Response to HM Treasury Call for Evidence on the UK Overseas Framework

11 March 2021

1. Introduction and general comments

The Association for Financial Markets in Europe (AFME[1]) welcomes the opportunity to respond to HM Treasury's Call for Evidence on the Overseas Framework (the "Call for Evidence").[2]

We welcome the Call for Evidence and HM Treasury's review to ensure that the UK's overseas framework continues to function effectively. The overseas framework plays a very important role in ensuring that UK businesses, investors and financial institutions can interact effectively with financial services firms based overseas. This is vital to support the UK's role as a global financial centre and UK financial markets. We welcome and strongly support the UK's commitment to open financial markets and the recognition that these are vital to support economic growth. This is especially important in the context of wholesale financial markets which is the focus of our response.

The ability for overseas firms to provide financial services under the overseas framework to wholesale and high net worth clients helps foster deep and liquid financial markets in the UK, and provides UK asset managers, sophisticated investors and large corporates with access to global expertise and services. It also supports UK financial services firms' access to overseas financial markets infrastructure and their ability to transact with overseas dealer banks and overseas affiliates. In addition to the review of the overseas framework, we suggest that the Treasury and regulators review additional regulatory barriers which overseas firms face in support of these objectives and the overarching principles set out in paragraph 1.7 of the Call for Evidence.

We answer the questions relevant to the overall overseas framework below (Qs 2, 3, 4 and 9) before turning to our comments and answers to the questions which specifically address (a) the Overseas Persons Exclusion (see section 2 – Qs 6 and 7); (b) Title VIII UK Markets in Financial Instruments Regulation (section 3 – Q5); (c) Recognised Overseas Investment Exchanges (section 4 – Q16); and the Financial Promotion Order (section 5).

Q2. Do you think that the route of access to the UK market provided for by the overseas framework adequately advances the principles set out in paragraph 1.7?

We support the overarching principles set out in paragraph 1.7 of the Call for Evidence. We view it as essential that the UK remains open to international financial services and maintains a stable and effective

[1] 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.

[2] We are grateful to Linklaters LLP for their assistance with preparing this response.

framework for overseas firms to operate in, minimising barriers and frictions while ensuring financial stability, market integrity and consumer protection. We agree with the government that open markets are vital to support economic growth and continue to support the UK's position as a global financial centre.

We view the existing overseas framework as generally working effectively to advance the goals and principles set out in the Call for Evidence and we do not consider that significant changes are required.

As recognised in the government's overarching principles, we would emphasise that it is particularly important to provide a stable and reliable framework for market access to the UK. While some aspects of the current framework can be complex to navigate, the relative stability of the current framework has been (and remains) important, providing firms and clients with a stable basis upon which to do business. If the government proposes to introduce changes to the framework, it is particularly important that an appropriate consultation period is provided and that any changes have an appropriate implementation period enabling firms to review the impact of changes and adapt their businesses as necessary to minimise disruption to markets and clients.

Q3. Are there any specific risks that the current regimes for overseas firms do not adequately address?

We regard the current framework as striking an appropriate balance between openness to international activity and maintaining financial stability, market integrity and consumer protection. We do not consider that there are any specific risks that the current regimes do not adequately address. We have not seen evidence of further risks having arisen under the existing framework, which has been working effectively for a number of years.

Q4. Are there specific complexities around the regime you think need to be addressed?

While the current regime is in some respects complex to navigate, we do not consider that significant changes are required. Any potential clarifications should be carefully considered to ensure that they do not undermine the stability of the current framework. As explained further below, we have identified a few areas where existing complexities could helpfully be addressed and that the application of the overseas framework could helpfully be clarified through FCA guidance.

Q9. Please comment on your current and future use of the OPE, ROIE and FPO exemptions specifically, as well as any other specific regimes under the access framework, setting out in particular: a) Your primary location. b) The type of client/counterparty you interact with in the UK. c) The type of activity conducted and through which regime (please be as specific as possible). d) Whether you have regulatory permission in your home state. e) Whether, and if so how, your use of these regimes enables you to manage business between different group entities, for example for risk management, or is used in conjunction with other group entities or structures as an alternative means of access or to expand the range of services that may be offered? f) How your use of these regimes may change in

