Enforcement Guide

Chapter 2

The FCA's approach to enforcement

Case selection and the use of 2.1 enforcement powers 2.1.1 The FCA's effective and proportionate use of its enforcement powers plays an important role in the pursuit of its statutory objectives, including its operational objectives of securing an appropriate degree of protection for consumers, protecting and enhancing the integrity of the UK financial system, and promoting effective competition in the interests of consumers. For example, using enforcement helps to contribute to the protection of consumers and to deter future contraventions of FCA and other applicable requirements and *financial crime*. It can also be a particularly effective way, through publication of enforcement outcomes, of raising awareness of regulatory standards. 2.1.2 There are a number of principles underlying the FCA's approach to the exercise of its enforcement powers: (1) The effectiveness of the regulatory regime depends to a significant extent on maintaining an open and co-operative relationship between the FCA and those it regulates. (2) The FCA will seek to exercise its enforcement powers in a manner that is transparent, proportionate, responsive to the issue, and consistent with its publicly stated policies. (3) The FCA will seek to ensure fair treatment when exercising its enforcement powers. (4) The FCA will aim to change the behaviour of the person who is the subject of its action, to deter future non-compliance by others, to eliminate any financial gain or benefit from non-compliance, and where appropriate, to remedy the harm caused by the noncompliance. 2.1.3 Enforcement is only one of a number of regulatory tools available to the FCA. As a risk based regulator with limited resources, throughout its work the FCA prioritises its resources in the areas which pose the biggest threat to its statutory objectives. This applies as much to the enforcement tool as it does to any other tool available to it. The next section of this chapter summarises how in practice the FCA takes a risk based approach towards its use of the enforcement tool, and the subsequent sections comment on other aspects of the FCA's approach to enforcement.

2.1.4 Where a *firm* or other *person* has failed to comply with the requirements of the *Act*, the *rules*, or other relevant legislation, it may be appropriate to deal with this without the need for formal disciplinary or other enforcement action. The proactive supervision and monitoring of *firms*, and an open and cooperative relationship between *firms* and their supervisors, will, in some cases where a contravention has taken place, lead the *FCA* to decide against taking formal disciplinary action. However, in those cases, the *FCA* will expect the *firm* to act promptly in taking the necessary remedial action agreed with its supervisors to deal with the *FCA*'s concerns. If the *firm* does not do this, the *FCA* may take disciplinary or other enforcement action in respect of the original contravention.

Case selection and referral criteria 2.2 2.2.1 [deleted] EG 2.3.1 2.2.2 The FCA does not have a set of enforcement priorities that are distinct from the priorities of the FCA as a whole. Rather, the FCA consciously uses the enforcement tool to deliver its overall strategic priorities. The areas and issues which the FCA as an organisation regards as priorities at any particular time are therefore key in determining at a strategic level how enforcement resource should be allocated. FCA priorities will influence the use of resources in its supervisory work and as such, make it more likely that the FCA will identify possible breaches in these priority areas. Further, should evidence emerge of potential breaches, these areas are more likely to be supported by enforcement action than non-priority areas. 2.2.3One way in which the FCA focuses on priority areas is through its thematic work. This work involves the FCA looking at a particular issue or set of issues across a sample of firms. Themes are, in general, selected to enable the FCA to improve its understanding of particular industry areas or to assess the validity of concerns the FCA has about risks those areas may present to the statutory objectives. Thematic work does not start with the presumption that it will ultimately lead to enforcement outcomes. But if the FCA finds significant issues, these may become the subject of enforcement investigations as they would if the FCA had discovered them in any other circumstance. Also, by definition, the fact they are in areas that are of importance to the FCA means, following the FCA's risk-based approach through, that they are proportionately more likely to result in the FCA determining that an enforcement investigation should be carried out than issues in lower priority areas. 2.2.4 This does not mean that the FCA will only take enforcement action in priority strategic areas. There will always be particularly serious cases where enforcement action is necessary, ad hoc cases of particular significance in a

markets, *consumer* protection or *financial crime* context, or cases that the *FCA* thinks are necessary to achieve effective deterrence.

