Consultation Response

FCA CP24/24 The MiFID Organisational Regulation – Chapter 4

28 March 2025

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on **FCA CP 24/24: The MiFID Organisational Regulation**. 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.

We summarise below our high-level response to the consultation, which is followed by answers to the individual questions raised.

Executive Summary

We welcome the opportunity to provide feedback on Consultation Paper (CP 24/24), noting that the consultation is seeking to identify immediate and longer-term opportunities for reform and rationalisation of the FCA Handbook. Several of our key messages are:

- **Market Data and the Review of the Reasonable Commercial Basis framework,** where we are of the view that market data should be treated as a by-product of the trading process and that relevant authorities have sound legal basis to prevent discriminatory pricing. We urge the FCA to address this in the more immediate term and in alignment with the competitiveness and growth agenda
- **Increased Optionality for Corporate Access payments**: we note that the UK Corporate Access rules are more onerous than in other jurisdictions. Corporate access is a critical part of the information gathering process of the investment manager and we welcome greater optionality in research payments
- **MAR Investment Recommendation disclosures:** (as set out in COBS 12.4) where we advocate for an exemption for sales and trading commentary/investment recommendations
- **Client categorisation:** we agree that a review is timely, and that, where appropriate, sophisticated retail clients should have the ability to opt up to professional client status and certain vehicles/counterparties should be considered per se professionals. We also call for a more qualitative approach to the client categorisation criteria seeking to align with other jurisdictions and providing greater choice and innovation to investors
- **Costs and timing of implementation:** Members believe that rationalisation will lead to reduced compliance costs and more consistency in interpretation. However, there will be potential initial cost associated with any regulatory change and the benefits of any change must outweigh the costs. Firms should be given sufficient time to comply with any regulatory change.

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Questions

Question 18: Are there any specific rules that are challenging to navigate or apply to any particular type of firm or activities? Do any of our rules (or related level 3 or other FCA materials) impose operational costs or other disadvantages that are disproportionate to the client protection they provide? If so, please state which rules and why

The rules in COBS 4.2 around fair, clear and not misleading communications technically overlap with the Consumer Duty Consumer Understanding outcome. However, members would not support removal of, or adjustments to, COBS 4.2 because the consequences would be felt across the Handbook (e.g. in the ESG Sourcebook) and a gap would be left in relation to wholesale business that is not subject to the Duty. Rather, substituted compliance could be a solution here (i.e. when firms are subject to and compliant with COBS 4.2 the Consumer Understanding outcome is deemed to be fulfilled), much like the approach taken to the rules in PROD 3, 4 and 7.

Question 19: Do any MiFID derived conduct or organisational rules create challenges in their interaction with other FCA rules or international standards?

Market Data: Review of Reasonable Commercial Basis (RCB) framework

Market data is the lifeblood of capital markets: irrespective of the asset class, data empowers all market participants to make informed decisions when allocating capital which, in turn, supports a competitive and growing capital market.

Our members actively use market data for a wide variety of primary and secondary markets purposes.

Many of the FCA's findings that certain features in the three markets may prevent, restrict or distort competition are consistent with AFME's concerns, also expressed in:

- our recent fixed income market data report "The Burden Continues to Rise" which provides updated analysis since publication of our last such report, published in February 2022.
- Market Structure Partners' equities market data report "There is no market in market data " which was undertaken on behalf of AFME, Plato Partnership, EFAMA, BVI, and FIA EPTA.

We encourage the FCA to review the existing RCB framework to ensure that market data is treated as a by-product of the trading process it underpins and that relevant authorities have sound legal basis to prevent discriminatory pricing.

We note the FCA's intention to examine the impact of its work on consolidated tapes on the issues identified in its market study before deciding whether any potential changes to the RCB framework are necessary and proportionate.

However, we also understand that the UK equities consolidated tape is not expected to go live before mid-2028. This means that any relevant review is unlikely to take place before 2030 at the earliest.