the future? Specifically, if the OPE is used: g) Volume of business of different types connected to the OPE per annum. h) Benefits accruing from the OPE, including capital treatment or access to clients. i) How important is the existence of the OPE for your current business model, booking arrangements and your use of the UK as a risk management hub? Please explain its advantages and any disadvantages. j) The type of approach used. Please be specific about using 'with or through' or 'legitimate approach'. If using a 'legitimate approach', please also be specific about the legal basis on which you rely not to breach the financial promotion regime. k) Whether you could rely on different approaches to the one your firm uses. If so, which approaches would be available to you? This includes not only relying on 'with or through' instead of a 'legitimate approach', as well as different legal bases for making a legitimate approach. l) If there are several different approaches available to you, could you comment on why you have chosen the approach you rely on? m)Does the OPE raise any practical challenges for you, either generally or more specifically in terms of ensuring your firm's compliance with it from a systems and controls point of view? n) Are there specific aspects of the OPE which give rise to uncertainty, for example over its application in some circumstances, and how might these be remedied? o) To what extent is your use of the OPE driven by tax residence considerations and/or any other non-regulatory considerations? p) If you are an overseas firm, do you use the OPE as a basis for undertaking business with other entities within your group, and if so, how do you use it? q) If you are a firm authorised in the UK, what business benefits do you get from dealing directly with overseas firms which rely on the OPE? r) How important is the intragroup exemption for your current business model, booking arrangements and your use of the UK as a risk management hub? Please explain its advantages and any disadvantages

While AFME members are headquartered in different jurisdictions with different legal and business structures, feedback suggests that the existence of the OPE is important for current business models including booking arrangements and use of the UK as a risk management hub. The OPE makes it attractive and cheaper to use the UK as a booking centre as it simplifies the analysis as to whether booking arrangements are regulated activities in the UK. The OPE also provides an effective and efficient regime which minimises unnecessary frictions to cross-border business.

2. The Overseas Persons Exclusion ("OPE")

General comments

The OPE is a very important part of the overseas framework. The OPE covers most activities relating to securities trading and derivatives business with sophisticated counterparties. The ability for global firms to access UK markets and provide services to wholesale and high net worth clients serves an important purpose, for example facilitating interdealer trading and supporting liquid markets in the UK. This facilitates the use of the UK as a global financial centre.

We set out below brief examples of some types of activities which are supported by the OPE:

- Enabling interdealer business between a UK bank and an overseas bank to be conducted on UK markets without the overseas bank requiring authorisation in the UK.

- Enabling a global banking group to enter into intra-group arrangements with an affiliate in the UK, facilitating the use of the UK as a global or regional hub for risk management.
- Providing UK-based asset managers and sophisticated investors with access to global markets and financial services.
- Facilitating UK-based firms in accessing services from overseas jurisdictions including accessing overseas market infrastructure such as exchanges and other trading venues.
- Facilitating UK-based market infrastructure in attracting international business, supporting the UK's role as a hub for trading and clearing, for example.

As discussed above, it is important that the UK provides a stable framework for market access. The OPE, while sometimes involving complex legal analysis, serves its purpose effectively and we do not consider that significant changes are necessary.

It is important that the current scope and approach should not be restricted to ensure that the UK retains its openness to international markets. Any changes which restrict or impose additional obligations on firms to access the UK for services currently within the scope of the OPE would affect the stability of the regime and could undermine the UK's attractiveness as an open global financial services centre. In this context we have suggested below a few areas where clarifications and further regulatory guidance on the application of the regime would be beneficial.

Q6. Are there national exclusions/exemptions in other jurisdictions that provide benefits comparable to those provided by the UK's regime?

There are a number of different national exclusions and exemptions in other jurisdictions. There are some examples of other jurisdictions which have exemptions or cross-border third country regimes which provide benefits comparable to the UK's regime. While each jurisdiction typically adopts a different approach, some examples include:

- The Republic of Ireland's overseas framework includes a 'Safe Harbour' exemption which enables third country firms to provide MiFID investment services to per se professional clients and eligible counterparties in Ireland without triggering a licence requirement. To rely on the safe harbour, non-EEA firms must satisfy the conditions set out in Regulations 5(4) and 5(5) of the European Union (Markets in Financial Services) Regulations 20173; these are broadly that the third country firm is subject to authorisation by a competent authority which pays due regard to recommendations of the Financial Action Task Force (FATF) in the context of anti-money laundering and countering the financing of terrorism; and that co-operation arrangements are in place between the Central Bank of Ireland and the competent authorities where the third-country firm is established.

- Luxembourg has a third country regime enabling third country firms, subject to certain conditions, to provide investment services or activities and ancillary services to per se professional clients

[3] http://www.irishstatutebook.ie/eli/2017/si/375/made/en/print

and eligible counterparties in Luxembourg, provided that the CSSF has made a determination that the relevant third country is equivalent for these purposes.4 The UK is included in the list of jurisdictions which Luxembourg deems equivalent for its national third country regime. Firms must apply to the CSSF to benefit from the regime.

While many other jurisdictions do not provide as open an approach to overseas firms as the UK, this is one reason why the UK has been so successful at attracting international financial services business.

Q7. What changes do you think should be made to the operation of the OPE, and what would be the advantages and disadvantages?

