Consultation response

AFME response to FCA Consultation Paper 18/36
Brexit: proposed changes to the Handbook and Binding Technical Standards – second consultation

21 December 2018

The Association for Financial Markets in Europe (***AFME***) welcomes the opportunity to respond to the FCA's Consultation Paper: Brexit: proposed changes to the Handbook and Binding Technical Standards – second consultation.

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is registered on the EU Transparency Register, registration number 65110063986-76.

Foreword

As a general point, our answers assume that UK firms will have the necessary licences to operate in the EU 27 and will be able to serve their EU clients. We also note that, given the extremely short consultation period, we may well have further points which we will aim to provide to the FCA as soon as possible in 2019.

Responses to specific questions

1. ***For those rules where we use powers under the EUWA, do you think any of the proposed changes in this CP or in relevant SIs represent a significant risk to compliance for your firm in time for exit day? If yes, please specify which and explain why this is the case, including projected time needed to comply with requirements were they to come into effect on exit day.***

   AFME understands that the FCA will not be able to confirm which changes are required for exit day until HM Government formally announces that the industry should actively prepare for a no-deal Brexit. Therefore, the date by which firms should actively mobilise implementation projects and the magnitude of those projects is uncertain.

   Feedback on this second consultation (and final text of the Handbook and Binding Technical Standards) will not be available until early January 2019 or later. The PRA is also consulting on potential changes. The CP questions relating to the required timeline to implement specific changes cannot be answered in isolation as the overall combined impact of change will drive the timeline. Indeed, without a detailed impact assessment by firms, which would require significant resources, and which firms have not initiated following consistent HMT and FCA advice not to prepare now to implement these changes by March 2019, there may well be risks that have not yet been identified and do not therefore appear in this response.

A key concern is the volume of amendments: responding to and implementing the changes will be labour intensive, operationally challenging and time-consuming. In order to respond to the changes, firms will need to undertake detailed impact analysis in relation to each of those changes in order to determine the size and materiality of those changes. There are also a large number of dependencies due to the interconnected relationships of industry actors (firms, venues, middleware providers, etc). Once implemented there will also need to be pre-deployment testing both at company and at industry level. Insufficient time for implementation of the proposed changes in the CP and/or relevant Statutory Instruments represents a significant risk to compliance and operational continuity on exit day.

We therefore believe that the FCA should minimise, in line with the FCA's statutory requirements, all changes that require firms, their clients and industry utilities (e.g. ARMs) to make temporary or permanent changes to business/operational processes and systems for 29 March 2019. AFME proposes that **only the changes necessary for the continued pursuit of the FCA's statutory objectives should be brought in on exit day**, with the remainder being introduced at a later stage, in a phased in manner and only if a detailed cost benefit analysis shows they are worthwhile. AFME would appreciate the opportunity to discuss these operational practicalities with the FCA.

AFME requests that the FCA set out, as soon as it is able to do so, its intentions in terms of the use of its transitional powers in the event that there is no implementation period. Information on how the FCA would act in that situation will be useful to firms though we appreciate that the FCA may not be able to provide such clarity until the terms of the withdrawal are clearer.

Clear and timely communication with industry as to how the phase-in should operate, with further consultation on an ongoing basis, will be vital for a successful transition to the new UK regime, allowing senior managers to be clear as to their responsibilities and appropriate changes be made to compliance procedures.

Furthermore, given the challenging deadline set by the FCA for reviewing the large volume of proposed handbook changes set out in the consultation paper, there may be areas which are not identified before the deadline. We propose to send any further issues we subsequently identify to the FCA as and when we are able.

2. Do you agree with our proposals to introduce general continuity provisions? If not, why?

We agree with the FCA's proposal to introduce general continuity provisions for all parts of the Handbook and BTS not covered by a specific transitional arrangement.

3. Do you agree that we have correctly identified all relevant amendments in our draft Handbook and BTS text related to the cross-cutting issues set out above? Do you have any other points you wish to raise about our approach to these cross-cutting issues?

Chapter 2 of the consultation explains the FCA's approach to cross-cutting issues (i.e. issues which affect multiple parts of the Handbook and Binding Technical Standards). The consultation sets out the policy approach to the following cross-cutting issues:

- The Distance Marketing Directive
- The E-Commerce Directive
- References to the official language of the member state or to information being submitted in languages other than English

We are responding only on the cross-cutting issue relating to languages.

We consider that the current requirements work well for all clients, whether UK or non-UK, and that the FCA's proposed approach could be detrimental to some clients. We therefore propose no change. We would be pleased to discuss any specific examples with the FCA if that would be helpful.

4. Do you agree with our proposals to remove the claims representative requirement and retain our claims handling requirements?

AFME is not responding to this question.

5. ***Do you agree with our proposed changes to COBS 4 and COBS 6 in respect of compensation disclosures?***

   AFME is not responding to this question.

6. ***Do you agree with our proposal to maintain the current scope of the Glossary definitions of 'nonreadily realisable security', 'non-mainstream pooled investment' and 'packaged product' and thereby maintain the application of the rules in COBS to which they relate?***

   AFME agrees with the FCA's proposed approach to these issues, as set out in paragraphs 3.37 and 3.38.

