FCA Mission Statement

10th January 2017

1. The Association for Financial Markets in Europe (AFME) welcomes the FCA's consultation on its future Mission. 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 listed on the EU Register of Interest Representatives, registration number 65110063986-76.

2. Introduction

2.1 Given AFME's pan-European focus, as well as our focus on the wholesale markets, not all of the questions that are posed in the FCA's consultation paper *Our Future Mission* are relevant to AFME. We have, therefore, chosen not to answer each specific question but, rather, to provide a general commentary and to answer those specific questions of particular relevance to our members' businesses.

2.2 We would start by commenting that the fact that *Our Future Mission* is expressed as a consultation is of itself positive. We were also particularly struck by the open and frank atmosphere at the FCA's Mission Conference, where representatives of a range of different constituencies, including the financial services industry, regulators, academics, consumer organisations, journalists and charities were able to get together and exchange views as to the FCA's Mission. We regard this sort of interaction as hugely beneficial, and we think it sets a good precedent for future such engagements.

3. Foreword

3.1 We note that, in his foreword to *Our Future Mission*, Andrew Bailey states that it is not a document about Brexit, and that that is the only time that the word appears in the document. This is because the FCA believes that "the issues we [the FCA] are setting out in the Mission are at the heart of financial conduct regulation, whatever we [the FCA] do next".

3.2 There is one important caveat to this. That is, that until at the earliest March 2019 - and possibly for some time thereafter, depending upon the outcome of the Article 50 negotiations and any transition period - the UK will still be in the EU and/or will still be implementing EU regulations and directives. Thus, the impact of EU financial regulation on the UK's financial regulation cannot be ignored, even if the UK's ability to influence it will reduce over time, as the UK becomes a rule taker and not a rule maker. This will be the case even though the FCA's desired agenda may, in the medium or long term, diverge from that of ESMA (or the European Commission / Parliament).

4. Ensuring markets function well (chapter 4)

4.1 The first substantive set of questions (questions 1 to 5 in chapter 4) deal with the FCA's objective to ensure markets function well.

4.2 AFME members' businesses function almost entirely in the wholesale capital markets. We do not seek to argue that our sector should be lightly regulated - if proof were needed, the LIBOR and FX scandals have demonstrated that such markets need strong regulation and strong enforcement of that regulation - but we do believe that the FCA's principal focus should be on retail markets, including most importantly private individuals and small businesses. The retail consumer needs protection in the way that the market counterparty does not.

4.3 There were some very good illustrations of the retail customer protection issue at the Mission Conference. One example given was savings accounts and pension schemes. These are inherently "good" products, but suitability for the customer is important. if a customer is sold a low interest savings account or pension scheme and he or she already has high interest credit card or mortgage debt, it would be a much better use of limited resources to use them to pay down the debt rather than open the savings account or pension scheme. Should the customer not be told of this at the point of sale?

4.4 Conversely, it has to be recognised that the regulator cannot and should not intervene in every instance where a consumer loses money as a result of a financial services transaction. Many products are perfectly correctly sold, and suitable for the consumer in question, but the consumer ends up losing money, or not making as much money as he/she would have done but for buying the product in question. An example of the latter category might be shared equity mortgages, which are suitable for customers who could not afford otherwise to buy a property but where the bank (as well as the customer) will profit greatly in the event of high rates of inflation in the retail property market. Similarly, an interest rate swap might be completely suitable for a customer whose principal objective is to fix his/her interest payments, but who with the benefit of hindsight would have done better by staying with floating rates during a period of low interest rates.

4.5 Mention of hindsight leads us to the comment that the regulator should not operate with the benefit of hindsight nor bow to political pressure. The FCA should be independent of political pressure and should exercise its supervisory judgement and its enforcement decisions on the basis of the rules, principles and market practice obtaining at the time of the relevant transaction, not some years later. Despite frequent statements to the contrary, we do not believe that this has always been the case.

