

Consultation response

FSA DP 13/1 Transparency

26 April 2013

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on the Financial Services Authority (FSA) consultation document DP 13/1: Transparency.

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

AFME is listed on the EU Register of Interest Representatives, registration number 65110063986-76.

We summarise below our high-level response to the consultation, which is followed by answers to the individual questions raised.

Executive Summary

AFME members support the regulatory intention to carry out work "in a way that is as open and accountable as possible" and welcome the general approach to increased transparency in areas such as product information, the manner in which the regulator carries out its functions and the effectiveness of that regulatory activity.

Inevitably there are costs, direct and indirect, associated with transparency and it is essential that an appropriate balance be maintained between those costs and the benefits achieved as a result of that transparency.

Other key areas that are essential to consider are the manner in which information is made transparent, the context in which the information is presented and the need to balance the desire for transparency against legitimate concerns regarding commercial sensitivities and the need for certain types of data to remain confidential.

AFME members believe that in general, individual regulated firms should not be identified by the FCA when disclosing information derived from thematic reviews or other supervisory activities. An exception to this would be where publication of the firm's identity is a part of a disciplinary/enforcement process. Furthermore the information should not allow the identity of firms to be deduced even if the name is not formally disclosed.

Given that regulators focus, or should focus, the majority of their activities in areas where there are regulatory issues, there is a significant danger that increased transparency of such activities may have the unintended consequence of distorting the view of consumers of the respective

market/product area. Care should be taken to ensure that an appropriate balance is maintained so that transparency is applied to both “good” and “bad” aspects identified as relevant to consumers and therefore worthy of publication.

Please do not hesitate to contact me, if you should have any further questions or would like to discuss any points raised in this response.

Yours faithfully

Angela Teke

Managing Director, Compliance
Phone: +44 (0)20 7743 9369 (direct)
Email: angela.teke@afme.eu

1. Setting the scene

1.4 - AFME Members are broadly supportive of the definition of transparency as set out in paragraph 1.4 of the discussion document. However, Members believe that it would be beneficial if the definition was expanded to include reference to the limitations on transparency as a consequence of the need to maintain confidentiality for commercial and other sensitive data.

Members believe that consideration needs to be given to both the quantity and quality of matters subject to transparency. There is a need to avoid too much regulatory “noise” where important messages are lost in more general “clutter” of routine matters. One way in which Members believe it would be possible to focus consumers (and others) on more important matters is to draw a distinction between:

- a) Matters that warrant attracting general attention and that are subject to specific publicity arrangements (press releases etc); and
- b) Matters that are more routine and where data is simply made available (e.g. placed on the web-site and available for download) without additional publicity.

However, where material is made available, members believe that it is essential that adequate definitions and other contextual information are also made available so that interested parties are able to interpret the material accurately. For example the size of the firm and the number of its customers can be significant in putting complaints data into context.

1.5 – AFME Members encourage the FCA to undertake a formal cost benefit analysis of any proposals to increase transparency. Ongoing, transparency initiatives should be subject to review to ensure that they continue to meet the original objectives in the most cost-efficient manner. The FCA should ensure that there is no unnecessary duplication where the same data elements are required to be disclosed in different formats in support of different transparency or regulatory initiatives. Wherever possible, the FCA should make use of data that it already has available rather than requiring firms to make additional submissions.

1.6 - We welcome the recognition that information should not be disclosed where it “would be unfair to a particular firm or individual“. Unless there is a specific reason to the contrary (e.g. in notices regarding enforcement action), AFME Members believe that publications should not include the identity of the firm or firms from which the underlying data have been sourced.

1.15 - Members are encouraged to see that the FCA plans to keep transparency arrangements under review to assess their efficiency and effectiveness. However, it is important to avoid over-engineering the transparency and review processes. Care should be taken to keep the implementation costs associated with transparency initiatives for both the FCA and regulated firms as low as is reasonable in the circumstances. The FCA should avoid overly complex review/analysis of those transparency initiatives, except where fully justified.