- 2.2.5 The combination of the priority given to certain types of misconduct over others and the *FCA*'s risk-based approach to enforcement means that certain cases will be subject to enforcement action and others not, even where they may be similar in nature or impact. The *FCA*'s choice as to the use of the enforcement tool is therefore a question of how the *FCA* uses its resources effectively and efficiently and how it ensures that it is an effective regulator.
- 2.2.6 In all cases, before it proceeds with an investigation, the FCA will satisfy itself that there are grounds to investigate under the statutory provisions that give the FCA powers to appoint investigators. Another consideration will be whether the FCA has any agreements in place regarding taking action on behalf of, or otherwise providing assistance to, other authorities. EG 2.5.1 discusses the position where other authorities may have an interest in a case. If the statutory test is met, the FCA will consider what is the most efficient and effective way of achieving its statutory objectives of protecting consumers, enhancing market integrity and promoting competition. A referral to Enforcement for an investigation will be made if the FCA considers that an investigation, rather than an alternative regulatory response, is the right course of action given all the circumstances. Enforcement action and other regulatory tools can be used together and are not mutually exclusive. To assist in making the decision to refer a matter for investigation, the FCA has developed referral criteria that set out a range of factors it may consider when deciding whether to appoint enforcement investigators. The criteria are not exhaustive, and all the circumstances of a particular case are taken into account. Not all the criteria will be relevant to every case, and additional considerations may apply in certain cases. Any one of the factors alone may warrant the appointment of investigators and in some cases, including cases where breaches are self-reported, the misconduct may be so serious that there is no credible alternative to referral.
- **2.2.7** If a decision to refer an *individual* or *firm* to Enforcement is made, the *FCA* will explain and set out the criteria applied in coming to the decision to refer, and will give a summary of the circumstances and the reason(s) for the referral at the start of the investigation.

Case selection: disciplinary regulatory cases

The FCA's referral criteria are published on the Enforcement section of the FCA's website: http://www.fca.org.uk/about/enforcement/referral-criteria. In considering whether an enforcement investigation is likely to further the FCA's aims and objectives, the FCA will consider factors that address the following issues:

- (1) any available supporting evidence and the proportionality and impact of opening an investigation;
- (2) what purpose or goal would be served if the FCA were to end up taking enforcement action in the case; and
- (3) relevant factors to assess whether the purposes of enforcement action are likely to be met.

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2.2.9

Case selection: markets cases

In relation to non-criminal *market abuse* investigations, the revised referral criteria will be similarly applied in deciding whether to open such an investigation. However, given the often limited alternatives to enforcement action available to address *market abuse* (with many of the subjects typically unauthorised), greater emphasis will be given to the egregiousness and deterrence value of a particular case when making such decisions.

