

# Non-Financial Misconduct in the UK: A Thoughtful Initiative or a Hastily Conceived Concept?

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Non-financial misconduct (“**NFM**”) within the financial sector has posed significant challenges for the U.K. Financial Conduct Authority (“**FCA**”) for several years. The FCA handbook prescribes that regulated firms must assess and certify to the FCA, at least annually, that senior individuals and those performing regulated activities meet the relevant standards of fitness and propriety to be approved to perform those roles.

The FCA has steadfastly maintained that NFM falls within its regulatory scope, yet inconsistent decisions and mixed messaging from the FCA and the Upper Tribunal have created some ambiguity in this area.

Following the controversial case of Jon Frensham and the FCA in 2021, which highlighted the uncertainty in this area, the FCA took proactive steps to reinforce their stance. The detail of this case is set out below, but in summary, the Upper Tribunal held that Mr Frensham’s conviction for attempting to meet a child following sexual grooming (outside of the workplace) was insufficient, by itself, to justify a finding that he was not fit and proper. The Upper Tribunal commented that the NFM must be “qualitatively relevant because it engages the standard of behaviour set out in the regulatory code concerned.”<sup>[1]</sup> The Tribunal’s focus being on whether sexual misconduct outside of work could be said to engage the activities in relation to which the person was regulated. This undermined the position adopted by the FCA that Mr Frensham’s conviction meant that he lacked the integrity and reputation to work in financial services, notwithstanding that his offence was not connected to his role in financial services.

The FCA responded robustly to the Upper Tribunal’s decision in Frensham, publicly disregarding the judgment as a non-binding precedent<sup>[2]</sup> and, in 2022, deciding to withdraw the approval of a person convicted of a violent offence and prohibit him from performing an approved role.<sup>[3]</sup> Subsequently, in their 2023 consultation paper aimed at promoting diversity and inclusion within the financial sector, the FCA announced proposed amendments to COCON, Fitness and Propriety assessments, and the Suitability Threshold Condition with regard to NFM.<sup>[4]</sup>

While we await the final guidance from the FCA following its consultation (which is likely to be

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delayed due to the UK's recent general election), this article examines some of the key challenges the FCA may face in relation to its proposals to take enforcement action for NFM occurring outside of the workplace. This is arguably one of the more contentious aspects of the FCA's proposed changes.

## **The Frensham Case**

Mr Frensham, an FCA approved financial advisor, was convicted of attempting to meet a child under the age of 16[5] following acts of sexual grooming.[6] On 27 March 2017, he was sentenced to 22 months' imprisonment and suspended for 18 months with a 60-day rehabilitation requirement. He was also subjected to an indefinite Sexual Harm Prevention Order and added to the sex offenders register until 2027.[7]

Following his conviction, the FCA prohibited Mr Frensham from performing an approved role. The Upper Tribunal upheld the FCA's decision during Mr Frensham's appeal, but it dismissed the FCA's assertion that the nature of the offence alone indicated a lack of personal integrity in regard to his professional role as "speculative and unconvincing".[8] The Upper Tribunal found that it was Mr Frensham's handling of the consequences of his behaviour, including his breach of bail and lack of candour with his regulator, that ultimately called his personal integrity into disrepute.

## **Overview of the Proposed Amendments by the FCA**

### *Cocon*

Within the 2023 consultation paper, the FCA's proposed changes to COCON aim to clarify that the Conduct Rules cover "serious instances of bullying, harassment, and similar behaviour towards fellow employees and employees of group companies and contractors"[9] and that the FCA will only take disciplinary action in "particularly serious instances of bullying, harassment or similar behaviour, or multiple instances that are collectively particularly serious." [10]

Annex E, the proposed additions to the handbook (the "**Draft Handbook Text**"), includes examples of NFM that may breach COCON, such as "seriously offensive, malicious, or insulting conduct"[11] and "unreasonable and oppressive conduct causing serious alarm or distress to a fellow member of the workforce".[12]

The consultation paper reiterates that when it comes to COCON, conduct occurring in a person's personal or private life is out of scope. However, the FCA has not taken the same view when it comes to assessing the fitness and propriety of senior managers.

### *Fitness and propriety*

The proposed amendments unequivocally confirm that misconduct in a person's personal or private life may be relevant to an assessment of fitness and propriety.[13] This may even be the case where the NFM does not involve a breach of standards that are equivalent to those required under the regulatory system, and/or there is little or no risk of that behaviour being repeated in their work for their firm.[14]

Furthermore, the FCA has proposed that a person may be deemed unfit and improper even if it cannot be shown that the "misconduct will by itself cause direct and discernible damage to public confidence in the financial system and financial services industry in the United Kingdom or to

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confidence in their firm on the part of customers or those who deal with the firm.”[15]

### *Suitability threshold criteria*

The FCA Handbook’s Suitability Threshold Criteria, assessing the fitness and propriety of firms and senior managers, could be expanded to include offences related to “demographic characteristics” such as sexual or racially motivated offences and discriminatory practices by the firm or its associates. The FCA will consider the overall actions of the firm on a case-by-case basis. These changes could result in firms being placed under supervision or having their permissions altered or cancelled due to NFM considerations, potentially leading to significant reputational consequences for employees.