5. Meeting FCA objectives (chapter 5)

5.1 Chapter 5 and questions 6 and 7 deal with the FCA's three operational objectives, viz to secure an appropriate degree of protection for consumers; to protect and enhance the integrity of the UK financial system; and to promote effective competition in consumers' interests in the markets that they regulate.

5.2 As stated we have no problem with the FCA focusing its attentions on the protection of the retail consumer. But the FCA coined the phrase "wholesale consumers" some years ago, and now uses it to describe such entities as hedge funds buying financial products or services. We do not believe that these entities require protection by conduct regulators such as the FCA. Market counterparties such as hedge funds are perfectly capable of taking their own legal advice and should be able to rely on market forces, combined with the constraints of contract law and competition law, to protect them. The FCA's limited resources are better directed at protecting the retail consumer.

5.3 We do agree that healthy and successful financial markets are those that can demonstrate clear, proportionate, and consistently applied standards of market practice, transparency, open access, and effective competition.

5.4 Transparency should not be restricted to markets. The regulator should practice what it preaches. The FCA needs to be more transparent, and *Our Future Mission* suggests that it intends to be. In this context, we would note that requests for the FCA to make public its internal organisation charts have not been acceded to, and a request for it to publish its list of high risk countries for anti money-laundering (AML) purposes was acceded to for a short time only.

5.4.1 There are many examples of FCA expectations which, if published for consultation, would make it much easier for the industry to understand what the FCA was looking for so that it could comply with it, or explain why it did not regard it as necessary to do so. Consultation is the key to this. The FCA must adhere to its published policy of not issuing guidance without prior consultation. This has not been always been the case, particularly recently.

5.5 We also believe that the regulator needs to think about the impact of any intervention that it may make. Regulation can, and often does, have unintended consequences. One example is the huge focus on anti-money laundering and counter terrorist financing ("AML/CTF") systems and controls over the last few years.

5.5.1 Brought into effect for very good reason following 9/11 and, more recently, the Paris attacks, AML/CTF regulation has had the unintended consequence of banks having to turn down or close the accounts of many customers. Regulators need to implement regulation proportionately, and not enforce against every bank whose systems and controls are not perfect. It is the perception of the industry however that this has been happening and, accordingly, banks have taken a very low risk approach to AML/CTF regulation.

5.5.2 As a result, some well-documented instances of poor outcomes have been observed. These include, at one end of the spectrum, relatives of members of the House of Lords being refused bank accounts; at the other end of the spectrum persons who are not even "just about managing" being unable to open bank accounts because they simply cannot afford passports, driving licences or other forms of photo ID; also, large parts of certain countries and communities have been closed out of the banking system. Thus, these people will turn to the informal sector, leading to a much greater likelihood of the money laundering or terrorist financing that the regulations were originally designed to prevent.

5.5.3 If banks, and individuals within banks, knew that they were not going to be enforced against for non-deliberate and occasional breaches of AML/CTF systems and controls they would be able to take a more proportionate approach to these issues. That would be in the best interests of all.

5.5.4 In contrast, we are of the view that deliberate breaches of law or regulation should normally be the subject of criminal proceedings. The FCA is to be congratulated on its recent success in prosecutions for insider trading and in the LIBOR and FX scandals. The more this happens, the greater the deterrent effect.

5.5.5 We would argue, in short, that the enforcement focus for a conduct regulator such as the FCA should be on deliberate breaches and not on accidental breaches where the individual or the firm has made a genuine mistake and/or a genuine effort to improve the situation. Even if negligent,

these are best dealt with via the supervisor working with the firm to assist in remediation. It is not good to encourage an exodus from the industry of compliance officers, MLROs and IT and operations staff.

6. Regulation and broader public policy (chapter 6)

6.1 Chapter 6 and questions 8-11 deal with the balance between regulation and broader public policy. Reference is made to the fact that the UK has an ageing population which may need different products and is less technologically able than younger generations. Some consumers are denied access to insurance (or to the best prices therefor) by reason, for example, of their age or medical history.