7. ***Do you agree with our proposal to amend COBS 10A.4.1R(2)(a) and (b) to include reference to shares and bonds admitted to trading on EEA regulated markets? If not, why?***

   AFME agrees with the FCA's proposed approach, set out in paragraph 3.45, *"to keep the current scope and consider shares and bonds admitted to trading on UK and EEA regulated markets as essentially non-complex".*

8. ***Do you agree with our proposal that we should rely on the new Handbook Glossary term for UCITS post exit and continue to treat UK and EEA UCITS as financial instruments in relation to which an appropriateness assessment is not necessarily required? If not, why?***

   AFME agrees with the FCA's proposed approach, set out in paragraph 3.51, *"to maintain the status quo by continuing to regard UK and EEA UCITS as essentially non-complex …, therefore, proposing to rely on the new Handbook Glossary definition of UCITS and make no further amendment to this rule".*

9. ***Do you agree we should continue to allow ISPVs assuming risks from EEA insurers to do so under COBS 18.6A?***

   AFME is not responding to this question.

10. ***Do you agree with the proposed amendment, which will lead to shareholders in all jurisdictions being eligible for inclusion in the free float calculation of shares in public hands?***

    AFME notes that the result of the proposed change to the free float requirements in the Listing Rules is that, when an issuer applies for admission of shares/depositary receipts over shares to the Official List, it must demonstrate that a sufficient number of securities of that class are distributed to the public in any jurisdiction (not just to EEA holders), and that the same will apply to the continuing obligation for listed issuers to maintain the level of shares in public hands.

    AFME agrees that counting holders from any jurisdiction towards the free float is necessary to ensure that there will be sufficient liquidity in the share class which is to be listed. Changing the reference from *"EEA holder"* to *"UK holder"* would not provide an appropriate basis for assessing likely liquidity, given the participation of overseas investors in UK markets.

    In order to avoid any confusion in the future as to the scope of the requirement, AFME suggests that the proposed rules (LR 6.14.1R and LR 14.2.2R) are amended to insert *"in any jurisdiction (whether the UK or any third country)"* after the reference *"be distributed to the public."*

11. ***Do you agree with our proposal to remove the reference to the EEA in the provisions setting out which issuers can benefit from an exemption from producing accounts?***

    AFME notes that the current application of these provisions to issuers with securities admitted to trading on a regulated market in the EU for which the FCA is the home competent authority will change to reflect that the home/host state distinction will fall away, and that, after exit, the transparency rules will apply to these issuers if they have securities admitted to trading on a UK regulated market.

    AFME also notes that the deletion of *"EEA"* from the provisions setting out which public sector issuers can benefit from an exemption from publishing annual and half-yearly financial reports will allow a wider group of issuers to benefit from the exemption, including public international bodies of which at least one state is a member and all national central banks.

    We have no objection to or concern regarding this proposal.

12. Do you agree with our proposals to amend the requirements in DTR 4.1.6R and DTR 4.1.7R in relation to audited financial statements?

AFME notes that the current application of these provisions to issuers with securities admitted to trading on a regulated market in the EU for which the FCA is the home competent authority will change to reflect that the home/host state distinction will fall away, and that, after exit, the transparency rules will apply to these issuers if they have securities admitted to trading on a UK regulated market.

AFME also notes that the proposed change to DTR 4.1.6R, which currently requires issuers with securities admitted to trading on an EU regulated market to use EU IFRS for their accounts (unless their home jurisdiction's standards are deemed equivalent), will require issuers to use UK IFRS instead.

This change would be administratively burdensome for issuers and their parent companies; The change also depends on the form (as yet unseen and due for publication in early 2019)) of the Department for Business, Energy and Industry Strategy (BEIS) SI giving the UK the powers to adopt IFRS at and post-exit.

We note that the impact on issuers will be mitigated, as HMT expresses the intention in its guidance[1] to issue an equivalence decision before exit day, determining that EU IFRS can continue to be used to prepare financial statements for Transparency Directive requirements and for the purposes of preparing prospectus under the Prospectus Directive, so that issuers registered in EEA states with securities admitted to trading on a UK regulated market (or making an offer of securities in the UK) can continue to use EU-adopted IFRS when preparing consolidated accounts. However, HMT's guidance states that the UK *"will keep this decision under review"* and we would urge the FCA to consider together with HMT our members' strong preference for continuity and certainty in this regard.

Non-UK EEA issuers are not currently subject to DTR 4.1.6R and DTR 4.1.7R (other than DTR 4.1.7R(4)), by virtue of DTR 4.1.1, which provides that the application of DTR 4 (including DTR 4.4.8) is subject to the exemptions set out in DTR 4.4. AFME assumes that this position will continue to avoid additional burdens on such issuers.

13. Do you agree that we should narrow the exemption from the voting rights notification requirements so that it applies only to the Bank of England?

AFME notes that the current application of these provisions to issuers with securities admitted to trading on a regulated market in the EU for which the FCA is the home competent authority will change to reflect that the home/host state distinction will fall away, and that, after exit, the transparency rules will apply to these issuers if they have securities admitted to trading on a UK regulated market.

We also understand that the change to DTR 5, to exempt only the Bank of England (instead of, as currently, members of the European System of Central Banks) from the notification requirements on issuers/holders of voting rights in issuers, in respect of voting rights provided to or by the Bank of England while carrying out its monetary authority function, is consistent with the baseline approach of treating the EU and its member states in the same way as non-EU third countries after exit day.

AFME has no objection to or concern regarding this proposal.

