

The Bank of England and Prudential Regulation Authority Consult on Approach to Enforcement

By [Helen Marshall](#), [Joe Hewton](#) and [Phil Davies](#)

1 August 2023

Key Points

- The UK's prudential and banking regulator has published a Consultation Paper proposing changes to its enforcement policies and procedures. The consultation runs until 4 August 2023.
- The consultation aims to rationalise and consolidate the Bank of England and the PRA's enforcement policies and exercise of its powers into a new "Bank Enforcement Approach".
- These changes would be important for firms regulated by the Bank of England and the Prudential Regulation Authority, such as banks, building societies, the largest investment firms, insurers and others, as well as senior managers and certified staff in those firms.
- The proposed changes would encourage firms and individuals to settle enforcement proceedings with the regulator at an early stage, by way of an Early Account Scheme and increasing the early-settlement discount on any financial penalty.
- If the changes are successful at achieving their aims, they could shorten the duration of investigations and lower financial penalties, which may be a significant benefit for subjects under investigation.
- Questions remain, however, as to how the proposed changes would operate in practice, particularly where there are parallel investigations into a firm and individuals or where there are investigations by multiple regulators. There will also be a concern for senior individuals who may be required to provide personal attestations.

New Bank Enforcement Approach

In recent years, there has been an uptick in the Bank of England and the Prudential Regulation Authority's (PRA) use of their enforcement powers (including a notable case only last week). Sometimes they have used their enforcement powers alongside actions brought by the United Kingdom's (UK) other major financial services regulator, the Financial Conduct Authority (FCA); other times, they have brought their own independent enforcement actions.

In light of this, the Bank of England (for itself, and in its capacity as the PRA) has put forward a Consultation Paper (CP 9/23) on proposals for a new consolidated Bank Enforcement Approach, which would guide the exercise of its enforcement powers.¹ As the Consultation Paper notes, the Bank's enforcement approach is currently set out in some 10 different policy documents, and the rationalisation of these into a single place is itself to be welcomed, before even discussing the proposed changes.

In addition, the Consultation Paper proposes to separate out the PRA's supervisory policies into a new Supervisory Decision-Making Policy to make the distinction between the PRA's supervisory powers and its enforcement powers clearer.

Early Account Scheme

One of the most significant proposals is the creation of an Early Account Scheme (EAS), in respect of which a subject under investigation could be compelled at an early stage of the investigation to provide a “detailed factual account of the matters under investigation” along with “all relevant materials/evidence” (the “Account”).² The idea behind this new approach is that it may shorten the length of the Bank/PRA’s initial fact-finding stage.

The Consultation Paper acknowledges that the EAS would not be appropriate in all investigations—for example, investigations into allegations of criminal conduct, where the allegation is a lack of integrity or where there may have been a breach of the duty to be open with the regulator—but it would potentially reduce the length of time in the information-gathering process between the regulator and the subject, which can be a very prolonged process.

From experience, the information-gathering period where there is a back-and-forth between the regulator and the subject of an investigation can be very protracted. Regulators sometimes feel the need to use their statutory powers to require the production of information and documents multiple times over a matter of years. It is therefore understandable that the regulators may be interested in trying to find a way to streamline this procedure. This said, putting the onus on an investigation subject to work out what the regulator in fact wants to see will no doubt be daunting for some firms and potentially a trap for the unwary. This is all the more true given that the Consultation Paper contemplates that a senior manager will be required to attest that the EAS response is complete and there are no other matters or potential breaches which should be notified to the regulator. The EAS may therefore speed up the process, but putting together the response to the regulator is likely to be of great concern to investigation subjects and their senior managers. This is particularly the case given that a decision whether to enter into the EAS has to be made within 28 days of receipt of the notice of appointment (unless otherwise agreed) and the Account likely provided within six months.

Early Settlement Discount and Financial Penalty Calculations

Similar to the FCA’s enforcement policy, if a party settles with the PRA at an early stage—for the FCA, during the 28-day “Stage 1”, and for the PRA, during the 28-day “Discount Stage”—the party will receive a 30% discount on any financial penalty. The Consultation Paper notes, however, that it is possible for a party to offer to make admissions even earlier than the Discount Stage, including potentially during an EAS procedure.

To encourage participation in the EAS, and/or for making early admissions of breaches of regulatory rules or requirements, the Consultation Paper proposes introducing a 50% discount on any financial penalty.

Relatedly, the Consultation Paper also proposes a new way for the PRA to calculate financial penalties. Under the current regime—and similar to the FCA’s financial penalty policy—penalty calculations for firms use revenue as the main input. Under the terms of the Consultation Paper, however, this would be changed to a predetermined matrix of values, with penalties depending on a firm’s regulatory category, and then three indicative ranges of values depending on the “seriousness” of the breach (depending on if it is deemed to be low, medium or high). The Consultation Paper says that these indicative ranges would “facilitate a more proportionate and consistent application of the penalty policy”, and given that the PRA has deviated from the revenue-based approach in a handful of recent cases, this is perhaps more a formalisation of an existing procedure.³

In relation to individuals, the Consultation Paper also suggests an amendment to the base figure, which is currently an individual’s income in the tax year preceding the breach. The Consultation Paper proposes instead to use the income received for the duration of the breach or in the 12 months preceding the end of the breach (whichever is longer). The Consultation Paper notes that this would bring the policy in line with the FCA’s

Financial Services Regulatory Alert

approach. Further, the PRA intends to increase the threshold below which individuals may request a reduction of the financial penalty on the grounds of serious financial hardship.

Enforcement Decision Making Committee

The Consultation Paper also proposes to make amendments to the Bank's Enforcement Decision Making Committee's (EDMC) procedures. The EDMC is similar to the FCA's Regulatory Decisions Committee, and it provides functional separation between the Bank's investigators and its decision-makers in contested cases. The new procedures will include a new policy on the Bank's approach to the publication of statutory notices, explicitly allow stays to permit settlement discussions to proceed and ensure that the procedure rules are fit for purpose (for example, ensuring that statutory references are up to date and amending the procedure for appointing EDMC members).

Comment

From the Bank of England/PRA's perspective, it is certainly easily understood why these proposed reforms would be attractive in terms of efficiency and potentially conserving resources. Further, increasing the early settlement discount to 50% may be of limited concern to the regulator given that (i) a 30% discount is already available and (ii) these funds are paid to the Treasury and not the regulator itself.

This said, we suspect that there may be a more nuanced response to the Consultation Paper from regulated firms and individuals. Whilst firms (in particular) are often keen to end investigations swiftly and will welcome the increased discount, the requirement that a senior individual or individuals will have to personally attest to the EAS is likely to be a significant concern in practice. Further, it is not entirely clear how the EAS would work where there are parallel investigations into a firm and individuals or where there are investigations by multiple regulators.

It will therefore be interesting to see whether or not the Consultation Paper's proposals are adopted in their current form, or if feedback from the regulated sector might precipitate changes before they are implemented.

If you have questions about this client alert, please contact any Akin lawyer or advisor below:

Helen Marshall

helen.marshall@akingump.com
+44 20.7661.5378

Joe Hewton

joe.hewton@akingump.com
+44 20.7012.9624

Phil Davies

phil.davies@akingump.com
+44 20.7012.9669

¹ <https://www.bankofengland.co.uk/prudential-regulation/publication/2023/may/enforcement>.

² See paragraph 2.8 of the Consultation Paper.

³ See paragraph 2.20 of the Consultation Paper.