1.16 – The cost, both to the FCA and regulated firms, associated with disclosure changes in terms of the initial consultation, analysis and subsequent changes to systems and working practices is significant. Consequently, the FCA should seek to limit the number of changes to disclosure requirements and ensure that a clear and significant benefit to consumer outcomes exists before embarking upon making changes to disclosure rules. If any changes are envisaged there should be sufficient time for transitional arrangements.

There is a specific additional element of transparency, which Members would like the FCA to consider. The FCA is encouraged to provide details of the costs of undertaking a typical consultation exercise and these details should be based on historic data available from FSA records.

The costs should include estimates of costs arising to the FCA (cost of preparation, distribution, analysis of responses and publication of the results) along with estimates of the cost to firms (to cover initial analysis of CP, briefing management and staff and any formal response both of the consultation exercise and final policy).

2. Background

2.4/2.5 - Whilst it is important that consumers “understand and engage with the market”, it is also important to remember that the term consumer encompasses a very wide range of individuals and organisations. Disclosures should be pitched at the correct level for the relevant consumer. It is not necessarily appropriate for disclosures associated with a product intended for sophisticated/experienced investors to be pitched at the same level as those intended for a consumer with little or no experience of investments. It is also important to set out criteria/parameters for firms’ disclosure of product features so that customers are able to compare different products by reference to the same or similar features. It is also important to remember that “the best deal” for a consumer may not be necessarily the best product for another. Firms should be required to be transparent and offer adequate information to their customers but customers should also be required to take responsibility for selecting the best available option for their own needs.

2.6 - Price comparison websites should be required to disclose a set of features for each product. It should be the customer’s responsibility, based on the clear, transparent set of information provided, to take a decision on what is best for his/her needs. It is also important to consider that firms may not have a relationship with these websites and therefore will not be in control of what information is published (see below).

2.10 – It is not clear from this paragraph whether:

- The FCA is envisaging that disclosures made to the FCA will be passed on to third parties;
- The FCA will regulate to require firms to supply data directly to such third parties; or
- The FCA will regulate to require firms to publish data that can subsequently be used by any third party.

Regardless of which of the above applies, we would like to seek clarity on the controls envisaged to ensure that any such consumer website or aggregator site uses the information in an appropriate way. For example, how will the FCA ensure that aggregator sites do not provide a distorted view of the market that is incomplete or biased against any single firm or group of firms? As the DP acknowledges, concerns have been expressed “about the independency or quality of intermediaries” but the paper does not outline in any detail how this concern should be addressed by the regulator.

2.11 - Members agree that disclosure can be a very powerful regulatory tool which can be used to the benefit of both consumers and regulated firms. However, given the potential for adverse/unintended consequences, it is vital that appropriate checks and balances are put in place to ensure that disclosure of regulatory data is only used in appropriate circumstances.

Where the FCA proposes an increase in transparency, Members believe that the proposal should include full details of the purpose of the initiative and the expected results in terms of e.g.

consumer education, consumer protection, anticipated changes in behaviour (both for consumers and firms) etc.

In all cases Members believe that it is essential that the FCA ensures that publication of regulatory data is kept within the correct context/perspective.

Care must be taken to ensure that publication does not lead to a false impression of overall market quality and that a small number of incidents/offenders does not tarnish the wider market inappropriately as this would not be in the public interest.

With regard to the list of examples, Members would like all formal speeches/presentations made at conferences and other public events by FCA staff to be made available (including the associated presentation slides/graphics). Whilst the FSA has been publishing a number of key speeches on its website, the list of speeches has been often incomplete. For example, on a number of occasions, speeches or formal comments by senior FSA staff at conferences or other public events have been referred to in the media without firms being able to verify completeness/ and or accuracy of these reports.

Although we are not aware of a formal announcement having been made at the time of drafting this response, we understand that the FCA has considered reducing the frequency and limiting the content of the Market Watch Newsletters. We are aware of the revised Guidance consultation process, but nonetheless Members would urge that the FCA reviews that decision, as Market Watch has proved to be one of the most useful publications made by the FSA and Members would like to see its continued publication combined with other forms of industry engagements such as bi-lateral meetings and workshops.

2.12 - Members are very supportive of the publication of final notices and decision notices in full as these give valuable insight to the FSA/FCA's supervisory approach.

