



The FCA's DP23/3: Review of SM&CR

<https://www.fca.org.uk/publications/discussion-papers/dp23-3-review-senior-managers-certification-regim>

e

Response by the Transparency Task Force, 1st June 2023

This response is all non-confidential.

Q1: To what extent do you agree or disagree that the SM&CR has made it easier to hold individuals to account?

SM&CR has made it easier to hold people to account, but not nearly as much had the regime been implemented properly.

Q2: To what extent do you agree or disagree that the SM&CR regime has improved safety and soundness and conduct within firms?

SM&CR has made just a small improvement in safety, soundness and conduct within firms compared to the potential improvements that would have been made had the regime been implemented properly.

Q3: To what extent do you agree or disagree that the fitness and propriety requirements support firms in appointing appropriately qualified individuals to Senior Manager roles?

Yes, they do, but again they would do so far more effectively had the regime been implemented properly.

Q4: Please provide any suggestions that can help ensure that appropriately qualified individuals are not deterred from taking up relevant Senior Manager roles.

The term 'appropriately qualified' includes reference to the integrity, professionalism and 'moral compass' of the individual, which we will refer to with one word - mindset.

People with the right mindset will not be deterred by SM&CR in taking on senior roles - they would welcome it as an important part of the overall governance framework of the sector.

Q5: To what extent do you agree or disagree that the SM&CR has made it easier for firms to hold staff to account and take disciplinary action when appropriate against them?

It has, but again not nearly as much as would have been the case had the regime been implemented properly.

Q6: To what extent do the specific accountabilities of individual directors established by the Senior Managers Regime work in ways that complement the collective responsibility of the board of directors or decision making committees? Are there ways this could be improved?

Yes they do, but again not nearly as much as would have been the case had the regime been implemented properly. Implementing the regime properly would of course be the way to make improvements on this particular matter.

Q7: To what extent do you agree or disagree that the prospect of enforcement promotes individual accountability?

Yes it does, but the lack of enforcement through SM&CR (i.e. the failure to implement it properly) means that the potential full deterrent effect has not been achieved.

Q8: How could our approach to enforcement be enhanced to better support the aims of the SM&CR?

By enforcing properly through SM&CR.

The regime has just not been implemented with sufficient vigour by the regulators. The failure is not a function of insufficient powers but the absence of means of holding to account regulators for being reluctant to use them to full effect.

Public perception is that there is little or no protection from consumer harm as a result of firms being authorised and regulated by the FCA.

SM&CR should be a major part of consumer protection but there is a complete lack of visibility. Improving governance, behaviour and culture within firms is directly related to the deterrence effect of sanctioning poor examples.

Success here is achievable with a sufficiently active regulator.

Since SM&CR started the FCA has imposed just one fine, one public censure, one prohibition and one undertaking on senior managers, as shown [here](#).

The PRA has imposed just one fine, as shown [here](#).

In public the FCA has rejected previous analysis focusing on its low caseload and enforcement record, but has failed to provide any alternative metric to justify its claims that the regime is helping to raise standards across the industry, see [here](#).

Meanwhile, there is no public evidence that criminal investigations have been started using the criminal offence introduced alongside the regime, in the Financial Service (Banking Reform) Act 2013, for reckless mismanagement of a financial institution. This is despite the high profile collapses of Greensill Capital and London Capital & Finance in recent years.

Clearly, SM&CR has resulted in very little enforcement action against senior managers. The problem is not with the regime itself but with the poor use of it by the regulators.

We therefore suggest the regulators use it as originally envisaged (i.e. properly) and review the situation again in due course rather than making changes to it prior to it being used properly.

Q9: To what extent do you agree or disagree that the scope of the SM&CR is appropriate?

The scope should be widened to include everybody in a senior role in any regulated entity. Not doing so is illogical - if it is believed that SM&CR can be a driver of good conduct then why limit the scope of the number of senior people that can be positively influenced by it?

Q10: Are there actions the regulators could take in respect of the SM&CR that would help enhance competition or international competitiveness?

Yes, implement it properly i.e. enforce through it robustly and routinely.