We do not consider that significant changes to the OPE are necessary. Any restriction of the scope or nature of the OPE would be likely to negatively impact international firms accessing markets in the UK and UK firms' ability to access overseas market infrastructure and trade with international firms in the UK. The introduction of changes could reduce the confidence of overseas firms in the certainty and stability of the UK overseas framework.

As discussed above, the stability of the framework is particularly important and therefore the mere fact of reviewing or proposing any changes to the OPE could have disadvantages and should be carefully considered.

In this context, we view the following as areas where clarification would be beneficial to clarify and improve the OPE:

- **Improved navigability and consistency**

  As noted above, the legal analysis of the OPE can be complex, particularly for incoming firms navigating a number of regimes. Whilst we do not consider there is a need to make significant changes to the framework, additional clarity may be beneficial. For instance, the application of characteristic performance might benefit from clarification – the current absence of a universal test for locating activity means that there is some ambiguity in its application.

  Further, as FCA guidance is currently split across PERG and SUP App 3, the regime would benefit from guidance being consolidated in a single location within the FCA Handbook.

  The navigability of the OPE could also be improved with the inclusion of additional categories of persons, making clear that the OPE applies where an overseas firm carries on the regulated activities covered by the OPE with or for authorised persons, other 'investment professionals' and 'high net worth entities' (including with authorised persons acting on behalf of underlying clients).

[4] https://www.cssf.lu/wp-content/uploads/cssf20_743eng.pdf

- **Overlap between / limitations of the FPO regime on use of OPE**

  In most cases, reliance on the OPE may depend upon whether the person with whom the entity is transacting falls within the FPO exemptions (e.g. they are UK authorised persons, other "investment professionals" or "high net worth entities"). The result of this is that the exclusion has limited availability in the retail context.

  Expanding the scope of the OPE, along with the FPO, to include counterparties and clients categorised as either 'eligible counterparties' or 'per se professional clients', would more closely align it with the domestic investor protection regime.

- **"Agreeing to…" activity**

  The OPE applies where there is a regulated activity carried on in the UK; however, its application is not uniform across the different regulated activities. Taking the example of portfolio management, as a result of the characteristic performance test, where an overseas firm provides portfolio management that activity will generally be regarded as carried out in the location of the firm (i.e. outside of the UK). If, however, an overseas person *'agrees to'* provide such portfolio management services whilst located in the UK (regardless of the location at which those services will be provided), that person may need to avail itself of the OPE.

  This inconsistent application means that firms have to consider the availability of the OPE to the activities that they are carrying out and this can create some uncertainty. For example, in the scenario where a person *'agrees'* to carry on the regulated activity during only a temporarily visit to the UK.

  Clarification of the application that the OPE extends to isolated activities in circumstances where the service as a whole is predominantly carried out abroad would help to remove some of the uncertainty in this area.

3. UK Markets in Financial Instruments Regulation (MiFIR) – Title VIII

General comments

While there is benefit in retaining the onshored article 47 MiFIR equivalence framework as part of its toolbox, the UK should, where possible, consider other opportunities for providing stable market access in financial services. For example we support the ambitions to develop a broader mutual recognition agreement with Switzerland. The government could also consider improving the scope and operation of the equivalence framework to address some of the shortcomings of the onshored framework.

Q5. Please could you comment on the overlap between article 47 of MiFIR and the OPE. If an article 47 decision was issued, how may this affect your decisions to undertake activity in the UK?

While the onshored article 47 MiFIR equivalence framework for investment services has a different scope to the OPE, for wholesale business an equivalence decision would not be favourable to third country firms currently utilising the OPE. The equivalence framework is potentially less stable and imposes additional requirements on firms wishing to provide investment services in the UK. This could dissuade some firms from providing services in the UK which they would have provided pursuant to the OPE and reduce the benefits of the OPE discussed above.

The UK government should therefore consider ensuring that all third country firms are able to continue to utilise the OPE, whether or not an equivalence decision has been made by the UK with respect to the relevant third country. It does not appear logical for firms in a third country which has been determined as equivalent to be put in a potentially worse position than firms in a third country which has not been determined as equivalent.

4. Recognised Overseas Investment Exchanges (ROIE)

Q16. Do you think that the current scope of the ROIE regime is appropriate from a market participant's point of view?

There is one aspect of the ROIE regime which we consider would benefit from clarification. The FCA's Direction titled "Application for ROIE status", dated 14 September 2018, and the associated FCA webpage, provide guidance on how market operators (as defined by MiFID II) from the EEA can apply to become an ROIE. This reference to market operators (as defined by MiFID II) could be interpreted as narrowing those who can apply to become an ROIE – for example, it raises the question of whether market operators who only operate MTFs are also able to apply for the MTF to get ROIE status.

An extension to the ROIE regime would ensure that MTFs and OTFs can be a ROIE, and further guidance in this area would avoid potential ambiguity in its application.

We would be happy to discuss these issues or answer any questions on our response.

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Annex

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