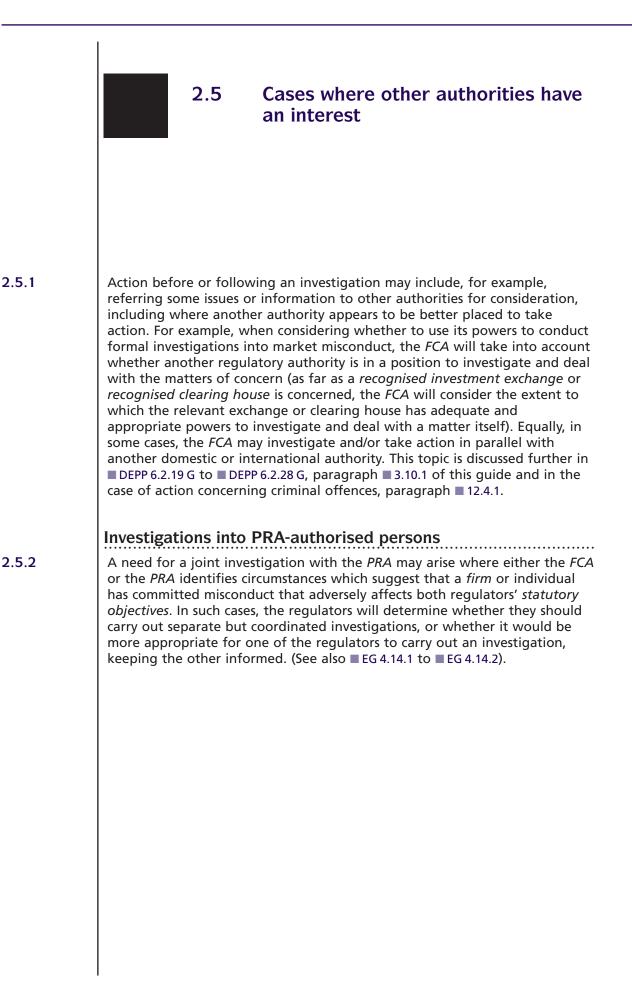
Case selection: listing cases

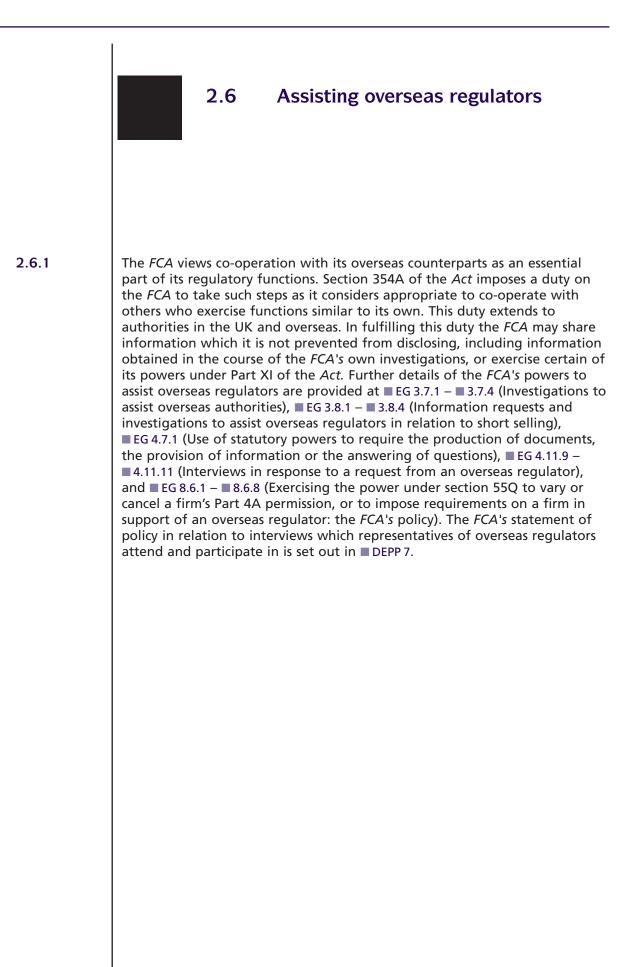
2.2.10

As with *market abuse* cases, many of the non-enforcement tools are not available for use in cases involving listing regime *breaches*. This is because in many cases (aside from certain areas such as *sponsors* and *primary information providers*), there will be no on-going supervisory relationship with the listed companies in question, and no similar authorisation regime as there is with *authorised persons*, *firms* and *individuals*. As a result, the ability to use many of the early intervention tools or restricting or limiting certain activities is not available and enforcement is likely to be the most effective (and sometimes only) regulatory tool available to address the misconduct.