Doing so will lead to improvements in conduct, which in turn will lead to a more attractive market in the UK, thereby driving up competitiveness.

In relation to this point, it is vital that 'competitiveness' is not allowed to be used as an excuse to deregulate.

The government has been lobbied hard by the financial services sector, led by UK Finance and other financial services groups that the standards and requirements under SM&CR are over onerous and act as an impediment to new entrants establishing businesses in the UK. But in reality of course, the UK is very much open for business for those who are prepared to accommodate the standards of good conduct that are required. The impressive range of international financial firms that have a UK base and accept the importance of those

standards bears testament to the fact that it is a spurious argument to suggest SM&CR, which has been in place for some years, has any anti-competitive effect. Rather it is commonly a wish that individuals in positions of responsibility would prefer to have less accountability.

A competitive regulatory environment is one in which firms wish to domicile because they want access to a large and affluent domestic marketplace and because firms regulated by that jurisdiction have low-friction access to other major markets. For this goal to be achieved, the UK must focus hard on raising standards of regulation so UK consumers and regulators and politicians in other jurisdictions believe that it is well regulated and that standards of conduct (and of consumer redress in the would-be-rare instances of misconduct) are good. This objective requires significantly more enforcement against senior managers than has been evident under SM&CR.

SM&CR should act as a deterrent to firms and individuals locating in the UK that wish to operate under a less robust regulatory system.

We are aware of arguments that the SM&CR creates unnecessary regulatory friction, for example by increasing the time taken for regulators to authorise an individual's appointment to a new role. The SM&CR is also largely discredited as a branded initiative given the paucity of enforcement actions undertaken under it.

There are of course many interacting factors that determine the 'attractiveness' and all will be case-specific to any particular firm.

We question the extent to which individual accountability is a genuinely held concern of financial firms currently operating in the UK as an impediment to new entrants entering the marketplace.

The government expresses a similar contrary view, "*The government also recognises that high standards of regulation and individual conduct are at the heart of the UK's long-standing success as a global financial hub*". Perhaps a more sincere position is that senior executives in financial firms would naturally wish to minimise the responsibilities under which they operate and see the 'international competitiveness' argument as a way of achieving this.

Neither do we view this a matter of serious concern for firms that may be considering conducting business in the UK. SM&CR should operate on a level playing field so new entrants would not operate at a competitive disadvantage.

Equally firms that operate in multiple jurisdictions are bound by the laws of the countries in which they operate and SM&CR has no impact on this.

One area of great concern is the process by which the FCA would implement its competitiveness objective under FSMA. It is not at all clear how this would operate in practice and of course this may have an impact on how the FCA enforces the provisions of the SM&CR.

The government has indicated that it would be in favour of holding the FCA accountable for achieving certain metrics with regard to its new secondary competitiveness objective. It has not indicated that it has the same appetite for ensuring that the consumer protection objectives are achieved. If accountability metrics are applied to the competitiveness 'objective' we would expect appropriate metrics to be applied to the other competing objectives at the same time.

The Transparency Task Force operates a "North Star" question to guide its work, and that question is "What is best for the consumer?"

It is our firm belief that a financial sector that first and foremost considers the needs of the consumer will flourish with abundance - what is best for the consumer is ultimately also what is best for the sector.

We are genuinely concerned that deregulatory measures will lead to poor outcomes for consumers that in turn will lead to a failure to achieve the full potential for commercial success for the sector itself. We believe that deregulation in the short term leads to the likelihood of disasters in the long term. There is evidence for this. For example, the repeal of the [Glass-Steagall Act](#) is thought by some to have been a major contributory factor that led to the Global Financial Crisis; [here's one article of many](#) that could have been chosen.

Our thoughts around our "What is best for the consumer?" North Star Question in the context of HM Treasury's consideration of reforms for the Senior Managers & Certification Regime, could be summarised as follows:

'To have an efficient Financial Services Sector that functions in a clearly prescribed way under a stable and accountable regulatory environment. Regulation must be transparently applied with demonstrably effective deterrence measures to adequately protect the consumer. Regulatory responsibility and operation should not be conflicted with inherently competing interests between various stakeholders, including regulatory stakeholders.'