14. Do you agree with our proposal to require issuers to use a PIP for disseminating regulated information?

AFME notes that the current application of these provisions to issuers with securities admitted to trading on a regulated market in the EU for which the FCA is the home competent authority will change to reflect that the fact the home/host state distinction will fall away, and that, after exit, the transparency rules will apply to these issuers if they have securities admitted to trading on a UK regulated market.

AFME also understands that the current choice in DTR 6 for issuers disseminating regulated information between a PIP and an incoming information society service will be removed such that, after exit, issuers will only be able to use a PIP.

In this context we would suggest that either transitional relief is given to issuers, or the FCA highlights this change in early course to issuers to allow them sufficient time to set up relevant arrangements with a PIP, if not already established.

[1] Guidance (updated 12 December 2018): Draft Official Listing of Securities, Prospectus and Transparency (Amendment) (EU Exit) Regulations 2019 Explanatory Information

15. Do you agree with our proposal to change the exemption from DTR 7.1 in respect of subsidiary undertakings?

AFME notes that, with respect to the DTR 1B.1.3R and 7.1 requirements in relation to audit committees, the exemption from DTR 7.1 for an issuer which is a subsidiary undertaking whose parent undertaking is subject to requirements implementing article 39 of the Audit Directive in any other EEA State, will be deleted such that an issuer will only be exempt where the parent undertaking is subject to DTR 7.1.

In our view this change could be regarded as administratively burdensome by such issuers and their parent undertakings.

AFME understands that the impact of this change will be initially mitigated by the existing exemption continuing to apply in respect of the financial year beginning before exit day.

We would propose that either transitional relief is given to issuers, or the FCA highlights this change in early course to issuers to allow them sufficient time to set up the relevant audit committee arrangements.

16. Are there any proposed changes reflected in the instruments in Appendix 1 that are not cross-cutting in nature (see Chapter 2) or discussed in this chapter where you think we should re-consider our approach? If so, why?

We have not identified any areas where we consider that the FCA should alter their approach. However, due to the nature and volume of changes proposed, we suggest that if we later identify any issues or operational challenges relating to these instruments, we will inform the FCA as soon as possible.

17. Are there any proposed changes where you think we should not follow the baseline approach of treating the EEA as a third country? If so, why?

Issues may be created as a result of adopting the baseline approach, for example treating EEA firms and venues exactly as any other third country may result in the EU27 being unable to grant or even initiate assessments for equivalence under the existing ruleset (which for example requires a third country to have an effective equivalent system for the recognition of trading venues to trade derivatives subject to a trading obligation in that third country on a non-exclusive basis). Additionally, following the baseline approach will give rise to a number of operational issues. These include having to treat derivative transactions on an EEA venue as OTC derivative business and availability of intragroup exemptions for UK/EEA transactions. It might be more pragmatic to recognise that in fact the EEA's regime is aligned with the UK's, at least for the moment.

Another area where the FCA should not follow the baseline approach is the changes to the reference to accounting standards in Technical Standards (European Market Infrastructure Regulation) (EU Exit) Instrument 2019, Annex B (EMIR Reporting RTS), Article 3. We would also question whether the change in the operational standards for trade repositories under Technical Standards (European Market Infrastructure Regulation) (EU Exit) (No 1) Instrument 2019, Annex C, Article 5 (from SSH File Transfer Protocol to Amazon S3 HTTPS API) is critical for exit day.

A more appropriate approach would be to achieve an outcome which most closely resembles the way that financial regulation operates currently, i.e. requiring minimal operational change in relation to the very finely tuned existing regulatory framework, much of which went live as recently as January 2018 (MiFID II).

18. Do you agree with our proposals for applying the SM&CR to EEA branches while they are in the TPR? If not, why not? (Q18 as stated on page 33 of the CP)

Solo-regulated TP firms

We welcome the proposed approach where APR or SM&CR requirements applicable to EEA branches will continue to apply during the TPR to solo regulated TP firms. We note, however, from CP 18/29, that the FCA anticipates that the first landing slot for authorisation applications will be October to December 2019. It therefore seems unlikely that authorisation will be granted before the start date for SM&CR (i.e. 9 December 2019).

We therefore consider that it would make more sense for TP firms to be able to apply for SM&CR functions for third country branches as part of their authorisation application, rather than applying for APR functions

as proposed in paragraph 4.13. This will lead to more simplicity and clarity around the actions that TP firms should be taking to ensure compliance with applicable requirements.

Dual-regulated TP firms

We also welcome the proposed approach where SM&CR requirements applicable to EEA branches will continue to apply during the TPR to dual-regulated TP firms. We would however suggest that there should be further alignment between the FCA's and PRA's approaches, with a preference for simplicity and retaining the status quo where possible, taking into account that TP firms will find it challenging to comply immediately after exit day with requirements that will apply to them for the first time and will be finalised shortly before exit day. In particular, we note the SMCR was designed to avoid gaps and overlaps in firms' governance structures. This should be the overarching principle when considering how to apply the SMCR under the TPR, and in this respect firms would appreciate clarity and consistency from the FCA and the PRA.

We have already raised our concerns about how the FCA and PRA regimes will co-exist during the TPR and have had good joint discussions with both regulators with a view to identifying a solution. We are suggesting to the PRA that, for the duration of the TPR, any Prescribed Responsibilities which feature in the third country firm regime are "switched off" until a firm is authorised as such by the PRA and the FCA and that regime applies in full. If this would not be possible, we are suggesting that the PRA discusses with the industry whether a subset of these Prescribed Responsibilities could be disapplied to ease specific concerns about SMF overlaps between the FCA and PRA.

