

Financial services regulation: enforcing the new regime
Financial Services Consumer Panel response to:
FSA Consultation Paper 17

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Introduction

1. This paper is the response of the Financial Services Consumer Panel ('the Panel') to FSA Consultation Paper 17: *Financial services regulation: enforcing the new regime*. The Financial Services Authority (FSA) established the Consumer Panel to advise the FSA Board on the interests and concerns of consumers and to report on the FSA's effectiveness in meeting its statutory objectives. There are eleven members of the Panel representing a broad range of consumer interests. The Panel is independent of the FSA - it can raise its own concerns, initiate its own research and publish its own reports.
2. The Panel generally welcomes the FSA's proposals to use the range of enforcement powers available to meet its statutory objectives. The Panel acknowledges that the consultation paper is based on the FSA's proposed powers contained in the Bill. The Panel, in common with other consumer

organisations, is concerned about the exclusion of certain activities (eg mortgages and long-term care insurance) from the FSA's regulatory scope.

Effective consumer protection

3. The Panel strongly supports the emphasis on civil action. It is vital that enforcement is both swift and fair if consumers' interests are to be protected. Consumers will not be adequately protected if the FSA's enforcement regime is to be founded on the protracted process of criminal prosecution with the higher burden of proof required. Nevertheless, in certain cases criminal prosecution is more likely to be appropriate. The FSA must not hold back from criminal prosecution in such cases. **The Panel recommends that the FSA should establish a clear and open process for determining whether criminal prosecution or civil action is most appropriate.**
4. The consultation paper places a great deal of emphasis on ensuring fair play for businesses, but appears less focused on what should be the primary objective of enforcement – that is, to provide effective consumer protection. **The Panel recommends that the primary objective of the FSA's enforcement activity should be ensuring effective consumer protection.**
5. The consultation document places much emphasis on collaboration with regulated firms following investigation and prior to discipline. While the process of investigation and discipline may be expedited where firms collaborate with the regulator, without open processes or external scrutiny there is a risk the FSA may not apply its disciplinary sanctions robustly and appropriately where this is warranted. **The Panel asks the FSA to indicate how it will ensure that its staff carry out the process robustly so that there is no scope for collusion. The Panel recommends that there is a role for the proposed Enforcement Committee in overseeing this (see paragraph 11).**

Proposals for securing consumer redress

6. The Panel is concerned about the assumption in paragraph 13 of the consultation paper that the FSA will rarely use the power to make good losses to consumers. In the retail market there are numerous examples of independent investigations finding evidence of mis-selling and unsuitable sales which may be indicative of wider problems. **If a regulated firm agrees bilaterally with the FSA to provide redress to customers the Panel recommends this should be an open and transparent process.**
7. Proposals on redress should refer to the availability of compensation through a criminal court. **If action is taken in the criminal courts then the request for compensation should run alongside it.**

Proposals for publicising intervention action and disciplinary cases

8. Publicity for intervention and disciplinary action is important both for its deterrent effect and to promote public understanding by teaching consumers what can go wrong and promoting vigilance. The FSA's commitment to make announcements of intervention action dependent on the circumstances of the case (paragraph 41 of the consultation paper) and to publish disciplinary action as a general policy but not in all circumstances (paragraph 113 of the consultation paper) is a retrograde step. **The Panel strongly recommends that where the FSA considers it necessary to take intervention or enforcement action to protect customers, this must be put into the public domain as a matter of course.**
9. Where targeted monitoring suggests poor or undesirable practice is widespread, the FSA should handle this in an open way. We appreciate the FSA will undoubtedly be under pressure not to make public issues that can have an adverse effect on the stability of the market, but this needs to be balanced with its consumer protection and public awareness objectives.

FSA's enforcement process

10. We would have liked to see greater emphasis in the document on the prerequisites for effective enforcement including:

- effective risk based monitoring and supervision;
- a suitably qualified and well-trained team with emphasis on continued professional development; and
- the interface with effective supervision and monitoring (which is discussed later in this response).

11. The Panel strongly supports the inclusion of public interest members in the proposed Enforcement Committee. **We recommend that public interest representatives are voting members. We recommend that this Committee should not be confined to reviewing enforcement decisions but that its terms of reference should require it to keep under review the effectiveness and credibility of the FSA's enforcement function.**

Sanctions

12. The Panel welcomes the FSA's powers to withdraw authorisation, revoke or vary permission, withdraw approval or disqualify an individual. Before the introduction of individual registration and training and competence requirements, it was easy for individuals who presented a risk to customers to move around firms. The danger is that now individual registration exists such individuals will move into areas outside the FSA's remit e.g. mortgage sales. We recognise that this is an issue about the scope of the Bill. It also has implications for the FSA's ability to share information from its monitoring and enforcement activities with non-statutory bodies, Ombudsman schemes and self-regulatory arrangements which we discuss below.

Sharing information gathered from FSA enforcement activity

13. We note that the consultation paper deals with the FSA's information gathering and investigation powers but that the FSA is awaiting details from the Government on the information gateway provisions of the Bill. **We recommend that there are information sharing powers between the FSA, OPRA, the Office of Fair Trading, local authority trading standards departments, the Financial Services Ombudsman Scheme and other relevant Ombudsman, amongst others.**
14. We recognise that the information gateway provisions in the Financial Services and Markets Bill coupled with data protection legislation are unlikely to permit information sharing powers between the FSA and non-statutory bodies. However, for reasons outlined at paragraph 12, **the Panel recommends that the FSA should explore every practical option to enable appropriate information about non-compliant firms and individuals to be made available to non-statutory bodies responsible for monitoring compliance with voluntary codes of practice (eg those responsible for monitoring compliance with the Mortgage Code).** For example, one possible option might be for the non-statutory organisations to make it a condition of their membership that firms and individuals provide consent for the FSA to pass on appropriate information to other non-statutory bodies, Ombudsman schemes and self-regulatory bodies.

Relationship between enforcement and monitoring and supervision

15. The Panel is disappointed that the consultation paper fails to deal with the interface between monitoring and supervision and the enforcement process. Effective enforcement relies heavily upon effective targeting of monitoring based on risk assessment and intelligence gathering. The Panel would have liked the document to have included information on how

the FSA will gather market research information to establish problem areas, use transferred intelligence from the Financial Services Ombudsman Scheme and other sources.

16. Our predecessor – the PIA Consumer Panel – called on the PIA to use mystery shopping in its monitoring techniques with ‘mystery shops’ based on surprise visits as opposed to announced visits. **The Panel would like to be assured that the FSA has taken into account the use of mystery shopping in combination with other monitoring techniques in developing its enforcement regime.**

Relationship with overseas regulators

17. The consultation document refers to support for overseas regulators. **The Panel considers it will be essential, particularly in view of the growth of electronic commerce, for the FSA to establish an enforcement network with overseas regulators and for agreements to be reached on reciprocal action.**

Training and competence

18. **The Panel recommends that the FSA ensures that lessons from enforcement feed back into the FSA’s training and competence regime to prevent, where possible, the need for further enforcement action.**

Other issues

19. The Cabinet Office has recently established an Enforcement Concordat which provides a framework for enforcement. The Panel hopes the FSA will consider its relevance as appropriate.