Given the fundamental need for the financial sector to be trusted for it to function successfully in supporting the economy and UK citizens, it should be of great concern for the sector's market participants, trade bodies, professional associations and regulators that it is a sector that society does not trust.

Lack of trust negatively impacts the regulatory objective of ensuring that the markets work well.

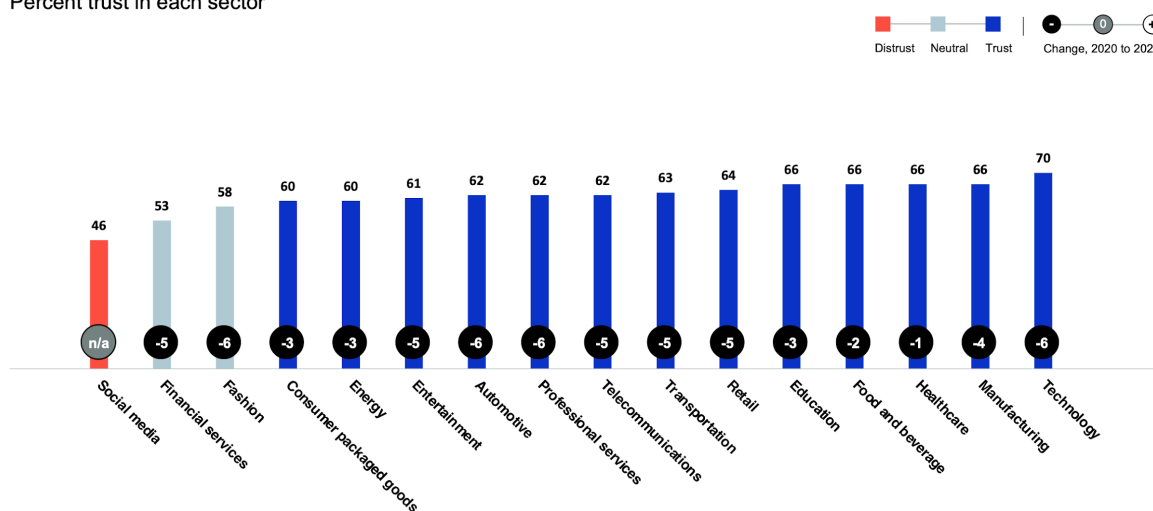
UK productivity (relative to hours worked) is significantly lower than our EU competitors for example Germany, this is accepted as a very serious problem resulting in UK firms being competitively disadvantaged. The regulators' failure to regulate and sanction translates into a failure to effectively impose deterrence to regulatory non-compliance. Clearly, this contributes to the undermining of UK productivity. A softening of regulation in the name of competitiveness would quite obviously lead to even lower investment and productivity.

"In the words of the Bank of England's Andrew Bailey in 2019, when he was CEO of the Financial Conduct Authority, the regulator "was required to consider the UK's competitiveness, and it didn't end well, for anyone'.

We believe that there is cause for concern about the reputational integrity of the financial services sector, in most parts of the world. There is ample evidence to suggest that society is distrusting of financial services. The highly credible [2021 Edelman Trust Barometer in Financial Services](#) shows it to be the second most distrusted industry; second only to social media.

TRUST DECLINES ACROSS SECTORS

Percent trust in each sector



2021 Edelman Trust Barometer. TRU_IND. Please indicate how much you trust businesses in each of the following industries to do what is right. 9-point scale; top 4 box, trust. Industries shown to half of the sample. General population, 27-mkt avg.

Edelman | 46

Given the fundamental need for the financial sector to be trusted for it to function successfully, it should be a great concern for the sector's market participants, trade bodies, professional associations and regulators that it is a sector that society does not trust.