19. ***Do you agree that consumers of EEA firms in the TPR with UK establishments should be protected by the FSCS, on an equivalent basis to other UK authorised firms, for activities from those establishments during TPR? If not, why?***

AFME is not responding to questions 19 – 24.

20. ***Do you agree that we should continue to provide FSCS cover for activities of certain incoming fund managers without an establishment in the UK during TPR, as they are already covered by the FSCS without any need to "top up"? If not, why?***

AFME is not responding to questions 19 – 24.

21. ***Do you agree with the proposed guidance for incoming EEA-based firms relating to material changes in home state compensation scheme coverage? If not, why?***

AFME is not responding to questions 19 -24.

22. ***Do you agree that services firms in the TPR should be included in the Compulsory Jurisdiction of the Financial Ombudsman Service and our complaints-handling rules and guidance? If not, why?***

AFME is not responding to questions 19 - 24.

23. ***Do you agree with our proposals regarding EEA services firms in the TPR who are already members of the Voluntary Jurisdiction? If not, why?***

AFME is not responding to questions 19 - 24.

24. ***Do you agree with our proposals regarding status disclosure for firms in the TPR? If not, why?***

AFME is not responding to questions 19 - 24.

25. ***Do you agree that our proposed amendments to the MiFID II transparency-related BTS are appropriate, given the provisions of the Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018 SI?***

In relation to waivers and deferrals applying to the transparency regime (liquidity determinations, calculations of orders/transactions that are large in scale, calculation of size specific to the instrument, and the volume cap mechanism) the FCA has identified the key areas of concern to the industry, noting in paragraph 5.19 that *"the regime was designed and calibrated with the assumption that it would apply across*

28 national markets. Some adjustments are therefore needed to ensure the regime continues to work as intended when applied on a standalone basis in the UK".

It is understood that the FCA intends to utilise the temporary powers that will be made available pursuant to the Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018 and this is welcomed.

We note from paragraph 5.21 that the FCA will issue a statement of policy on how the temporary powers will be used. Please could the FCA confirm when it is intending to issue the statement of policy.

In our answers to this question, when we refer to binding technical standards, we use the amended definitions as set out in the Glossary.

For example:

"MiFID RTS 1" means *"the UK version of Commission Delegated Regulation (EU) 2017/587 of 14 July 2016 supplementing MiFIR with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and the obligation for investment firms to execute transactions in certain shares on a trading venue or a systematic internaliser, which is part of UK law by virtue of the EUWA."*

"MiFIR" means *"the UK version of Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, which is part of UK law by virtue of the EUWA."*

Comments on the scope of the equity transparency obligation

Article 3 of MiFID RTS 1 states that

"(1) Market operators and investment firms operating a trading venue shall make public the range of bid and offer prices and the depth of trading interest at those prices. The information is to be made public in accordance with the type of trading systems they operate as set out in Table 1 of Annex 1.

(2) The transparency requirements referred to in paragraph 1 shall also apply to any 'actionable indication of interest' as defined in Article 2(1) (33) and pursuant to Article 8 of Regulation (EU) No 600/2014."

Article 4(1) of MiFID RTS 1 (as amended) states that

For the purposes of Article 4(1)(a) of Regulation (EU) No 600/2014, the most relevant market in terms of liquidity for a share, depositary receipt, ETF, certificate or other similar financial instrument shall be considered to be the trading venue with the highest turnover within the ~~Union~~ relevant area for that financial instrument.

Article -1(5) of MiFID RTS 1 states that

The 'relevant area' in relation to a financial instrument means the United Kingdom and such other countries or regions as have been specified by the FCA by direction for the purposes of Article 5 or Article 14 of Regulation (EU) No 600/2014, as the context requires.

AFME's interpretation is as follows:

- the trigger for the transparency obligation in Article 3 MiFID RTS 1 is the trading of instruments traded on a UK trading venue (i.e. the scope is limited to UK TOTV instruments only) – this is because of the amendment to Article 2(1)(62) of MiFIR set out in the Markets in Financial Instruments SI, where it is stated that *"unless the context otherwise requires, all references in this Regulation a) to a trading venue are to a UK trading venue"*
- the FCA will use 'relevant area' data in addition to UK data for the purposes of calculations, such as for calculating the most relevant market – Article 4(2) MiFIR RTS 1; the average daily turnover – Article 7(3) MiFID RTS 1; and the average value of transactions – Article 11(2) MiFID RTS 1 (and also for the volume cap mechanism – Article 8 of MiFID RTS 3)

Please can the FCA let us know if they disagree with this reading (in which case we would welcome a discussion with the FCA as soon as possible).

Please can the FCA confirm when they will publish the list of instruments that are UK TOTV.

The specification of 'relevant area'

Article -1(5) MiFID RTS 1 states that

"The 'relevant area' in relation to a financial instrument means the United Kingdom and such other countries or regions as have been specified by the FCA by direction for the purposes of Article 5 or Article 14 of Regulation (EU) No 600/2014, as the context requires".

We note that the term 'relevant area' is defined 'in relation to a financial instrument'. Our understanding is that the definition of the 'relevant area' might therefore be different for different financial instruments.