We invite the FCA to re-consider its approach and re-engage with the industry on this matter so vital for the competitiveness and growth of UK capital markets with a view to suggest a more timely course of action.

Increased Optionality for Corporate Access payments

We welcome optionality in research payments, and we note the stated desire in the Investment Research Review recommendations that the UK continue to remain aligned with the EU and the US, and not to be put at a competitive disadvantage.

Corporate access is a critical part of the information gathering process of the investment manager, which is beneficial to not only the investment manager but also ultimately to the investment managers' end clients. Importantly, encouraging providers to create corporate access events which include SMEs, who may not generate as much investor interest, allows a greater opportunity for investors to directly access SMEs/corporate management, which can form an integral part of the investment process.

As corporate access, like research, forms an integral part of the investment process and the information ecosystem, it follows that it should have the same options for payment as research. This is the position shared by AIMA, AFME and The IA as per our joint letter of November 2024 which we submitted to the FCA in December last year.

Our recommendation will help achieve a balanced and flexible framework for all research payment arrangements, including the new "CSA-like" arrangement introduced by the FCA in August 2024.

We note that UK Corporate Access rules are more onerous than other regions such as the US and APAC and require either separate payment or justification as a minor non-monetary benefit by the attendee. In the US and APAC, these payments can be part of a bundled service.

We believe that this change will further incentivise the take up of the new payment option and help reinvigorate UK capital markets and bolster UK economic growth. AFME encourages the FCA to consult on the above targeted change with a view to ensure that the outstanding elements of the research payment framework can be finalised in close sequence.

Question 20: What are the likely benefits of any rationalisation or improvements you would propose, for example reduced compliance costs or improved competition?

Members believe that a rationalisation of the suggested rules would lead to reduced compliance costs and more consistency in interpretation. However, members are concerned about the potential initial cost of any regulatory change and the benefits of any change must outweigh the costs. Timing is also key; firms should be given sufficient time to comply with any regulatory change.

Members believe it is important for the FCA to consider any changes holistically and to consider how amendments across different parts of the Handbook will impact different sectors (e.g. Consumer Composite Investments and disclosure requirements).

In making any amendments to the Handbook, the FCA should also be mindful of international alignment, in line with its objectives, including the FCA's secondary objective to support the international competitiveness and growth of the UK economy, particularly in light of the UK Government's growth agenda[1] which is looking to reduce the complexity and burden of regulations.

Question 21: Do you agree that it would benefit firms to rationalise SYSC 10?

Yes – members agree that having more high-level and outcomes-focussed conflicts of interests rules would give more firms more flexibility and lead to more consistency of application. Ultimately, despite the many different applications of the rules/guidance in SYSC 10 to specific activities, the overarching intention is the

[1] https://www.gov.uk/government/publications/a-new-approach-to-ensure-regulators-and-regulation-support-growth/new-approach-to-ensure-regulators-and-regulation-support-growth-html

same (i.e. identifying, preventing and managing conflicts of interest) regardless of business model. Firms should be able to implement this in a way appropriate for their business model. Any changes to SYSC 10 will, of course, require a review of internal policy / procedure, but firms should be doing regular reviews of policies / procedures anyway, so this should not be a huge uplift or additional compliance cost for firms. Conflicts of interest policies are often high-level and product/service-agnostic, so they should be simple to amend.

Members would suggest that the FCA goes further than just a rationalisation of SYSC 10 and incorporates any rules / guidance around conflicts of interest that currently appear in COBS (e.g. at COBS 4.10.12R, COBS 11A.1.3UK etc.) into SYSC 10, and adds cross-references into COBS instead of having additional conflicts of interest rules in COBS. Firms will then be able to find all conflicts of interest rules and guidance in one place.

One point to note is that some members that are EU-headquartered banks may have conflicts of interest policies / procedures based on the EU MiFID requirements, so these will need to be revised, and they may need to create UK-specific policies. There will be increased compliance costs for these banks.