2.13 – The publication of anonymous aggregated data may be helpful e.g. where a number of firms have been asked to change/improve their approach in a particular area (i.e. supervisory intervention rather than enforcement action). Such publication would help communicate regulatory expectations and allow firms the opportunity of modifying their behaviour, if necessary, to avoid potential supervisory/enforcement action. (However, there will be cases, where contextual information will be needed, as FSA recognised in the case of the reports on market cleanliness).

The FCA should ensure that when publishing firms' specific data, whether individually or alongside other firms, care is taken to ensure that firms are not unfairly disadvantaged in any way as a consequence of that publication. Wherever possible, firms should be advised in advance of publication if their identity is to be disclosed.

Given that FCA supervisory staff will have most day to day contact with C1 and C2 category firms, there is a danger that publication of regulatory data will be skewed inadvertently to the disadvantage of larger firms. Members are concerned that the FCA maintains an appropriate balance to ensure publication does not distort the view consumers have of the larger firms.

2.19 – Notwithstanding the information contained in the complaints data and mindful about the limitations of disclosure, Members would be interested to see an up-to-date detailed analysis of the impact on consumer behaviour resulting from the increased transparency around complaints data.

3. How the FCA could be more transparent

3.3 - Members would ask the FCA to consider what other internal material could be published in addition to the minutes of board meetings. In particular members feel that greater transparency around policy development would be beneficial. This would allow stakeholders to review the types of issues being considered by the FCA and, if appropriate, provide input at an early stage which will have the potential to improve the overall efficiency of the regulatory process.

Members feel that the FCA should consider adopting the same approach as used by some of the European bodies, such as ESMA, where there is frequently a call for evidence from interested parties before a formal proposal is put out for wider consultation. This approach would allow trade associations and consumer groups an opportunity to provide information that could assist in the FCA's development of policy at an earlier stage of the thought process.

3.7 - We welcome the publication of formal investigations into regulatory failure as well as transparency regarding relevant FSA/FCA internal audit reports such the "Review of the extent of awareness within the FSA of inappropriate LIBOR submissions".

3.10 - Our members support FCA initiatives in developing a website that is easier to navigate and strongly encourage the promotion of best practice and equal accessibility across various departments of the FCA as for example historically, important policy documents such as CEO letters were only published on the FSA "Small Firms" section of the website although they would have been equally relevant to larger firms.

3.12 - Members believe that the FCA should publish details of all FOI requests it receives and the subsequent FCA responses unless there are very good and disclosed reasons to the contrary.

Members believe that the FCA should publish/make available (after the event) details of all research it has commissioned especially that from external suppliers. Information should be provided on the objectives/rationale for the research, the process used to select the party commissioned to undertake the research and copies of the final result/reports as well as any follow-up actions intended as a result of the research.

Members would like to see the FCA publish a balanced view of the results of its research activities with publication of results both where there is perceived to be an issue warranting regulatory intervention as well as where the results indicate that no significant regulatory action would appear to be required/appropriate.

3.13/3.14 - Members would like to see the FCA publish more information regarding supervisory activity and supervisory outcomes particularly in those areas where FCA believe there is a significant risk to the FCA's consumer protection and integrity objectives.

3.16 - Members would support an FCA initiative to increase the transparency around whistleblowing subject to maintaining an appropriate degree of confidentiality being maintained to protect both the whistleblower and the firm concerned. Members feel that Section 348 4 b of the Act provides an adequate gateway for publication (in anonymised/sanitised form) to allow, in most instances, sufficient details relating to whistle-blowing for the disclosure to be meaningful.

Members believe that feedback to whistleblowers is very important to maintain confidence in the system and to encourage appropriate use in the future. Obviously an individual whistleblower may not wish to be contacted and receive feedback but where feedback is requested it should be possible for the FCA to provide confirmation that the matter has been investigated, the overall result of that investigation and confirmation as to whether any further regulatory action is likely to be taken regarding the matter. It would not be necessary or appropriate for the FCA to provide specific details such as the names of individuals within the firm contacted or precise information regarding regulatory action taken/proposed.