Paragraph 27 of the Markets in Financial Instruments (EU Exit) (Amendment) Regulations 2018 inserts the following paragraphs into MiFIR:

Paragraph 5(10) MiFIR *"For the purposes of this Article, "the relevant area" consists of the United Kingdom and those countries or regions specified by the FCA by direction in accordance with Article 50B".*

Paragraph 5(11) MiFIR *"The FCA may only give a direction under paragraph 10 specifying that a country or region is in the relevant area in relation to one or more financial instruments for the purposes of this Article if the FCA is able to obtain sufficient reliable trading data to enable it to assess the volume of trading in the financial instruments concerned in that country or region."*

Please could the FCA advise as to how it plans to apply these provisions in practice.

In particular, when does the FCA expect to carry out the assessment of the volume of trading in relation to particular financial instruments?

When will the FCA specify the 'relevant area' in relation to particular financial instruments?

What other parameters would determine whether a country forms part of the "relevant area"?

Would the FCA expect to include Switzerland in the 'relevant area' for the purposes of Article 5 MIFIR, subject to Switzerland meeting the requirements of Article 5(11)?

AFME would welcome the opportunity to engage with FCA to understand further how the relevant area for different instruments will be identified in practice.

"Relevant Area" will need to be defined in good time prior to the definition being used for practical purposes, in order that firms are afforded sufficient time to perform impact assessment and implement the requisite changes. Any post Brexit amendments to the concept of "Relevant Area" will also need to give the industry enough time to implement the changes.

Comments and request for confirmation on the transitional period

We note that Article 17A of MiFID RTS 1 provides for a transitional period for publication of transparency calculations, and in particular that

- the term 'transitional period' has the same meaning as under Article 5(3A) of Regulation 600/2014/EU (i.e. the period of four years beginning with exit day, or ending on the day directed by the Treasury, where this is earlier)
- during the transitional period and until the FCA makes a publication under Articles 4, 7, 11 or 17 of MiFID RTS 1, the most relevant market, average daily turnover and average value of transactions are determined by Article 17A (3) of MiFID RTS 1
- from exit day and during the transitional period, the FCA's obligations are modified as set out in Article 17A (4) of MiFID RTS 1

We welcome the transitional period and ask for confirmation from the FCA as to how the transitional period will operate in practice, and for ongoing engagement with the FCA on this subject.

Comments and request for confirmation on equivalence of EEA venues

AFME members' understanding is that any instrument which is traded on a UK trading venue (**UK TOTV instrument**) will be in-scope for the UK post-trade transparency obligation for investment firms where the trade in that instrument is executed on an EEA venue. Under the existing MiFIR transparency regime, if the trade is executed on a third country venue but, in accordance with the ESMA Opinion on third country trading venues for the purpose of post-trade transparency (15 December 2017[2]), that venue is deemed equivalent, the EEA investment firm does not need to make that trade post-trade transparent.

[2] https://www.esma.europa.eu/sites/default/files/library/esma70-154-165_smsc_opinion_transparency_third_countries.pdf

We would welcome the FCA's confirmation that a trade in a UK TOTV Instrument that is executed on an EEA trading venue does not attract a UK post-trade transparency in the period before any equivalence determinations are made. This approach would be consistent with the way in which third country venue trades are currently treated under MiFIR and removes duplicate transparency information in the market. Members would also appreciate confirmation from the FCA of the other third country venues which would be considered to be equivalent for post-trade purposes.

Further, AFME members would urge the FCA to consider whether it could extend the post- transparency "equivalence" treatment outlined above to EEA execution venues, given the post-trade transparency regime applicable to trades executes on them,

We would also strongly support a formal equivalence determination by HM Treasury in relation to EEA venues for the purposes of the UK trading obligations.

Could the FCA confirm whether these issues may be affected by the application of the transitional provisions in Article 17A MiFID RTS 1?

Comments and request for confirmation on CSDR

Article 2 of MiFID RTS 1 (as amended) states that

"A transaction in shares does not contribute to the price discovery process where any of the following circumstances apply:

(a)…

(i)… the transaction is carried out under the rules or procedures of a trading venue, a CCP or a central securities depository to effect a buy-in of unsettled transactions in accordance with Regulation (EU) No 909/2014 (or a similar third country law for the same type of transactions, where applicable)."

Regulation (EU) No 909/2014 (the CSDR Regulation) has a date of application after 29 March 2019. This is an example of in-flight legislation.

Please could the FCA confirm the construction of Article 2(i). Is the reference to the CSDR, or to the UK version of the CSDR?

When would the FCA envisage providing guidance on how Article 2(i) would apply?

Comments and request for confirmation on Table 3 in Annex 1 to MiFID RTS 1 – list of details for the purposes of post-trade transparency

Table 3 in Annex 1 requires publication of certain details. It is stated in the second column

"Identification of the venue where the transaction was executed. Use the ISO 10383 segment MIC for transactions executed on a trading venue. Where the segment MIC does not exist, use the operating MIC. Use MIC code 'XOFF' for financial instruments admitted to trading or traded on a trading venue, where the transaction on that financial instrument is not executed on a trading venue, systematic internaliser or organised trading platform outside of the ~~Union~~ UK."

In light of the application of Article 2(1) (62) of MiFIR (as set out in the Markets in Financial Instruments SI), it would seem that references to trading venue in this provision should be read as references to a UK trading venue. It would appear to follow that the ISO 10383 segment MIC, or the operating MIC, could no longer be used for EEA trading venues. It is therefore not clear how these EEA venues should be reported. AFME members would urge the FCA to consider carefully whether this is a change that is required for exit day and would propose that this provision is left as is under the EU version of the RTS and is specifically stated not to be subject to the application of Article 2(1) (62) of MiFIR. Alternatively, AFME members would suggest that any changes be phased in and that the provision is clarified to ensure it is clear which code should be used for transactions executed on EEA trading venues and non-EEA third country organised trading platforms. Otherwise, firms would be required to invest significant time and resources in order to implement this change and it is likely to require intricate changes to firms' reporting systems due to the overlap in reportable information under the MiFIR transparency and transaction reporting obligations, particularly for UK TOTV Instruments that can be traded on EEA trading venues.