Question 22: What differences between conflicts rules for different types of activity do you think need to be maintained in a rationalised SYSC 10?

AFME is not responding to this question.

Question 23: Do you agree that it would be beneficial to rationalise these requirements?

In relation to best execution, members would urge that the FCA exercise caution in making any changes to these rules, particularly in relation to MiFID vs non-MiFID business. Best execution rules and guidance are intended to ensure investor protection. Members would appreciate some further clarity from the FCA on what it is they intend to do in rationalising these rules. Members are concerned that an unintended consequence of this rationalisation may be the bringing of non-MiFID business into scope of the MiFID best execution rules. This may create some confusion in the market. Non-MiFID business tends to follow the approach laid out in the Global FX Code and guidance for pre-hedging situations.

In relation to personal account dealing, members are supportive of the rationalisation of these requirements. As these are personal conduct-based rules and guidance, and the policy intention is the same for all individuals (i.e. to prevent improper personal dealings), it would be simpler to have one set of rules and guidance and one process that all relevant individuals have to follow.

Question 24: Do you have any specific suggestions for which disclosure requirements could be rationalised? This does not include CCIs. [If yes, please explain your answer, including which disclosure requirements should be prioritised for review, and why.]

Members are of the view that the MAR investment recommendation disclosures (as set out in COBS 12.4) are too detailed for consumers to understand, and conflict with the Consumer Understanding outcome. The FCA should consider reviewing this section of the Sourcebook ahead of the UK MAR review as part of the Smarter Regulatory Framework. We, however, advocate for a complete exemption for wholesale clients (professionals/eligible counterparties) for sales and trading commentary/investment recommendations and no change for investment research (independent/non-independent) that is aimed at wholesale clients only.

Members believe it is important to consider this from the angle of both (i) new customers and (ii) existing customers. Members agree that new customers need certain disclosures about the firm and risk warnings, amongst other disclosures. However, existing customers that are, for example, investing in the same product

on a repeat basis, do not need to be provided with, for example, the same risk warnings over and over again. Of course, firms do need to make certain disclosures from a litigation risk perspective, but members believe that these could be streamlined to reduce the amount of disclosure made, which will in turn make disclosures more effective.

Members believe it is important for the FCA to consider any changes holistically and to consider how amendments across different parts of the Handbook will impact different sectors (e.g. Consumer Composite Investments and disclosure requirements). Please also see AFME's response to the FCA CP 24/30 A new product information network for CCIs – here.

The current FCA rules often mix the disclosures requirements for retail and professional client disclosures (see COBS 6.1ZA, for example), members suggest that these should be further distinguished. Clients categorised as professionals and eligible counterparties do not need the large volume of disclosures that they currently receive. Even where professional clients are acting on behalf of a retail client, their professional categorisation should mean that they do not need the same level of disclosure as a retail client. The FCA should move to a more calibrated approach, taking into account a client's FCA authorisation status and the relationship between the end client and their representative, leading to more meaningful disclosures.

Question 25: Do firms that act on behalf of clients tend to request to opt down to professional status? Should such firms be removed from the list of entities that can be treated as per se ECP? Would this help clearer calibration of client protection rules?

AFME is not responding to this question.

Question 26: Could the per se categories be simplified in other ways, eg, replacing different types of authorised firm listed separately with 'authorised person'? Or harmonising the differences in certain thresholds within the wholesale categories which differ for MiFID and non-MiFID business?

Special purpose vehicles ("SPVs") or other investments or holding vehicles with sponsors that are professional clients should be considered per se professionals. For these purposes, "sponsor" is intended to capture a person that qualifies as an eligible counterparty (pursuant to Article 30 MiFID II and Art 71 of Delegated Regulation 2017/565) or a per se professional client (pursuant to Article 4(1)(10) and Annex II, Part I, MiFID II) and that establishes, and manages or supports, the SPV (or other investment or holding vehicle) with a view to promoting to the market a future transaction to be carried out by or via the SPV (or other investment or holding vehicle), and who would benefit economically from the relevant transaction.