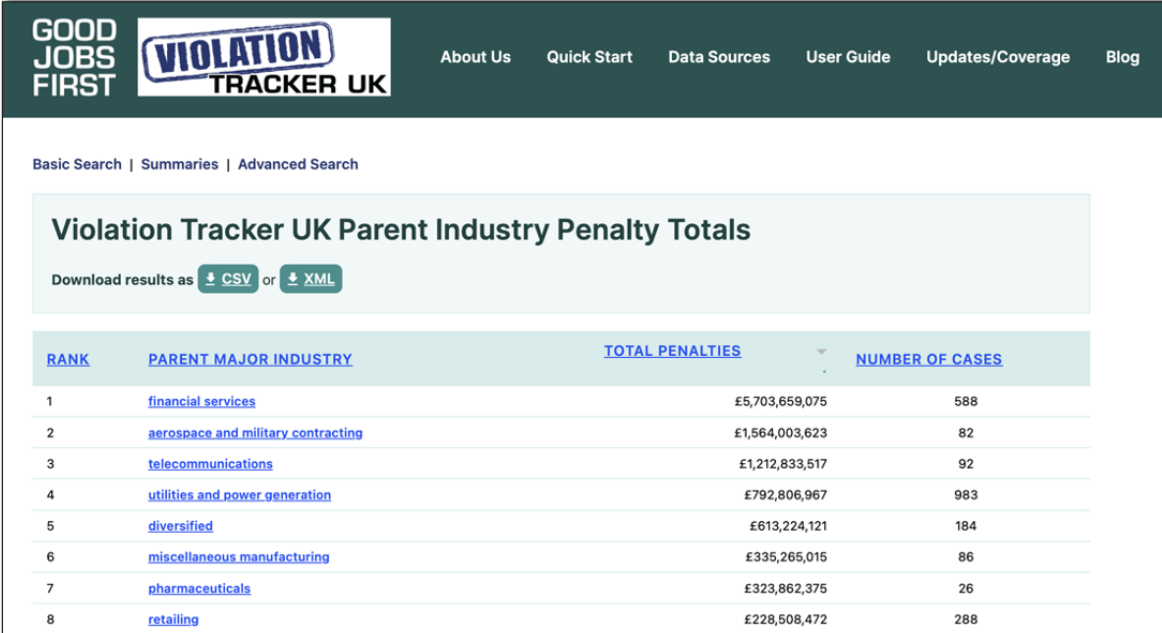
It is easy to understand why the financial sector is distrusted; in fact the evidence suggests that people *should* distrust it. Consider for example the overall conduct of the financial industry in the UK compared to other industries when it comes to the level of violations.

The best source for such data is the recently launched [Violation Tracker UK](#), which has already been referred to. In the interests of transparency we should point out that Transparency Task is [very closely connected with Violation Tracker UK](#); and proudly so. For example, we Chair its UK Advisory Board.

Violation Tracker UK holds data about corporate infringements in 46 sectors. What does the data in Violation Tracker UK show about the UK's financial services sector? It shows that the conduct of the sector is so bad that if you add up all the infringements by all the other 45 industries it equates to roughly the same as the financial sector on its own.

That is a truly alarming reality; so much so that repairing the reputational integrity of the sector should be Priority #1 for all stakeholders that truly care for the wellbeing of the sector and the society it is meant to serve.

The screenshot below shows the top of a chart that all financial sector stakeholders in the UK should be embarrassed that the financial sector is at the top of:



GOOD JOBS FIRST VIOLATION TRACKER UK

About Us Quick Start Data Sources User Guide Updates/Coverage Blog

Basic Search | Summaries | Advanced Search

Violation Tracker UK Parent Industry Penalty Totals

Download results as [CSV](#) or [XML](#)

RANK	PARENT MAJOR INDUSTRY	TOTAL PENALTIES	NUMBER OF CASES
1	financial services	£5,703,659,075	588
2	aerospace and military contracting	£1,564,003,623	82
3	telecommunications	£1,212,833,517	92
4	utilities and power generation	£792,806,967	983
5	diversified	£613,224,121	184
6	miscellaneous manufacturing	£335,265,015	86
7	pharmaceuticals	£323,862,375	26
8	retailing	£228,508,472	288

To view the chart in full, [click here](#).