If no action is to be taken by the FCA in response to the report from the whistleblower then the whistleblower should be offered an adequate explanation as to why the FCA have decided not to act.

3.20 - What information would be helpful?

The FCA should provide feedback to all stakeholders providing aggregate details on:

- The number of whistleblowing events;
- The types of issues raised by whistleblowers;
- Whether the whistleblower had used the relevant firm's internal whistleblowing arrangements before approaching the FCA;
- Whether the FCA investigated the matter and the results of that investigation;
- Details of what action was taken/is proposed to be taken by FCA along with a justification for that action.

3.20 - What are the potential benefits?

Potential benefits include encouragement for others to use the whistleblowing process if it is seen to be taken seriously by the regulator. Equally firms may well update/amend their own procedures based upon the data made available (e.g. improve their own internal whistleblowing procedures or change working practices within the firm to take account of lessons learnt).

3.20 - What are the potential drawbacks?

A significant number of "false alarms" where, upon investigation by the FCA, no action was required, could lead to a drop in the number of reports (with potential whistleblowers losing faith in the system believing that it was a waste of time or that they would not be taken seriously given, malicious reports aside, the whistleblower presumably always thinks there was a concern even if subsequent investigation suggested there were no issues).

3.21 – Members believe that in the majority of cases it is fairly obvious why enforcement action has been taken by the regulator. However, there may be instances where it would be helpful for the FCA to comment on the reasons why they have taken action in a particular case e.g. where action was taken to set an example and to specifically warn the wider population on a point.

An explanation as to why the FCA has focussed on one particular area rather than another may assist stakeholders in understanding where the FCA perceives there to be greater risk to its objectives and consequently greater risk/impact on consumers.

Publication of more information regarding the scope and costs associated with investigations would be helpful although average costs are of very limited value. It would be much more helpful were the FCA to include an estimate of the costs associated with each enforcement action it undertakes. Such information should be readily available from FCA's internal records and could be included at minimal additional cost. This information would assist stakeholders assess efficiency and the cost vs. benefit of regulation and regulatory action.

3.22 - Extent to which this would be helpful?

Greater detail regarding the activities undertaken within the enforcement division may assist stakeholders in assessing the overall efficiency of the regulator and the cost vs. benefit of regulation in particular areas.

The information could be a potential source of data for education programs providing better information as to regulatory expectations/standards and processes.

3.22 - What additional information should be published?

In addition to the existing data published on enforcement cases, Members would like to see information regarding cases investigated by the FCA where, upon investigation, no action was taken. Information in this area should include details of the number and type of cases investigated, the time/resources allocated to the investigations and details as to why no action was taken e.g. no case to answer, insufficient evidence to prosecute, not in the public interest or matter referred back to Supervision for action by supervisors and the firm concerned.

Members would also like to see greater transparency around the use of Section 166 powers by the FCA to include:

- Who is on the list of organisations approved to undertake Section 166 reviews?;
- What criteria are used to assess such firms and the processes around being included on that list?;
- What arrangements does FCA have in place to assess the performance/quality of reports obtained using Section 166?;
- How frequently are Section 166 reviews being required by FCA?; and
- What are the estimated costs/benefits associated with the use of Section 166 powers by the FCA?

Members believe that the FCA should publish more detail on its market monitoring activities, particularly those arising out of the monitoring of transaction data supplied by firms. Consideration should be given to providing information on alerts generated, investigations undertaken and results obtained from monitoring price and transaction data across the various markets.

3.22 - What are the potential benefits?

Stakeholders will gain a better understanding of the regulator's activities and the rationale as to why action has been taken or not taken in by the enforcement division.

Greater understanding of the regulator's priorities will assist regulated firms in focussing their own resources on the areas where the regulator believes there is the greatest risk to consumers.

3.22 - What are the potential drawbacks?

There is a danger that too much regulatory resource will be devoted to producing information and subsequent analysis of that information in an appropriate format for publication.

3.25 - Members do not believe that publication of the type of information outlined in paragraphs 3.23 and 3.24 would lead to any significant fall in standards in other areas.

Members would like to see the FCA provide a more forward-looking view of supervisory activities indicating where, over the next 12 months the FCA anticipate the most significant activity will take place e.g. the number of visits planned and the areas under consideration for thematic review.