In the funds sector, the per se professional and eligible counterparty categories are often quite muddled. When a firm is contracting with the fund itself, the fund may be categorised as a per se professional, whereas when the firm is contracting with the investment manager, the investment manager may be categorised as an eligible counterparty. The business being done is exactly the same, as is the counterparty to the trade in most cases (ManCos often being the exemption). Members request some guidance around best practice in this area. In general, firms would appreciate some further guidance as to how firms should be categorising clients where sub-contractors are involved.

Question 27: How important is it to your clients to have the ability to opt up to professional client status? What are the benefits to clients of opting up eg is there a cost saving from lower fees and /or better pricing?

It is very important for clients to have the ability to opt up to professional client status. Many 'retail' clients have the sophistication and knowledge and experience to be investing into 'professional-only' products, but do not meet the prescriptive requirements of a per se professional investor, so the flexibility that the opt up process offers is essential (consider SPVs, for example). It enables clients to benefit from a broader range of investments, which in turn can help them meet their investment objectives in a way that would constitute a good outcome from a Consumer Duty perspective. It also assists with diversification of risk – allowing clients to diversify their portfolios into a greater variety of products.

Question 28: Do you think we should change our rules in relation to opting clients up to professional status? If yes, would you support any of the approaches suggested above, or a combination of these? Are there any alternative approaches you would suggest?

Yes. The current opt up rules are no longer fit for purpose. There are certain *de facto* retail investors for which the retail investor classification is not appropriate. These clients are often financially sophisticated and have professional support in the form of financial, tax and other advisors or established family offices. These clients are also usually operating internationally. They may also conduct complex financial transactions as part of their professional employment but would still fall short of the current thresholds if their employer is not within the financial services sector. The current thresholds do not accurately recognise clients' experience or rely on conducting large numbers of transactions that would not be sensible investment behaviour or may even be prohibited by a client's personal account dealing policy at their place of work. Many of these factors are assessed through the suitability process (where a client is advised), but the current quantitative categorisation criteria prevents firms from moving forward to the suitability assessment stage. As a result, these investors are unable to access certain investment products to optimise their portfolios. We feel especially strongly that the 'transaction frequency' threshold is inappropriate, but we would recommend wholesale changes to the approach in order to give investors the outcomes they want for their portfolios and to retain and promote the international competitiveness of the UK.

However, AFME members are mindful of the need to find an approach that works for members with different business models and different geographical exposures. The EU is recalibrating the professional client opt up criteria as part of the RIS. The file has entered the final stage of negotiations, and recognising the impact on our members, we are keen to ensure that the positions in both the UK and the EU in relation to categorising their clients remain workable for members. The EU position is not yet settled but they do look to be taking a more quantitative approach. AFME would reiterate that, as we have said in relation to the RIS approach, we consider that the criteria to reclassify retail clients as professional clients should continue to apply equally to both individuals and legal entities, not individuals only. For undertakings established with the corporate purpose of buying, holding and selling financial instruments it should be sufficient to meet only the own funds requirement by way of a minimum investment amount of EUR 1 000 000. The investment firm shall assess that the legal representative of that legal entity or the person responsible for the investment transactions on behalf of that legal entity, understands the relevant transactions or services envisaged, is capable of making investment decisions in line with the legal entity's objectives, needs and financial capacity and is able to evaluate adequately the risks.