Furthermore, it is impossible to ignore the obvious question: how can it be, that despite the UK's financial sector being such a systemically important part of our economy and our international reputation, that we are tolerating such poor stewardship of it by its principal conduct regulator?

That question becomes even more poignant when you look deeper into the data held within Violation Tracker UK and consider the obvious pattern of recidivism that exists within the sector. The screenshot below gives a feel for the nature of the recidivism within the sector:

To see the evidence for widespread recidivism [click here](#) and when viewing it, scroll down and see the obvious pattern of the same organisations committing the same offences over and over again. Perhaps this suggests that there is a culture within the sector that sees the fines imposed on it as a cost of doing business. Perhaps this hard evidence also calls into question the lack of effectiveness of the Financial Conduct Authority in ensuring the sector behaves properly and that it succeeds in its objective to maintain the integrity of the sector and provide an appropriate level of consumer protection.

The validity of that line of thought becomes even more obvious when you drill down to the next level of infringement data, and look at the violations of particular organisations. For example, examine the infringements by [Barclays](#), [Lloyds Banking Group](#) and [Nat West](#); and ask yourself if it would be prudent to do anything that might encourage even more misconduct?

For the avoidance of any doubt the answer is “No”!

All this makes it perfectly clear that any notion of reforms that might lead to even worse conduct by the sector should be distinguished immediately as a reckless line of thought. The reputation of the financial sector and wealth it generates matter far too much for any reforms to be allowed to gamble with it. Rather, we would respectfully suggest that resource and energy would be better spent examining what needs to happen for the FCA, and thus the delivery of financial regulation in the UK, to become fit for purpose.

We believe that turning the UK’s financial services industry into the world’s best-regulated is the best way to restore consumer confidence in it and the UK, and to persuade governments and regulators overseas that the ghosts of the Global Financial Crisis have finally been laid to rest and that the City of London can be trusted to trade freely across borders. Thus, fixing UK financial regulation, rather than weakening the Senior Managers & Certification Regime is the most effective way to boost the performance of the industry.

Please therefore be mindful of these well-founded concerns when reading our response.

Q11: To what extent do you agree or disagree that the SM&CR is applied proportionately to firms and individuals?

The frequency through which SM&CR has been enforced i.e. so infrequently makes this question rather academic.

Q12: How could the process for SMF approvals be further improved?

Sufficient organising and resourcing for the work to be done efficiently and effectively.

Q13: To what extent do you agree that the process for obtaining criminal records and notifying these to the regulators is effective in supporting the aims of the SM&CR?

Agreed.

Q14: To what extent do you agree or disagree that the 12-week rule sufficiently helps firms to manage changes in SMFs?

Agreed.

Q15: To what extent do you agree or disagree that the regulators have in place

a. an appropriate set of Senior Management Functions to achieve the aims of the SM&CR?

Question skipped.

b. an appropriate set of Prescribed Responsibilities to achieve the aims of the SM&CR?

Question skipped.

Q16: To what extent does the Duty of Responsibility support:

a. personal accountability?

Agreed, but it would be more effective if the regime were robustly and routinely enforced through.

b. better conduct of Senior Managers?

Agreed, but it would be more effective if the regime were robustly and routinely enforced through.

Q17: To what extent do you agree or disagree that Statements of Responsibilities and Management Responsibilities Maps help to support individual accountability?

Question skipped.

Q18: To what extent do you agree or disagree that the Certification Regime is effective in ensuring that individuals within the regime are fit and proper for their roles?

It is one of a multiplicity of factors that can help; it would help more if it were used more as an enforcement mechanism.

Q19: Regarding the Directory of Certified and Assessed Persons, to what extent do you agree or disagree that:

a. it captures the appropriate types of individuals?

Question skipped.

b. the requirements for keeping it up to date are appropriate?

Question skipped.

Q20: To what extent do you agree or disagree that regulatory references help firms make better-informed decisions about the fitness and propriety of relevant candidates?

Agreed.

Q21: To what extent do you agree or disagree that the Conduct Rules are effective in promoting good conduct across all levels of the firm?

They should be considered and applied firm-wide, i.e. at all levels, and if they are they will have a positive effect throughout the organisation.