Alternatively, AFME would urge the FCA to confirm that EEA trading venues can be considered equivalent for

post-trade transparency which would help minimise the impact of this proposed change.

Comments on references to CET in MiFID RTS 3 – Article 6

Article 6(6) of MiFID RTS 3 (as amended) states that

"Trading venues shall submit the data referred to in paragraphs 1 to 5 to the ~~competent authority~~ FCA on the first and the sixteenth day of each calendar month by 13:00 CET. Where the first or the sixteenth day of the calendar month is a non- working day for the trading venue, the trading venue shall report the data to the ~~competent authority~~ FCA by 13:00 CET on the following working day."

We consider that the FCA is right to keep the references to CET in RTS 3.

We think that more generally the FCA should avoid changing references from CET to BST and/or GMT unless there is a compelling supervisory justification for doing so and should adopt a consistent approach throughout the Handbook.

Changing the time references for firms' activities such as pre and post trade transparency reporting, transaction reporting, best execution and others from CET to BST and/or GMT will raise significant implementation challenges, as firms have built their MiFID reporting systems based on references to CET.

These challenges also apply to changes which in principle would provide UK firms with an extra hour to satisfy certain reporting obligations (e.g. a reference to a report being completed by a designated GMT/BST time as opposed to CET time). Such changes would lead firms to incur adaptive costs which may not be necessary for the FCA to carry out its supervisory functions effectively.

Comments and request for confirmation on MiFID RTS 3 – Articles 7 and 8

We assume that Article 7 is being deleted in its entirety (including the title). Please could the FCA confirm.

We assume that the heading in Article 8 should refer to the FCA, rather than to ESMA. Please could the FCA confirm.

Comments and request for clarity on MiFID RTS 2 Article 1 – Definition of "relevant area"

Article 1(4) states that *"the relevant area in relation to a financial instrument means the United Kingdom and such other countries or regions as have been specified by the FCA by direction for the purpose of article 9 of Regulation (EU) 600/2014".*

Regulation 27(4)(h) of the Markets in Financial Instruments (EU Exit) (Amendment) Regulations 2018 inserts the following paragraphs into MiFIR:

Article 9(5A) MiFIR *"For the purposes of this Article, "the relevant area" consists of the United Kingdom and those countries or regions specified by the FCA by direction in accordance with Article 50B".*

Article 9(5B) MiFIR *"The FCA may only give a direction under paragraph 5A specifying that a country or region is within the relevant area in relation to one or more financial instruments for the purposes of this Article if the FCA is able to obtain sufficient reliable trading data to enable it to assess the volume of trading in the financial instruments concerned in that country or region".*

Please could the FCA advise as to how it plans to apply these provisions in practice.

In particular, when does the FCA expect to carry out the assessment of the volume of trading in relation to particular financial instruments?

What other parameters would determine whether a country forms part of the "relevant area"?

When will the FCA specify the 'relevant area' in relation to particular financial instruments?

Would the FCA expect to include Switzerland in the 'relevant area' for the purposes of Article 9 MiFIR, subject to Switzerland meeting the requirements of Article 9(5B)?

AFME would welcome the opportunity to engage with FCA to understand further how the relevant area for different instruments will be identified in practice.

"Relevant Area" will need to be defined in good time prior to the definition being used for practical purposes, in order that firms are afforded sufficient time to perform impact assessment and implement the requisite changes.

Any post Brexit amendments to the concept of "Relevant Area" will also need to give the industry enough time to implement the changes.

Comments on MiFID RTS 2 Article 13A – Transitional period for publication of transparency calculations

Article 13A (3) states that "*During the transitional period and, until the FCA makes a publication under Article 13 in relation to the financial instrument in question, the determination of whether or not it is liquid, the minimum order and transaction size of the size specific to the financial instrument and the minimum sizes of orders and transactions that are large in scale (as appropriate) in respect of a bond, structured finance product, emission allowance or derivative shall be as follows:*

a) that stated in the most recent information published before exit day under article 13 or 18 (whichever is the most recent) by a competent authority in the European Union (including the FCA), provided the calculations used to produce that information did not exclude trading in the UK for the relevant period; or

b) if no such information was published by a competent authority in the European Union in respect of a financial instrument under those provisions before exit day:

i) the financial instrument shall be considered not to have a liquid market;

ii) the minimum order and transaction size of the size specific to the financial instrument and the minimum size of orders and transactions that are large in scale (as appropriate) shall be that estimated by the FCA, taking into account any previous trading history of that financial instrument and of other financial instruments that are considered to have similar characteristics, and published on exit day".

We would welcome a discussion with the FCA as to operation of this provision.

Article 13A(4)(c)(d) revises the publication of calculations from the first day of the month to 5th day of the month in relation to articles 13(17) and 13(18).

Our understanding is that where the FCA is relying on publication by ESMA, then the FCA will indeed require additional days before it can publish calculations. It would be better if the FCA could get the data earlier, so that it could publish the calculations on the same day as ESMA, but we understand that this may not be possible.