6.2 AFME members do not come across these issues as often as do providers of retail financial services, and so we have no major comments on the question as to the extent to which the FCA should intervene in such markets.

6.3 We do feel that access to basic financial services should in principle be universal, but equally that a bank (which is a commercial organisation) should not be required to subsidise those customers who are more expensive to service at the expense of those who are not. That should be for the government to fund, if it so sees fit.

6.4 On question 11, we see no material value to be gained in the functioning of financial markets by the introduction of a duty of care on firms providing financial services to retail customers. FCA principles already include a principle to treat customers fairly and this has been the basis of a number of successful enforcement actions, as well as of several successful interventions, over the last few years.

7. Protecting consumers (chapter 7)

7.1 We agree that the levels of protection afforded to consumers by the regulator should vary according to the level of complexity of the product and level of sophistication of the consumer. See also in this context our comments in paragraph 5.2 about "wholesale consumers".

8. Vulnerable consumers (chapter 8)

8.1 Similarly, we agree with the FCA's approach of giving vulnerable consumers greater levels of protection.

9. The role of disclosure in consumers' choices (chapter 9)

9.1 The key issue here is the usefulness of the disclosure to the consumer to enable him or her to take a better-informed decision. Unfortunately, the trend of regulation within the EU has been towards greater disclosure and not more useful disclosure.

9.2 A good recent example was the requirement for disclosures to accompany investment recommendations introduced in July 2016 by the Market Abuse Regulation ("MAR'). By this, investment recommendations have to be accompanied by a number of disclosures relating to the recommenders. Disclosure of the buy or sell positions that a research analyst had taken in relation to a particular stock when he or she had published 3 or 4 times on that stock during the previous 12 months might be useful. Disclosure of the positions taken by a salesman on a particular FX future

which he or she had traded several times a day for the previous year, often in different market conditions and with different clients, are of no value.

9.3 Indeed, certain members of the professional buy-side who constitute AFME members' clients have asked whether it is permissible for these disclosures not to be sent, or to be sent to a junk inbox. It is not so permissible. Accordingly, the regulation, which presumably was designed to increase the level of information available to the client, has simply resulted in terabytes of useless information being sent to clients who do not want it, at increased costs to the supplier (and, ultimately, to the client).

9.4 There are many such examples. Another one would be the pages of disclosures that are required to accompany receipts from asset managers accepting payments in to personal pensions. It is not clear that these are ever read, let alone understood.

9.5 Accordingly, the regulatory focus should be on clear, concise, and comprehensible disclosure obligations that are appropriate to the client, and can be waived in the case of clients that do not need them, such as market counterparties or professional clients.

10. Intervention (chapter 10)

10.1 We agree with the parameters set out in chapter 10 governing when the FCA should intervene in the market. In particular, we welcome the statement that the FCA "intend to be more transparent about the things [it chooses] to do and the things [it decides] not to do" as well as "want all parties to be able to clearly track FCA action from harm to cause to interventions". This accords with our general desire for greater levels of consultation and transparency from the regulator.

11. Competition and market design (chapter 11)

11.1 AFME has no comments on chapter 11 or question 22 save, again, to welcome the increased level of consultation that is implied by the proposals.

12. Supervising firms (chapter 12)

12.1 Most AFME member firms have the benefit of specific FCA supervision teams. It is important that these teams take time to understand the business of the firm and are not moved on too quickly to different positions within the FCA. Beyond that general comment, we are supportive of the regulatory approach set out in chapter 12, page 42, and value continued interaction with the FCA supervision teams. Our members have benefited over the last few years from regular meetings with the wholesale regulation team at the FCA, and we believe the benefits have been mutual.

12.2 We are, however, concerned about the role of specialist subject teams such as those responsible for market conduct or financial crime. We think it important that these teams should not exist as part of the enforcement division of the FCA, but should either be part of supervision or a separate entity distinct from enforcement.