Q22: Are there other areas, not already covered in the question above, where you consider changes could be made to improve the SM&CR regime?

Yes.

There are many questions that could have been asked in this DP that would have helped to 'shine a light' on important relevant issues.

Our thoughts that haven't been expressed already will be provided in response to this 'catch-all' question 22.

An awkward asymmetry

We feel strongly that the Regime's success is essentially a function of its application - that's what determines whether or not the aims are achieved. As expressed throughout our response there has been a woeful lack of application.

Any potential changes should be fully consulted on, and the handling of consultation responses should be cognisant of the fact that the financial industry is very well placed to provide a huge quantity of high-quality responses; whereas pro-consumer organisations such as ours are less well-equipped to respond.

This asymmetry of influence must be taken into account.

We are concerned that there is an inappropriately narrow focus on certain aspects of the regime that have been brought to the government's attention by firms operating within the regime. One wonders what a Freedom of Information Request designed to reveal how many meetings with relevant Ministers had been had by those representing City interests versus those representing consumer interests would show; and of course it is perfectly clear that there has been a huge effort to influence by the sector - [here's one relevant article](#) from many that could have been chosen.

This narrow focus translates through to the wording and formulation of the questions themselves which would seem to be designed to facilitate the answers the government wishes to garner, i.e. they are 'leading questions'.

The empirical evidence shows that fines clearly do not act as a deterrent and are widely seen as a cost of doing business. If the regulators do not use its powers of enforcement against individuals in the major institutions, constituting a meaningful number of cases, then SM&CR has no deterrent effect and does not improve culture.

Failure to properly enforce regulations that Parliament has granted, and expects to be enforced, has the effect of undermining public confidence in the regulator and trust in the institutions that it has a duty to regulate. Confidence of SMEs, in particular that they can borrow and be treated fairly by the banks is key to economic growth and investment to increase productivity.

Continuing reluctance by the regulator to resolve historical malpractice of SMEs is a major stumbling block to restoring that confidence. Clearly the effective application of the SM&CR regime in this regard presents a golden opportunity to better deliver on the regime's core objectives.

TTF certainly shares the government's wishes to drive growth across the economy but prioritising financial services business's short term interests alone will not achieve this. Finance should responsibly partner and promote the wider economy not become the whole economy. It is abundantly clear that this route to prosperity will only succeed with a robust regulator which in turn is accountable to elected representatives.

The SM&CR regime, consistent with its original aims, has a significant part to play in this by instilling a culture of compliance and good behaviour within firms. However, the dividend of reduced enforcement action, compliance burdens and reduced litigation expenditure for firms will only result from credible and consistent enforcement action by the regulator.

And of course the cost to the sector of the reputational damage that is created by poor conduct is immense.

No visible impact for consumers?

From a consumer perspective SM&CR has had no visible impact despite it being in place for some years. There are numerous examples of where it should have been utilised but wasn't. One wonders which proportion of the violations by the financial sector shown [here](#) should have had an SM&CR dimension to the regulatory response, as opposed to simply imposing fines on the innocent shareholders of the organisations concerned.

Of course the answer is virtually (or arguably literally) none.

Why is that, when it is so obvious that personal accountability is a key driver for good conduct? A woeful lack of jeopardy for the individuals responsible for malpractice, malfeasance, misconduct and mis-selling is close to condoning the behaviour, which is not that far removed from inviting it.

A short film that points to some of the underlying issues

The Transparency Task Force is very grateful to [TTF UK Ambassador](#) and [Advisory Group](#) member, JB Beckett who kindly produced a short film in 2022 that provides an excellent entrée into the main issues that this DP touches on.

It is of course now slightly out of date but the key points it makes are still relevant.

The film can be watched by [clicking here](#).