We consider that the FCA should use CET to define working days. Using BST and/or GMT might lead the formation of different data sets due to different midnight cut-off points, which might further create reporting synchronisation issues.

Comments on MiFID RTS 2 Article 17 – Provisions for the liquidity assessment for bonds and for determination of the pre-trade size specific to the instrument threshold based on trade percentiles

We agree that removing the reference to stages S1 to S4 allows the FCA more flexibility in adjusting the liquidity assessment and would welcome an opportunity to engage with the FCA to understand how the flexibility introduced by the changes is intended to be used.

Comments on Annex II, Table 2 of MiFID RTS 2

Table 2 in Annex 1 requires publication of certain details. It is stated in the second column

"Identification of the venue where the transaction was executed. Use the ISO 10383 segment MIC for transactions executed on a trading venue. Where the segment MIC does not exist, use the operating MIC. Use MIC code 'XOFF' for financial instruments admitted to trading or traded on a trading venue, where the transaction on that financial instrument is not executed on a trading venue, systematic internaliser or organised trading platform outside of the ~~Union~~ UK."

Please refer to our response above with regard to Table 3 in Annex 1 to MiFID RTS 1.

Comments on Annex III, Table 4.1 of MiFID RTS 2

We note that Table 4.1 of MiFID RTS 2 refers to *"transferable security as defined in Article (2)(1) (24) of Regulation 600/2014/EU"* rather than point (c) of the same definition in Article (4)(1) (44) MiFID.

Regulation 26(2)(b) of the Markets in Financial Instruments (EU Exit) (Amendment) Regulations 2018 inserts the following paragraphs into MiFIR:

2(1) (24) "transferable securities" means those classes of securities which are negotiable on the capital market (with the exception of instruments of payment) such as—

(a)shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;

(b)bonds or other forms of securitised debt, including depositary receipts in respect of such securities;

(c)any other securities giving the right to acquire or sell any such securities or giving rise to a cash settlement determined by reference to such securities, currencies, interest rates or yields, commodities or other indices or measures;

There being no obvious reason for such a broadened scope in Table 4.1, we assume the reference should be to *"transferable security as defined in Article 2(1) (24)(c) MiFIR"*.

Please could the FCA confirm.

Comments on Article 3A of MiFID RTS 11

Article 3A, paragraph 2 states that

"2. During the transitional period and until the FCA makes a publication under Articles 3, 4 or 5(3) in relation to the financial instrument in question, the average daily number of transactions in respect of a share or depositary receipt for the purposes of retained EU law relating to markets in financial instruments shall be as follows in (a) or (b), subject to (c):

(a) that stated in the most recent information published before exit day under Article 4 or 5 (whichever is the most recent) by the competent authority in the European Union (including the FCA) for the relevant instrument under Article 3(1) as it applied in the European Union before exit day (including the FCA); or

(b) if no such information was published by that competent authority in the European Union in respect of a financial instrument under those provisions before exit day, the average daily number of transactions for that financial instrument shall be that estimated by the FCA, taking into account any previous trading history of that financial instrument and of other financial instruments that are considered to have similar characteristics, and published on exit day; and

(c) if information was published before exit day under Article 3(1) by the competent authority in the European Union (including the FCA) for the relevant instrument under Article 3(1) as it applied in the European Union before exit day, but the information was not required to be used under Article 3(4) before exit day, then the average daily number of transactions shall become that stated in such information from the point at which it would have been required to be used under Article 3(4) as it applied in the European Union before exit day, provided that the calculations used to produce that information did not exclude trading in the UK for the relevant period.

We request that the FCA provides a clarification on the proposed ways for venues/firms to adopt the appropriate average daily number of transactions (ADNT) for an instrument, which in turn is used to determine tick sizes. The transitional provisions to calculate ADNT are set out in Article 3A(2)(c) of MiFID RTS 11. Based on how it is currently drafted, we understand that the provisions seem to mean that:

- Where there is an ADNT (and therefore tick size) that has both i) been published by ESMA and ii) enters into force prior to Brexit date, then participants should use that information to set the tick size;
- Where no ADNT was published by ESMA prior to exit day, the FCA will conduct its own estimation and publish it *on exit day;*
- However, where information was published by ESMA before exit day but which did not come into force in time for exit day (which could be a likely scenario since ADNT information is published on 1 March and the tick size table is applied from 2 April to the following 1 April), then provided the ESMA information that was published did not exclude UK volumes, then market participants should instead use the ESMA data.

We request further guidance from the FCA for the circumstances when ESMA publishes data, but the tick size does not enter into force prior to exit day, and ESMA decides to exclude UK volumes in its published data.

We consider that, if there was no ADNT published by ESMA prior to exit day, the FCA should conduct its own estimation and publish it on or before exit day. We would like to note that there would be operational difficulties to consume and adopt ADNT data/tick sizes at very short notice, were the FCA to publish ADNT on or close to exit day.

We consider that some additional drafting would be necessary to address such circumstances and would welcome a discussion with the FCA on this provision.

We also note that ESMA published its Final Report on proposed amendments to RTS 11 on 14 December 2018.

The accompanying Press Release states that *"The proposed draft amendments to RTS 11 will allow National Competent Authorities (NCAs) of European Union (EU) trading venues, where third-country shares are traded, to decide on an adjusted average daily number of transactions (ADNT) on a case-by-case basis in order to take into account the liquidity available on third country venues in the calibration of tick sizes"*.