3.25 - To what extent do you think this would be helpful?

Members believe that greater transparency in this area would assist them in understanding areas of regulatory concern and provide useful information that would help them assess their own position relative to their peer group.

3.25 - What additional information about supervisory activities should be published?

Refer to comments on paragraphs 3.13 and 3.14 above regarding publication of the FCA's view of the "state of the market".

Members believe that when publishing information about authorisations, variations of permissions or other similar data sets, the FCA should include details on time to process, reasons for delays, reasons for withdrawal of applications etc. to facilitate a better understanding of the overall application/approval process.

Information regarding the application for and granting of waivers, anonymised details of waiver requests and the resultant action taken by FCA would also be helpful and would help maintain a level playing field for participants. For example, with regard to recently introduced mobile phone recording requirements, some firms felt at a disadvantage believing that others had been granted waivers when in fact FSA confirmed that no waivers had been given and consequently their concerns were unfounded.

Members would like to see information on a regular basis (e.g. annually) on the qualifications, training and experience of the staff within both the supervisory and policy areas of the FCA along with details as to how the FCA monitors and assess the quality of the work undertaken by those teams.

3.25 - What are the potential benefits?

The benefits would be improved consumer confidence that the supervisor is aware of issues/concerns in the market and taking appropriate action to address those issue/concerns in a timely manner.

Consumers may become aware of regulatory concerns in particular areas which may lead them having a better understanding of the particular product and the risk associated with that area. Consumers may take more care when purchasing/investing in a product where they have a greater understanding of the risks involved.

Regulated firms may be able to use data as an early warning of potential issues that may arise which could lead to improved compliance monitoring within firms.

3.25 - What do you think are the potential drawbacks?

There is the potential for misunderstandings to arise unless appropriate disclosure of contextual information is also provided to stakeholders alongside the details of supervisory activity.

Increased transparency may lead to supervisory staff seeking to justify their existence by undertaking unnecessary visits/data requests which would have an adverse effect on the overall costs of regulation.

4. Information we could release about firms, individuals and markets

4.12 - To what extent do you think this would be helpful?

The publication of averages is of very limited value as the results are subject to distortion/bias as a consequence of unrepresentative samples in the underlying data. It would be much more beneficial for the FCA to publish the range/distribution of the time taken to process applications for authorisation with associated commentary as to the nature of the applications in the sample.

4.12 - Other information in relation to the authorisation process

Where the application has taken more than the target time to process some explanation should be provided so that stakeholders can interpret the data correctly e.g. if the firm submitted an incomplete application or the FCA took longer than normal to process the application for some other reason.

Information should also be provided so that the statistics can be viewed in context such as whether the application related to a complex business involving a wide range of regulated activities or whether it was an application for a very small business focused on a specific business area.

4.18 - Do you think this would be helpful?

Members believe that the FCA should always publish the results of its thematic reviews, provided the sample size is large enough for aggregation to work effectively and therefore avoid the identification of the individual firms included in the review.

4.18 - What sort of information would you expect to see?

Members believe that publication should include as a minimum:

- The objective behind undertaking the review;
- Details of the methodology adopted when undertaking the review including the rationale for the sample size and individual firms selected for participation in the review;
- A view of the results/raw data arising from the review;
- Details of the analysis undertaken of that raw data;
- The conclusions drawn from the review; and
- Any further action planned as a consequence of the review.

4.18 - How would you like this information to be made available?

In general, Members support publication of material on the website with a facility to download any underlying data so that firms can carry out their own analysis where required.

4.18 - What are the potential benefits?

Members believe that there are a wide range of potential benefits including:

- Better understanding of regulatory action/inaction;
- Better understanding of the state of the market;
- Opportunities for enhanced consumer education/understanding; and
- The potential that the underlying data may be useful for other purposes leading to cost savings or other efficiencies.

4.18 - What are the potential drawbacks?

As with all publications there is the potential for the information to be used out of context or otherwise misunderstood. There is also the risk that firms subject to the review may be identified and subjected to unfair criticism.

