maintaining market integrity. It appears the current approach to FCA enforcement is one size fits all.

There is no dispute that there are bad actors across the various 'firm types' as set out in regulations. Interestingly only 33% of cases passed to enforcement result in fines and prosecution while disappointingly the majority (67%) of these cases result in "no further action". Whether you call them Whistleblowers or witnesses they play a crucial part in identifying breaches. This in turn, speeding up the decision making as it will be clear who has met the evidential threshold and releasing the ones who have not. It is clear these statistics need further clarification by the FCA as they read starkly without the necessary context.

Our proposals demonstrate that there are better ways to achieve the statutory objectives. We hope that we can support the LFSRC and the FCA in providing solutions which protect the economy whilst maintaining market integrity. The latter is a prerequisite for the former. Without market integrity, the UK's prime position of being a centre of commerce is compromised. This is often the dominant reason for securing investment and placement within the UK financial services market. For example, the London Stock Exchange (LSE) owes its global prestige in part due to its strict entry requirements, so placement onto the LSE is recognised as a commercial advantage. It cannot be ignored that the UK is now rated by Credas as 2nd in the world for laundering dirty money<sup>8</sup> the equivalent of 4.3% of GDP, with an eye watering fraud loss epidemic at over £2.3 billion<sup>9</sup>, outlined as a priority in the government's 2023 fraud strategy. Therefore a cohesive plan is plainly required to gather intelligence (in part from whistleblowers/witnesses) to address these issues and free up resources on less systemic problems. Simply put, the focus should be on strong prevention rather than reactionary measures, which rarely recover the full funds lost. The absence of which is fundamentally damaging the UK economy.

## **Conclusion**

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<sup>8</sup> <https://credas.com/news/oecd-money-laundering-leader-board/>

<sup>9</sup> BDO FraudTrack Report findings in February 2024

<https://www.bdo.co.uk/en-gb/news/2024/reported-fraud-doubles-in-2023-bdo-report-finds#:~:text=The%20value%20of%20reported%20UK,by%20BDO%20in%2020%20years.>

Whilst WBUK is not opposed to the identification and publication of the identity of firms under FCA enforcement investigation, it is the opinion of my team of regulatory experts that this policy requires further consideration. This consideration includes the development of wider framework enhancements and careful planning of the execution and a much more collaborative approach. We believe that the single most important success factor is collaboration with industry experts and whistleblowers.

We would warmly welcome the opportunity to share our information and evidence with the LFSRC.

I look forward to hearing from you.

*8 May 2024*