Paragraph 40 of the Final Report states that

"ESMA is suggesting to add the following paragraph 10 to Article 3 of RTS 11:

8. The competent authority for a specific share may adjust the average daily number of transactions for that share calculated in accordance with the procedure set out in paragraphs 1 to 7 where the following conditions are met:

(a) the principal venue for the trading of the share is located in a third country;

(b) the average daily number of transactions calculated and published in accordance with the procedure set out in paragraphs 1 to 4 is greater than one. …"

ESMA submitted the Final Report to the European Commission on 12 December 2018, commencing a three-month period for the Commission to decide whether to endorse the proposed amendments.

Although this timeframe envisages endorsement by the Commission ahead of exit day, we recognise that further time will be allotted for approval by the European Parliament and the Council.

We would welcome a discussion with the FCA in due course on these amendments.

26. Do you agree that our proposed approach to amending the PRIIPS RTSs to avoid risk ratings for certain PRIIPs increasing directly after exit is appropriate? (Q26 as stated on page 42 of the CP)

AFME agrees with the FCA's approach proposing that EEA entities are not treated as third-country entities under certain RTS provisions related to risk indicators.

Do you agree with our proposed approach about the exemption for UCITS manufacturers from producing a PRIIPs KID? (Q26 as stated on page 51 of the CP)

We are supportive of the proposal that the UK maintains an exemption from the PRIIPs Regulation for UCITS until 31 Dec 2019; in our opinion, it would be unhelpful and potentially confusing to investors to receive both a KID under PRIIPs rules and a KID under UCITS rules for a single product, both documents broadly having the same intended purpose but having different content and format requirements. It would also not be an efficient use of resources for manufacturers.

27. Do you agree with the proposed changes to the BTS under PAD?

AFME is not responding to this question.

28. Do you agree that we have correctly identified all relevant amendments in our draft BTS text related to the cross-cutting issues set out in Chapter 2? Are there any proposed changes in the instruments in Appendix 2 or discussed in this chapter where you think we should reconsider our approach?

We would like to add the following comments in relation to the BTS for the Market Abuse Regulation.

Regarding RTS on insider lists, could the FCA please confirm that the references to auction platforms have been deleted because there will not be regulated UK emissions auction platforms?

In relation to RTS on data submissions, we support the maintenance of CET in line with previous AFME suggestion on time zones.

In relation to RTS on investment recommendations, the amendment made to Article 2 seems to require firms to provide details of the relevant regulator (which could include EEA regulators as well as other third country regulators) in their disclosures. This would seem to expand the notification requirement from what is currently required by MAR. Could the FCA confirm that the reference to "relevant competent authority" is intended to be a reference to an EEA competent authority.

29. ***Do you agree with our approach to Handbook forms? If not, why not? Do you have any comments on the proposed guidance at Appendix 2 to this CP? (Q29 as stated on page 46 of the CP). Do you agree with our approach to amending forms? If not, why not? (Q30 as stated on page 51 of the CP)***

In principle, we agree with the FCA's proposals on Handbook forms and consider that the approach is helpful to firms and market participants. Should we identify any issue in practice relating to the completion and submission of forms, we will inform the FCA.

30. Do you agree with our approach to amend DEPP and EG. If not, why? (Q30 as stated on page 47 of the CP). Do you agree that our proposals to amend DEPP and EG reflect the changes made by legislation? If not, why not? (Q29 as stated on page 51 of the CP).

We agree with the FCA's proposals relating to DEPP.

In the proposed amendments to the FCA's Enforcement Guide, we note that the FCA proposes a change to EG 19.15.5 (The conduct of investigations under the Money Laundering Regulations).

In particular, when deciding whether a person has failed to comply with the Money Laundering Regulations, currently the FCA "*must consider"* whether he or she followed any of the relevant guidance set out under EG 19.15.5[3]. However, it is proposed that the reference to "*must consider*" should be replaced by "*may have regard to, as appropriate"*.

We consider that the current wording should be retained, and would be pleased to discuss further with the FCA.

We consider that retaining the current wording would also be consistent with the approach to EU Level 3 materials set out by the FCA in Appendix 3 to FCA CP 18/28.

As previously stated, should we later identify any other issues relating to DEPP and EG, we will raise them with the FCA.

31. Do you have any comments on the proposed guidance on our approach to non-Handbook guidance set out at Appendix 1 to this CP?

We note from paragraph 11 of Appendix 1 that the FCA expects *"firms and other market participants to sensibly and purposively interpret pre-exit non-Handbook guidance in light of the provisions of the European Union (Withdrawal) Act 2018 (EUWA) and any changes to the underlying provision as it is preserved or converted into UK law".*

We consider that this is a reasonable approach. We would welcome engagement with the FCA in the event that firms have questions about application in specific cases.

32. ***Have you identified any non-Handbook guidance which should be specifically reviewed and amended because you think that the interpretive approach proposed will not be enough to ensure the regulatory framework remains fit for purpose? If so, please explain why you think this is the case***.

We have not identified any non-Handbook guidance which should be specifically reviewed and amended.

[3] Guidance which was issued by a European Supervisory Authority in accordance with articles 17, 18.4 or 48.10 of the Fourth Money Laundering Directive, with article 25 of the Funds Transfer Regulation with any relevant guidance which was issued at the time by a supervisory authority or other appropriate body, including the Joint Money Laundering Steering Group.

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