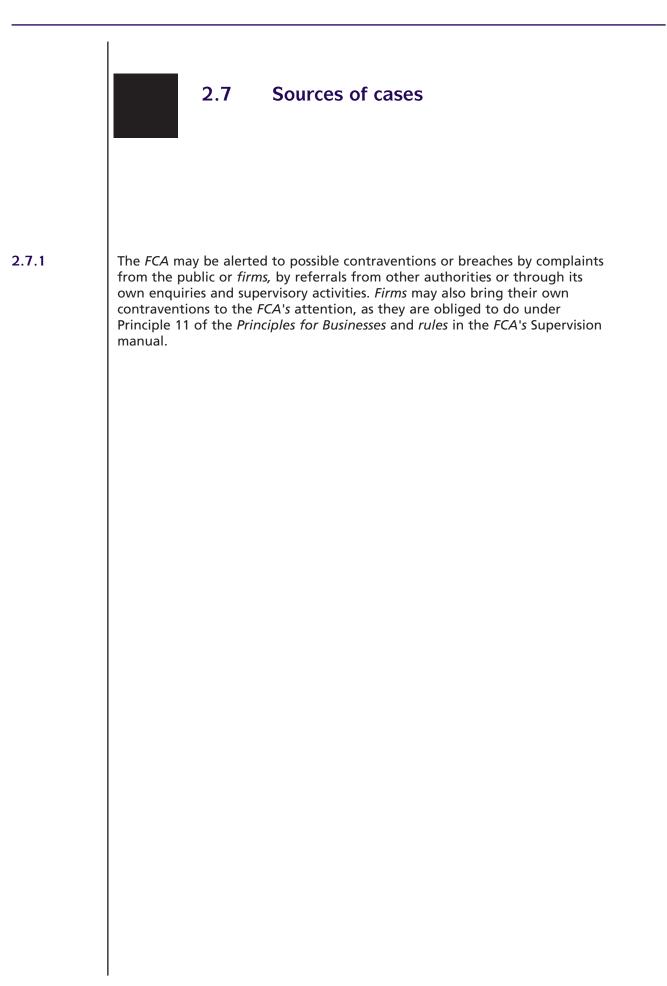


Case selection: Unauthorised 2.4 business 2.4.1 Where this poses a significant risk to the *consumer* protection objective or to the FCA's other regulatory objectives, unauthorised activity will be a matter of serious concern for the FCA. The FCA deals with cases of suspected unauthorised activity in a number of ways and it will not use its investigation powers and/or take enforcement action in every single instance. 2.4.2 The FCA's primary aim in using its investigation and enforcement powers in the context of suspected unauthorised activities is to protect the interests of consumers. The FCA's priority will be to confirm whether or not a regulated activity has been carried on in the United Kingdom by someone without authorisation or exemption, and, if so, the extent of that activity and whether other related contraventions have occurred. It will seek to assess the risk to consumers' assets and interests arising from the activity as soon as possible. 2.4.3 The FCA will assess on a case-by-case basis whether to carry out a formal investigation, after considering all the available information. Factors it will take into account include: (1) the elements of the suspected contravention or breach; (2) whether the FCA considers that the persons concerned are willing to co-operate with it; (3) whether obligations of confidentiality inhibit individuals from providing information unless the FCA compels them to do so by using its formal powers; (4) whether the *person* concerned has offered to undertake or undertaken remedial action.





EG 2 : The FCA's approach to enforcement



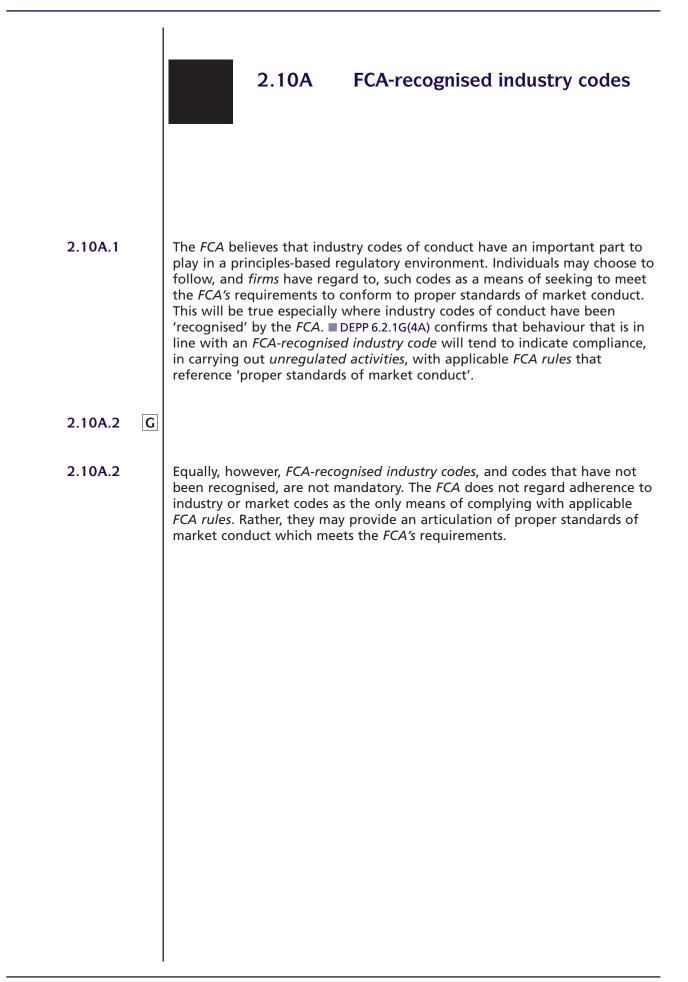
	2.8 Enforcement and the FCA's Principles for Business ('the Principles')
2.8.1	The FCA's approach to regulation involves a combination of high-level principles and detailed <i>rules</i> and <i>guidance</i> .
2.8.2	The FCA will, in appropriate cases, take enforcement action on the basis of the <i>Principles</i> alone (see also DEPP 6.2.14 G). This will have the benefit of providing further clear examples of how the <i>Principles</i> work in practice.
2.8.3	The FCA wishes to encourage firms to exercise judgement about, and take responsibility for, what the <i>Principles</i> mean for them in terms of how they conduct their business. But we also recognise the importance of an environment in which <i>firms</i> understand what is expected of them. So we have indicated that <i>firms</i> must be able reasonably to predict, at the time of the action concerned, whether the conduct would breach the <i>Principles</i> . This has sometimes been described as the "reasonable predictability test" or "condition of predictability", but it would be wrong to think of this as a legal test to be met in deciding whether there has been a breach of <i>FCA rules</i> . Rather, our intention has been to acknowledge that firms may comply with the <i>Principles</i> in different ways; and to indicate that the <i>FCA</i> will not take enforcement action unless it was possible to determine at the time that the relevant conduct fell short of our requirements.
2.8.4	To determine whether there has been a failure to comply with a <i>Principle</i> , the standards we will apply are those required by the <i>Principles</i> at the time the conduct took place. The <i>FCA</i> will not apply later, higher standards to behaviour when deciding whether to take enforcement action for a breach of the <i>Principles</i> . Importantly, however, where conduct falls below expected standards the <i>FCA</i> considers that it is legitimate for consequences to follow, even if the conduct is widespread within the industry or the <i>Principle</i> is expressed in general terms.