Member firms can also see the benefit in adopting a more qualitative approach (like that used in other jurisdictions, for example, Switzerland – a regime that has been recognised as mutually equivalent to the UK regime as part of the Swiss Mutual Recognition Agreement under the Berne Agreement[2]) which may potentially allow firms to exercise more discretion and judgement, and bring the appropriate flexibility for the UK to adapt to changing international standards. A more qualitative approach may also allow flexibility for

[2] https://www.gov.uk/government/publications/the-berne-financial-services-agreement

retail investors to better achieve their investment goals – i.e. if they have experience and knowledge of a particular product type, they could be treated as an elective professional for the purposes of investment in that product only. Members are also of the view that the "opt up" process in general should be able to be more proactively offered by firms. This will offer more choice to investors and reduce the regulatory burden on firms. Members feel that, regardless of the approach that the FCA takes, the FCA should be conscious of international approaches to opting investors up and ensure that the UK approach is not out of line with key jurisdictions.

The FCA should also consider alignment with certain other FCA positions, such as the non retail market instrument £50k minimum denomination / investment threshold under the Consumer Duty, which de-scoped some customer business where the investment was higher and such investment were effectively not deemed retail, which the industry welcomed.

Furthermore, the fundamental premise behind client classification is to distinguish between those firms who can properly assess and manage their risks, versus those who need additional regulatory safeguards.

Where a firm outsources their financial risk management to a 3rd party (for example, a Fund receiving currency overlay) that firm is de-facto deemed to have identified their own risks and is actively seeking to manage them. It is usually more sophisticated, corporate retail clients that engage in this kind of risk management (e.g. local authorities or pension funds). It would follow then, that a retail classification may not be appropriate for these clients, and the elective professional criteria should be appropriately calibrated so that these clients are able to be opted up to professional status for this service. A retail classification here may prevent effective financial risk management, for example, by limiting the financial instruments used for risk management or preventing the risk management provider from taking the firm on as a client.

Question 29: Where possible, please quantify the effect changes would have. For example, estimate the additional potential investment in UK capital markets from certain client groups as a result of any proposed change in the opt up rules.

If the opt up rules were to change to allow more flexibility around which 'retail' investors could be opted up to professional status or to have better refined quantitative thresholds, we believe that an additional source of capital would be made available for investment in the UK capital markets, without compromising investor protection. If the amendments give the right type of client the ability to have greater choice and the ability to participate in more investments, then we anticipate that this will be a positive move for UK capital markets. This is also in line with the FCA's secondary objective to support the international competitiveness and growth of the UK economy.

Question 30: In what circumstances do clients opt up to be treated as elective professionals for the purpose of exemption from certain financial promotion rules only?

AFME is not responding to this question.

Question 31: To what extent do firms treat corporate finance contacts as elective professional clients for the purpose of complying with the financial promotion rules?

AFME is not responding to this question.

Question 32: How do firms navigate the process of opting up while ensuring that contacts are not under the impression that they are receiving a service in the relation to a designated investments (and related protections) from the firm?

AFME is not responding to this question.

Question 33: To the extent you rely on the venture capital contacts regime, please provide answers to the questions we have asked for corporate finance contacts.

AFME is not responding to this question.

Question 34: Are there any areas where you think sector specific changes are needed? If yes, please explain your answer.

Members are aware that the Consumer Duty implementation will be reviewed in the next year or so. The FCA must ensure that the implementation of any reform or new regimes (for example, the Consumer Composite Investments regime) are future-proofed in light of any potential future changes to the Consumer Duty regime. The FCA should consider now how it will manage any inconsistencies in the future should the Consumer Duty be reformed in the long term.

Question 35: To the extent not already raised in your response to the Consumer Duty CFI, are there any MiFID derived rules, that we should consider tailoring differently for Article 3 firms? Are there any improvements we could make to our Handbook to make it easier for Article 3 firms to navigate?

AFME is not responding to this question.

Question 36: In the event of future reform, would you plan to take advantage of any removal of the activity restrictions to offer more services to your clients? What, if any, proportionality would need to be added to any current rules relating to these additional activities to better tailor them to the risks presented by your business?

AFME is not responding to this question.

We would be happy to meet with you to discuss any aspects of our response if that would be helpful.

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