

First Challenge to FCA's New Investigation Publicity Policy Dismissed

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The High Court has dismissed a judicial review claim brought by an anonymised company ("CIT") challenging the FCA's decision to publicly name it as the subject of an investigation.

The case represents the first court challenge to the FCA's new investigation publicity policy,

The court held that the FCA's decision to make a "naming announcement" was both lawful and reasonable, rejecting arguments that the regulator had misinterpreted its Enforcement Guide (the "Guide") or acted unreasonably. The claimant unsuccessfully argued that, whilst an "anonymised announcement" might be lawful, a "naming announcement" identifying the company was unlawful and unreasonable.

This note is based on Part 1 of the judgment, which has been written to enable prompt public hand-down whilst maintaining anonymity and reporting restrictions. Part 2 of the judgment contains further detail but remains subject to restrictions pending any appeal, as naming the claimant would be tantamount to determining the proceedings against it.



Background



The Court's Decision



Grounds of challenge



Key Take Aways

Background

The FCA commenced an investigation into CIT and appointed four investigators pursuant to section 168 of the Financial Services and Markets Act 2000. The investigation was at its early stages, with no findings made and no conclusions reached as to whether regulatory requirements had been breached.

Under section 4.1 of the Guide which provides for "Publicity during FCA investigations", the FCA has three essential options when considering whether to publicise an investigation: (1) no announcement, reflected in the baseline position that the fact of the investigation is not made public; (2) an anonymised announcement; and (3) a naming announcement, where the subject of the investigation is identified. In this case, the regulator decided to make a "naming announcement" publicly identifying CIT as the subject of the investigation. Whilst CIT accepted that an anonymised announcement (identifying the sector and concerns without naming the company) could be lawful and reasonable, it challenged the decision to name it specifically.

The FCA's decision-making process involved two memoranda from the case team to the FCA decision-maker. The initial memorandum recommended an anonymised announcement, but after the decision-maker identified several points that merited consideration that either did not feature or were underplayed in the memo, the case team prepared a second memorandum recommending a naming announcement. The decision-maker adopted the recommendation in the second memorandum, and the focus of the legal challenge is on the reasons set out there.

The claimant's grounds of challenge argued that the FCA decision-maker materially misinterpreted the Guide, or

Grounds of challenge

alternatively reached a decision which was unreasonable as to "outcome" or as to its reasoning "process".

The claimant advanced three key points about the objectively correct interpretation of the Guide which the court accepted as correct:

1. "Exceptional circumstances" in the Guide means exceptional relative to investigated-situations (the investigation cohort), not exceptional relative to regulated-situations, i.e., the key question is whether this is an exceptional investigation rather than an exceptional regulated-situation;
2. Desirability under the Guide must be judged against both alternatives: no announcement and an anonymised announcement; and
3. Exceptionality involves reasons relevant to naming, not just reasons relevant to announcing. Taking points 2 and 3 together, the essential insight here is that to justify as reasonable a naming announcement, the exceptionality and desirability of the naming announcement need to be for reasons relevant to naming, judged against the alternative of an anonymised announcement, and not just judged against the alternative of no announcement. It would be an error of interpretation for the FCA to have approached exceptionality or desirability by reference only to no announcement, or for reasons relevant only to announcement of the investigation rather than naming the claimant.

Fordham J granted permission for judicial review on all grounds, finding that the arguments crossed the threshold of arguability with a realistic prospect of success. However, the court ultimately dismissed the substantive claim, accepting the FCA's submissions that the decision was lawful and reasonable.

Interpretation of the Guide

Whilst the court was satisfied that the claimant's arguments met the threshold of arguability for the purposes of seeking permission for judicial review, it could not accept the claimant's substantive case on misinterpretation. The court concluded that the claimant could not identify any specific sentence or passage in the second memorandum that actually misstated the correct interpretation of the Guide. The court found that the claimant's criticisms went to how well the FCA had reasoned its decision, rather than showing that the FCA had misunderstood what the Guide required.

The court held that when the FCA's reasoning was read fairly and as a whole, it did not misinterpret the Guide's requirements on desirability and exceptionality. Importantly, the court found that the FCA's justification for exceptional circumstances was not based simply on the seriousness of the matters being investigated, but specifically addressed the question of whether to name CIT.

Reasonableness of Application

The court acknowledged that aspects of the FCA's reasons in the second memorandum could be criticised and that some of the reasoning appeared weak when viewed in terms of the arguments for a naming announcement rather than an anonymised

announcement. However, the court was unable to accept that the decision was ultimately unreasonable as to outcome or process as it was within the range of reasonable decisions open to the decision-maker and concluded that there was no demonstrable flaw in the FCA's reasoning process.

The "Key Theme"

Central to the court's reasoning was what it termed the "key theme": the case team had identified regulatory reasons for communicating a message specifically to the claimant's customers, designed to alert them that they may wish to consider their options by reference to aspects of the way in which they may have come to be the claimant's customers, and to do so sooner rather than later.

The case team assessed that a communication announcing the investigation and naming the claimant was the most effective regulatory response to get a message across to a group of customers which it specifically wanted to ensure was best informed, and that this was desirable when viewed against the alternatives of customers being in the dark or receiving a generic anonymised announcement.

The court held that this key theme was "fatal" to the claimant's reasonableness challenge, as it represented evaluative regulatory reasoning which specifically related to naming the claimant alongside announcing the investigation.

The court dismissed the claim for judicial review as it failed on its substantive legal merits, granted the FCA's costs of £32,000, and refused permission to appeal. The FCA gave an undertaking not to publish the naming announcement until the expiry of time for filing an appellant's notice or a Court of Appeal decision refusing permission to appeal, and the court abridged the period for seeking permission to appeal to 7 days.

This judgment provides important guidance on the scope of the FCA's powers to publicise investigations and the courts' role in reviewing such decisions:

- **Division of responsibility between the FCA and the courts:** whilst the objectively correct interpretation of the Enforcement Guide is ultimately a question for the court, questions about whether circumstances are exceptional, whether an announcement is desirable, and which option is the appropriate regulatory response belong to the FCA as primary decision-maker, subject only to reasonableness review by the courts.
- **Key principles of interpretation:** "exceptional circumstances" means exceptional relative to investigated-situations (not regulated-situations), and desirability and exceptionality must be judged against both alternatives (no announcement and anonymised announcement) with reasons relevant to naming the firm, not just announcing.
- **Consumer protection as justification for naming:** the court accepted that where the FCA considers that consumer

protection requires customers to be specifically informed that a particular firm is under investigation, and that an anonymised announcement would leave customers inadequately protected, this can justify a naming announcement even where potential prejudice to the firm is identified

- **Routes to an anonymised announcement:** the court acknowledged an unresolved question about whether paragraph 4.1.8G of the Guide provides the exclusive basis for making an anonymised announcement, or whether alternative independent routes could exist. The court declined to resolve this question, as all parties agreed that an anonymised announcement was a viable option in this case and met the criteria in 4.1.8G
- **Anonymity and reporting restrictions:** the case was heard with anonymity orders and reporting restrictions in place, as naming the claimant would have been tantamount to determining the proceedings against it

R (CIT (an anonymised company)) vs The FCA [2025] EWHC 2614 (Admin)

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