Transparency of the redress process

4.19 - In general Members would support a proposal to increase transparency around the redress process although care is required to ensure that consumers are not misled and that individual firms are not disadvantaged as a consequence of that increased transparency.

In particular Members feel that greater clarity/definition would be required regarding the definition of redress to differentiate matters such as:

- Payments made to cover costs;
- Compensation in respect of specific losses;
- Compensation for lost opportunities;
- Compensation/damages for inconvenience etc;

- Goodwill payments; and
- Fines or other financial penalties paid by the firm.

4.21 - Do you think this would be helpful?

Generally, we support transparency but have no specific points to raise this topic.

4.21 - What sort of information would you expect to see?

See comments against 4.19 above. In addition, it would be helpful to see data on the number of redress cases per year per each firm, turnaround times for dealing with complaints and more detailed data to understand if redress is paid at the end of an investigation or at the outset as a gesture of goodwill. In order to put the information in context, reference should also be made to the percentage of complaints by reference to the overall customer base of the firm.

4.21- How would you like this information to be made available?

It will be important that the information is available free of charge and online.

4.21 - What do you think are the benefits?

This would provide evidence to support the scheme and demonstrate that valid complaints are appropriately dealt with.

4.21- What do you think are the drawbacks?

There is a need to avoid a “compensation culture” where people are encouraged to seek redress on an invalid basis e.g. significant number of false PPI claims.

5. Information that we could require firms to release

5.3 - Whilst it is relatively easy for aggregator sites to rank products by price, it is much more difficult to rank those same products by quality given the subjective nature of an individual's perception of quality. Care should be taken to ensure that the “quality” of a product in terms of its suitability to meet a particular need is not assessed by simply counting/assessing the number of add-ons that come with that product.

5.4 - Members would encourage the FCA to seek specific input from Consumer and Practitioner Panels on the matters felt most relevant to consumers when selecting a particular product/product supplier.

Members also feel that it is important to keep in mind the very wide definition of consumers and recognise that a “one size fits all” approach is unlikely to be appropriate or acceptable to stakeholders.

5.10 - We think the annuity market could be more transparent and easier to understand.

We have no specific comments to make on this section as insurance activities fall outside the scope of AFME activities.

5.17 - Publication of claims data for insurance products is one idea that we think could help improve the outcome for consumers and change firm behaviour.

Insurance activities fall outside the scope of activities primarily covered by AFME, however AFME members have suggested that such data should not be made available in respect of insurance products sold as part of a packaged account, as information on how easy is to claim against that insurance company may have an anti-competitive effect on the market.

5.19 - Contextualisation of complaints data

5.19 - To what extent do you think this would be helpful?

It would be useful if data are provided with a detailed context and background. For instance, this could include reference to the overall percentage of accounts. It would also be important to provide details of the reasons for the complaint to differentiate between a customer's general dissatisfaction with a service provider from dissatisfaction with a feature of the product or the sale process of the firm.

5.19 - Do you have any suggestions about what matrix we should mandate?

Information could include:

- Overall number of complaints;
- Overall number of successful outcomes versus complaints upheld in favour of the firm;
- Percentage of complaints versus overall number of customers (e.g. 5% of the total population);
- Details of complaint; and
- Details of how complaints are logged.

5.19 - Do you have any other suggestions about where firms releasing information about their own behaviour may lead to beneficial outcomes?

We have no specific comments to make on this section.

5.20 – Members believe that the FCA should undertake a review of the criteria in association with relevant trade associations/consumer groups and then issue a formal consultation document to ensure that all stakeholders have an opportunity to review and input on the proposed arrangements. Consultation with trade bodies and consumer groups in advance of the formal publication of the consultation document should help ensure that the overall policy proposal has been subject to review by appropriate experts before being published to consumers and other stakeholders. Members believe that the overall quality of the consultation exercise will be improved as a consequence of adopting this approach.

6. Conclusions

We have no comments on this section - please refer to our detailed comments on the specific sections.

7. Appendix 1 – The Legal Framework

The regulator should carefully balance the legal requirement to make information available with the legal obligations for firms to keep customers' information confidential. Firms should not be required to disclose customer data unless this information is anonymised.