### **NFM Outside of the Workplace: Four Difficulties**

- Allegations of NFM
- NFM Acquittals
- The Seriousness Of NFM
- Retrospective NFM

### **Allegations of NFM**

In 2018, Christopher Woolard, Executive Director of Strategy and Competition at the FCA, famously stated, “non-financial misconduct is misconduct, plain and simple.” However, it remains to be seen how the FCA will handle allegations of NFM as opposed to convictions.

In a letter to Harriett Baldwin, Chair of the Treasury Committee, outlining the FCA’s role concerning NFM, Nikhil Rathi stated that the FCA could “consider allegations subject to ongoing criminal investigations”; however, it is unclear how this will be implemented in practice. In our view, this is likely to present several difficulties for the FCA. Whilst relevant criminal convictions provide a clear basis for establishing the fact, nature and seriousness of NFM, this may be significantly more difficult in cases involving allegations.

For example, consider a senior manager who is the subject of repeated allegations of domestic violence within the family home but never prosecuted. If they never face prosecution because the victim retracts their statement or refuses to attend court (as, sadly, is often the case despite the Crown Prosecutions Service’s commitment to tackling this issue and its pursuit of victimless prosecutions), it is possible that a manager may be the subject of several allegations of violence whilst performing an approved role. Therefore, at what stage will the FCA decide that repeated allegations of NFM outside the workplace are sufficient to deem them unfit for an approved role?

Firms will inevitably face difficulties when assessing their senior managers’ fitness and propriety. Nikhil Rathi publicly stated that the FCA “expect firms to have effective systems in place to identify and mitigate risks of all kinds.”[16] Therefore, firms will need to consider a procedure for identifying potential NFM by an employee, a system for obtaining relevant information, and the appropriate evidential threshold for launching an investigation. Furthermore, firms will need to be mindful of who is the appropriate person to investigate. Will firms need to instruct external investigators to investigate NFM, and if so, is it appropriate for firms to cover the additional cost that instructing third parties will inevitably bring?

Professionals in the field expect that most incidents of NFM will be left to firms to address, with only

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the most serious cases being taken up by the FCA. From an employee's perspective, what recourse will be available to employees whose cases are determined by their employers rather than by the FCA (where there is a right of appeal to the Upper Tribunal)? In the former scenario, employees face limited options for challenging decisions despite the potentially career-ending outcomes.

## **NFM Acquittals**

The FCA may also face challenges when an employee is tried for an NFM offence but acquitted. The evidence presented at trial may indicate that there have been several serious instances of NFM committed by the employee, but ultimately, they may be found not guilty. The FCA has acknowledged that they may face "significant challenges" in using the same evidence presented in a case that resulted in an acquittal to justify the use of their "formal powers"[17] in relation to the same conduct.

The FCA have indicated that there may be occasions where it is appropriate to keep their investigation on hold while the police or another authority considers relevant matters.[18] However, if an employee is then acquitted on the criminal standard, the FCA will need to consider the standard of proof they will rely on when assessing NFM cases in their regulatory context. Adopting the lower standard of proof generally used in civil and regulatory matters, namely the balance of probabilities, allows for a broader interpretation of evidence but poses challenges, such as ensuring fairness and consistency in judgments and balancing the protection of individuals' reputations with the need to uphold regulatory standards.

## **The Seriousness of NFM**

NFM is a broad concept. As noted above, the Draft Handbook Text states that misconduct may be relevant to fitness and propriety even if it does not damage public confidence in the financial system and/or there is little or no risk of the conduct being repeated in the individual's work for their firm. This applies where the misconduct is "disgraceful, [morally reprehensible](#), or otherwise sufficiently serious." [19]

Respondents to the consultation paper have sought clarification on the FCA's interpretation of 'serious', and there have been questions raised as to whether the test for seriousness should be objective or subjective.[20]

It might be straightforward to assess NFM that is particularly egregious, however less severe cases of NFM may pose more difficulties. What is morally reprehensible to the more conservative individual may not be to the more liberal person. For example, where an employee performing an approved role is convicted of drink driving. The employee knows the potential consequences of getting behind the wheel over the legal limit. However, they take the risk and find themselves stopped by the police, breathalysed and subsequently disqualified from driving. If they work from home and do not need to drive for their role, would this conduct impact their fitness and propriety; will the FCA consider it to be disgraceful or morally reprehensible?