12.3 It is valid for supervisors to use the specialist teams to seek further information before considering whether or not to refer a firm to enforcement. Supervisors cannot be specialists on everything. But it is not valid for the specialist teams to act as though they are part of enforcement. There is a perception that once a firm has been referred to a specialist team in relation to a particular matter then, inevitably, a referral to enforcement and a fine will result.

13. Enforcement (chapter 13)

13.1 We have stated above that enforcement actions should be aimed at deliberate, serious breaches and that normally these should result in criminal prosecutions. We also think that the tendency, particularly in the AML and financial crime space, to enforce against firms for non-deliberate breaches of systems and controls where no evidence of actual financial crime has been found has resulted in firms taking an over risk-averse approach and this has resulted in poor outcomes for consumers. See our comments in paragraph 5.5 above.

13.2 As stated in paragraph 12.3, there is a perception that once a firm has been referred to a specialist team in relation to a particular matter then, inevitably, a referral to enforcement and a fine will result. This is even more so the case following a referral to enforcement. We do not think that changing the name of such referral process (as suggested on page 44) is going to solve this issue.

13.3 In response specifically to question 25, we do think that more formal discussions with firms about lessons learned would improve regulatory outcomes. Individuals and firms who have been through enforcement processes do not generally get the impression that improved regulatory outcomes are seen by the regulator as the objective, so much as closing the matter with a final notice (giving the regulator's view of events and not the firm's) and a sanction.

13.4 As mentioned, the enforcement focus for a conduct regulator such as the FCA should be on deliberate breaches, which should be dealt with as criminal offences, and not on accidental breaches where the individual or the firm has made a genuine mistake and a genuine effort to improve the situation. Even if negligent, these are best dealt with via the supervisor working with the firm to assist in remediation. It is not good to encourage an exodus from the industry of compliance officers, money-laundering reporting officers (MLROs) and IT and operations staff. We note that the FCA has recently (at its November 2016 Financial Crime Conference) asked whether the criminal liability attached to MLROs does more harm than good. We would say yes; it is unnecessary, encourages over risk-averse decision taking, and makes recruitment of good quality staff very difficult. The FCA has also commented on the shortage of good quality MLROs but, for the reasons given above, we do not find this surprising.

13.5 In our view enforcement is one of the areas where there is the greatest room for improvement in the process and policy of the FCA. There is very little transparency surrounding the FCA's approach to enforcement. This is an area where the regulator, the industry and the consumer would benefit from a much greater understanding and much greater consultation. AFME would be happy to assist with this process.

14. Looking ahead (chapter 14)

14.1 As banks become increasingly reliant on technology so regulators and compliance departments have to do the same.

14.2 It is famously commented that the FCA Handbook when printed out stands more than 2m tall and costs more than a second hand Mini Cooper. Surely the time has come for the Handbook to exist solely in electronic format and to be searchable with links to law reports, enforcement decisions, academic comment, FICC Markets Standards Board (FMSB) and Joint Money Laundering Steering Group (JMLSG) publications, codes of conduct, relevant EU regulation, FCA guidance, Market Watch and the like, and generally made more user-friendly.

14.3 In terms of content of the Handbook, we note that the FCA has recently started to publish a Financial Crime Guide which contains content that overlaps with the work of the JMLSG. This does not seem to us to be helpful and we would suggest that the FCA review this Guide to ensure that, if indeed it is seen as useful, its remit is restricted to guidance that has been consulted on and agreed with the JMLSG.

14.4 We also believe the regulators should encourage the industry to act together in sharing information and sharing technology, reducing costs, and increasing efficiency (without, of course, acting in an anti-competitive way). The only reason why, for example, KYC utilities (being databases in which client information is stored for AML/CTF purposes) are not widely used is that the regulators will not permit banks to rely on the information that is stored in them. Also, more sharing by the regulator of information about cyber-attacks, attempted market abuse and financial crime would be to the benefit of all, except of course the criminals. Again, we are pleased to see that these ideas were floated at the recent FCA Financial Crime Conference; and again, we would be happy to contribute to the process of taking them forward.

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