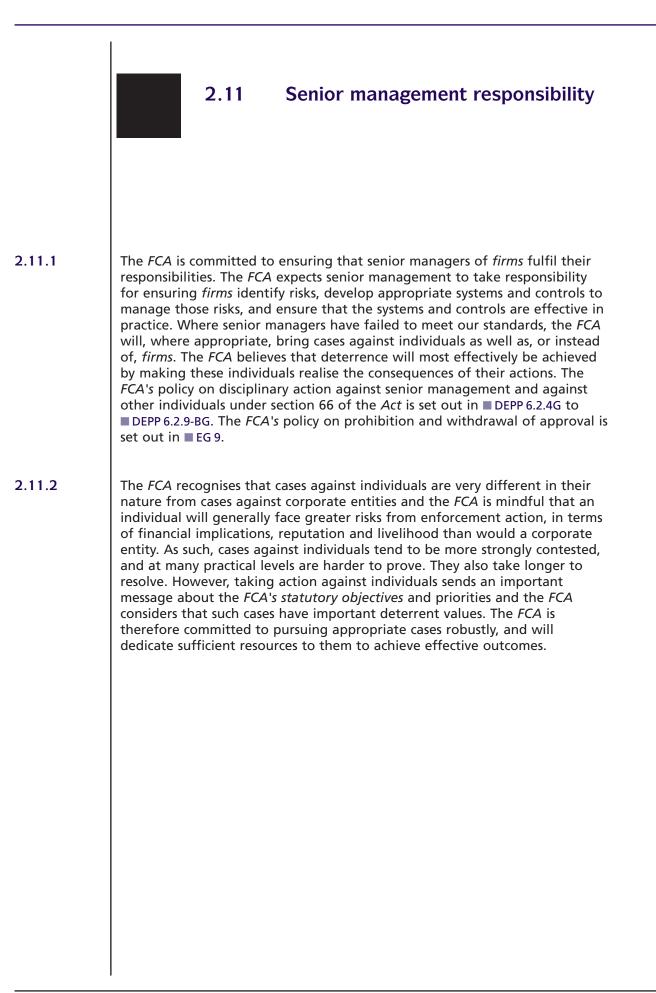
	2.9 FCA guidance and supporting materials
2.9.1	The FCA uses guidance and other materials to supplement the Principles where it considers this would help <i>firms</i> to decide what action they need to take to meet the necessary standard.
2.9.2	<i>Guidance</i> is not binding on those to whom the <i>FCA's rules</i> apply. Nor are the variety of materials (such as case studies showing good or bad practice, <i>FCA</i> speeches, and generic letters written by the <i>FCA</i> to Chief Executives in particular sectors) published to support the <i>rules</i> and <i>guidance</i> in the Handbook. Rather, such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant <i>rules</i> .
2.9.3	■ DEPP 6.2.1G(4) explains that the FCA will not take action against someone where we consider that they have acted in accordance with what we have said. However, guidance does not set out the minimum standard of conduct needed to comply with a <i>rule</i> , nor is there any presumption that departing from guidance indicates a breach of a <i>rule</i> . If a <i>firm</i> has complied with the <i>Principles</i> and other <i>rules</i> , then it does not matter whether it has also complied with other material the FCA has issued.
2.9.4	 Guidance and supporting materials are, however, potentially relevant to an enforcement case and a decision maker may take them into account in considering the matter. Examples of the ways in which the FCA may seek to use guidance and supporting materials in an enforcement context include: (1) To help assess whether it could reasonably have been understood or predicted at the time that the conduct in question fell below the standards required by the Principles.
	 (2) To explain the regulatory context. (3) To inform a view of the overall seriousness of the breaches e.g. the decision maker could decide that the breach warranted a higher penalty in circumstances where the FCA had written to chief executives in the sector in question to reiterate the importance of ensuring a particular aspect of its business complied with relevant regulatory standards.
	(4) To inform the consideration of a <i>firm</i> 's defence that the FCA was judging the <i>firm</i> on the basis of retrospective standards.