## **Retrospective NFM**

The FCA has indicated that the new rules will come into force 12 months after publishing their policy statement.[21] However, they must carefully consider whether the new guidance will have any retrospective application. How will the FCA deal with historical conduct that comes to light several years later? Similarly, what becomes of NFM occurring between the publication of the consultation papers in September 2023 and the rules' implementation, likely to be in the second half of 2025?

A firm may have made decisions based on the regulatory position at the time, potentially making it unjust to treat historical conduct differently and apply the new rules.

## **A Thoughtful Initiative or a Hastily Conceived Concept?**

As it stands, the FCA's approach to NFM outside of the workplace appears to be a hastily conceived concept with potentially severe consequences for firms in the financial sector and those who work for them. The FCA's proposed policy on NFM lacks clarity and leaves several questions unanswered. This is unacceptable where the determination of whether an individual has engaged in NFM and, if so, whether it is sufficiently serious to mean that they are not fit and proper, can have such significant and enduring consequences for individuals. Further, the FCA's proposals fail to provide meaningful insight into how to overcome the practical difficulties and challenges likely to arise in all but the simplest cases when seeking to investigate conduct that occurred outside the workplace.

Hopefully, the FCA will reflect upon the constructive feedback provided in response to the consultation to consider how it can respond with clearer guidance and practical recommendations for how firms should approach this issue. Given the ambiguity about how the proposed guidance might apply to historical conduct, many firms are already updating their policies and procedures to reflect the proposals. The point being that, if today's conduct is to be judged tomorrow against these standards, it is better to make staff aware of that now (even if the final rules might look a little different). Notwithstanding any proactive action taken by firms, it is incumbent on the FCA to address the widespread concerns in the market, crucially to prevent unfairness for individuals and ensure that it does not overreach its regulatory objectives, creating an unnecessarily onerous burden for firms.

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[1] Jon Frensham v The FCA [2021] UKUT 0222 (TCC), para 64(4).

[2] Nikhil Rathi, FCA CEO, in evidence to the Treasury Committee on 17 January 2024.

[3] Ashkan Zahedian, 2022 <https://www.fca.org.uk/publication/final-notice/ashkan-zahedian.pdf>.

[4] CP23/20 Diversity and inclusion in the financial sector – working together to drive change, September 2023.

[5] section 1(1) of the Criminal Attempts Act 1981.

[6] Section 15 of the Sexual Offences Act 2003.

[7] Jon Frensham v The FCA [2021] UKUT 0222 (TCC), para 3.

[8] Jon Frensham v The FCA [2021] UKUT 0222 (TCC), para 179.

[9] CP23/20 Diversity and inclusion in the financial sector – working together to drive change, September 2023., para 4.19.

[10] CP23/20 Diversity and inclusion in the financial sector – working together to drive change, September 2023., para 4.23.

[11] CP23/20 Diversity and inclusion in the financial sector – working together to drive change, September 2023., Appendix 1, Draft Handbook text, Annex E, para 4.1.1.F(2).

[12] CP23/20 Diversity and inclusion in the financial sector – working together to drive change, September 2023., Appendix 1, Draft Handbook text, Annex E, para 4.1.1.F(6).

[13] CP23/20 Diversity and inclusion in the financial sector – working together to drive change, September 2023., para 4.14.

[14] CP23/20 Diversity and inclusion in the financial sector – working together to drive change, September 2023., Appendix 1, Draft Handbook text, Annex E, para 1.3.15 G (1).

[15] CP23/20 Diversity and inclusion in the financial sector – working together to drive change, September 2023., Appendix 1, Draft Handbook text, Annex E, para 1.3.16 G (1).

[16] <https://committees.parliament.uk/publications/40749/documents/198516/default>

[17] <https://committees.parliament.uk/publications/40749/documents/198516/default>

[18] <https://committees.parliament.uk/publications/40749/documents/198516/default>

[19] CP23/20 Diversity and inclusion in the financial sector – working together to drive change, September 2023., Appendix 1, Draft Handbook text, Annex E, para 1.3.15 G (1).

[20] Employment Lawyers Association, DIVERSITY, AND INCLUSION IN THE FINANCIAL SECTOR – WORKING TOGETHER TO DRIVE CHANGE (CP23/20) and DIVERSITY AND INCLUSION IN PRA-REGULATED FIRMS (CP18/23), Response from the Employment Lawyers Association, 15

December 2023.

[21] Employment Lawyers Association, DIVERSITY, AND INCLUSION IN THE FINANCIAL SECTOR – WORKING TOGETHER TO DRIVE CHANGE (CP23/20) and DIVERSITY AND INCLUSION IN PRA-REGULATED FIRMS (CP18/23), Response from the Employment Lawyers Association, 15

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