“The Competitiveness Agenda; and why we need to push back on it”

Our general concerns about the deregulatory agenda are reflected in [our January 2022 event](#) about the topic. We are very grateful to the speakers, namely:

- David Pitt-Watson, Visiting Fellow, Cambridge Judge Business School
- JB Beckett, Non Executive Director & Author of “New Fund Order”
- Nicholas Shaxson, Author, journalist, investigator and co-founder of the Balanced Economy, an anti-monopoly organisation
- David T Llewellyn, Professor of Money and Banking; and former regulator
- Marloes Nicholls, Head of Policy and Advocacy, Finance Innovation Lab
- Mark Bishop, Leader, Connaught Action Group

The full video recording of the event can be watched by [clicking here](#).

The Transparency Task Force is not alone in having serious concerns

The Transparency Task Force is one of 37 organisations that have issued a Joint Statement about our collective concerns regarding HM Treasury’s Future Regulatory Framework proposals, which we believe provide the overarching framework into which the proposals for reform of the Senior Managers & Certification Regime.

You can get to the press release about the Joint Statement, which includes comments from several individuals including Sir Vince Cable, [here](#). The Joint Statement [here](#). We are proud to be amongst this collection of progressive organisations, each of which has its own set of reasons for concern about the proposals (continued on the next page):



Further food for thought, that shouldn't be ignored

In his well-known and highly regarded 1994 article "Competitiveness: A Dangerous Obsession" [Paul Krugman](#), then Professor of Economics at the Massachusetts Institute of Technology, set out a range of concerns that, whilst now decades old and of course US-focused still do a great job in skewering the woolly thinking behind the current calls for competitiveness.

Paul Krugman's comments below (almost all of which are from the 1994 article) capture the essence of his thinking on the topic very well.

We posit that the wisdom of such a highly-acclaimed, award-winning and highly relevant subject-matter expert should not be ignored.

- "If we can teach undergrads to wince when they hear someone talk about 'competitiveness,' we will have done our nation a great service."
- "A government wedded to the ideology of competitiveness is as unlikely to make good economic policy as a government committed to creationism is to make good science policy."
- "Countries are nothing at all like corporations....countries do not go out of business."
- "The rhetoric of competitiveness — the view that, in the words of President Clinton, each nation is "like a big corporation competing in the global marketplace" — has become pervasive among opinion leaders throughout the world. People who believe

themselves to be sophisticated about the subject take it for granted that the economic problem facing any modern nation is essentially one of competing on world markets.”

- “The idea that a country’s economic fortunes are largely determined by its success on world markets is a hypothesis, not a necessary truth; and as a practical, empirical matter, that hypothesis is flatly wrong.”
- “The growing obsession in most advanced nations with international competitiveness should be seen, not as a well-founded concern, but as a view held in the face of overwhelming contrary evidence. And yet it is clearly a view that people very much want to hold.”
- “The obsession with competitiveness is not only wrong but dangerous, skewing domestic policies and threatening the international economic system.”
- “Most people who use the term “competitiveness” do so without a second thought.”
- “Over and over again one finds books and articles on competitiveness that seem to the unwary reader to be full of convincing evidence but that strike anyone familiar with the data as strangely, almost eerily inept in their handling of the numbers.”
- “In each case, the growth rate of living standards essentially equals the growth rate of domestic productivity — not productivity relative to competitors, but simply domestic productivity.”
- “Competitiveness is a meaningless word when applied to national economies.”

Further supporting testimony



TTF ran [an event about this consultation](#) on 9th May 2023.

The recording of it can be watched, it is available to view [here](#).

The discussion covers a range of points that reinforce and augment the views being shared in this written response.

In particular, we would like to draw your attention to the comments made by Steve Middleton in relation to the powers available to the FCA to use the [Approved Persons Rules](#) (APER) to impose fines *against individuals* as shown here: [2016 fines | FCA](#) and here: [2017 fines | FCA](#)

We are left wondering:

- Has the APER regime also been an under-utilised set of powers?

- Has APER been overlooked i.e. how does the APER regime fit into HMT and FCA thinking about potential reforms to the SM&CR?

We are grateful to all the speakers:

- Mark Bishop, Leader of the Connaught Action Group, whose slides can be downloaded [here](#)
- David Llewellyn, Professor of Money & Banking, Loughborough University
- Steve Middleton, [Bank Confidential](#)

End.