	(5) To be considered as part of expert or supervisory statements in relation to the relevant standards at the time.
2.9.5	The extent to which <i>guidance</i> and supporting materials are relevant will depend on all the circumstances of the case, including the type and accessibility of the statement and the nature of the <i>firm</i> 's defence. It is for the decision maker (see paragraphs \blacksquare 2.15.1 to \blacksquare 2.15.3) - whether the <i>RDC</i> , <i>Tribunal</i> or an executive decision maker - to determine this on a case- by-case basis.
2.9.6	The FCA may take action in areas in which it has not issued guidance or supporting materials.

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	2.10 Industry guidance
2.10.1	The FCA recognises that Industry Guidance has an important part to play in a principles- based regulatory environment, and that firms may choose to follow such guidance as a means of seeking to meet the FCA's requirements. This will be true especially where Industry Guidance has been 'confirmed' by the FCA. \blacksquare DEPP 6.2.1G(4) confirms that, as with FCA guidance and supporting materials, the FCA will not take action against a firm for behaviour that we consider is in line with FCA-confirmed Industry Guidance that was current when the conduct took place.
2.10.2	Equally, however, FCA-confirmed Industry Guidance is not mandatory. The FCA does not regard adherence to Industry Guidance as the only means of complying with FCA rules and Principles. Rather, it provides examples of behaviour which meets the FCA's requirements; and non-compliance with confirmed Industry Guidance creates no presumption of a breach of those requirements.
2.10.3	Industry Guidance may be relevant to an enforcement case in ways similar to those described at paragraph 2.9.4. But the <i>FCA</i> is aware of the concern that <i>firms</i> must have scope to exercise their own judgement about what <i>FCA rules</i> require, and that Industry Guidance should not become a new prescriptive regime in place of detailed <i>FCA rules</i> . This, and the specific status of <i>FCA</i> -confirmed Industry Guidance, will be taken into account when the <i>FCA</i> makes judgements about the relevance of Industry Guidance in enforcement cases.





2.12 **Co-operation** 2.12.1 An important consideration before an enforcement investigation and/or enforcement action is taken forward is the nature of a firm's overall relationship with the FCA and whether, against that background, the use of enforcement tools is likely to further the FCA's aims and objectives. So, for any similar set of facts, using enforcement tools will be less likely if a firm has built up over time a strong track record of taking its senior management responsibilities seriously and been open and communicative with the FCA. In addition, a firm's conduct in response to the specific issue which has given rise to the question of whether enforcement tools should be used will also be relevant. In this respect, relevant matters may include whether the person has self-reported, helped the FCA establish the facts and/or taken remedial action such as addressing any systems and controls issues and compensating any consumers who have lost out. Such matters will not, however, necessarily mean that enforcement tools will not be used. The FCA has to consider each case on its merits and in the wider regulatory context, and any such steps cannot automatically lead to no enforcement sanction. However, they may in any event be factors which will mitigate the penalty. 2.12.2 On its web site, the FCA gives anonymous examples of where it has decided not to investigate or take enforcement action in relation to a possible rule breach because of the way in which the *firm* has conducted itself when putting the matter right. This is part of an article entitled 'The benefits to firms and individuals of co-operating with the FCA'. However, in those cases where enforcement action is not taken and/or a formal investigation is not commenced, the FCA will expect the firm to act promptly to take the necessary remedial action agreed with its supervisors to deal with the FCA's concerns. If the *firm* does not do this, the FCA may take disciplinary or other enforcement action in respect of the original contravention.

