UK FINANCE

UK Finance Response to FCA CP18/36 - Brexit: proposed changes to the Handbook and Binding Technical Standards – second consultation

Introduction

UK Finance welcomes the opportunity to comment on the FCA's consultation on the proposed changes to the Handbook and Binding Technical Standards for Brexit. This response should be read in the context of our responses to CP 18/28 and CP 18/29.

UK Finance is a trade association representing nearly 300 of the leading firms providing finance, banking, markets and payments-related services in or from the UK. UK Finance has been created by combining the activities of the Asset Based Finance Association, the British Bankers' Association, the Council of Mortgage Lenders, Financial Fraud Action UK, Payments UK and the UK Cards Association.

Our members are large and small, national and regional, domestic and international, corporate and mutual, retail and wholesale, physical and virtual, banks and non-banks. Our members' customers are individuals, corporates, charities, clubs, associations and government bodies, based in the UK and overseas, served domestically and cross-border. These customers access a wide range of financial and advisory products and services, essential to their day-to-day activities, from our members. The interests of our members' customers are at the heart of our work.

Response to CP Questions

This consultation will impact and cover a broad range and depth of UK Finance's membership and has therefore been through a selection of key technical committees and working groups.

Question 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.

We refer the FCA to our response set out in Q1 to FCA CP18/28 – main points from Q1 CP18/28 set out below

Question 1 asks firms to consider the extent to which compliance with onshored legislation will raise significant challenges and how long they will need to adapt.

This question in itself is challenging for firms to answer in a meaningful way until there is more clarity on what the post-exit day regime will look like. To identify the changes which might cause implementation challenges (i.e. "significant compliance risk") if they were to come into effect from exit day, firms would need to devote substantial resources to carry out an impact assessment. In effect, firms would need to undertake the significant work which the regulators' published statements say is not needed yet.
In light of the unprecedented timings between legislative, regulatory finalisation and the 'go live' date, UK Finance encourages the FCA to provide firms with flexibility to adapt to the new regime and time to implement the changes required in an orderly manner. In considering how long firms will need to adapt to the proposals we suggest the FCA look back to historic examples of where firms have been required to make wholesale changes to their business (noting that such regulatory change projects have related to distinct business lines rather than the entirety of an organisation's operations). For example, the FCA's first policy statement relating to MiFID II (PS17/5) was published on 31 March 2017, giving firms just over 9 months to implement the requirements; this followed a number of years of detailed consultation at UK and European levels, during which time firms had the opportunity to consider the implications, and a postponement of a year to allow firms sufficient time to implement the reforms.

We note that in recognition of the significant work firms will need to undertake in order to implement the onshoring of legal and regulatory requirements, on 27 June 2018 HM Treasury and the UK regulators explained that they do not expect firms to start this work just yet. Further, on 8 October 2018, HM Treasury clarified that it intends to temporarily empower the FCA, and other UK financial regulators, to assist firms in transitioning to the amended regulatory regime. In paragraph 1.7 of the CP, the FCA repeats that it does not expect firms to prepare now to implement the changes set out in the CP from exit day. Firms need time to

make an orderly transition and need to understand how and where relief will be granted in respect of changes to legal and regulatory requirements in order to plan accordingly. UK Finance requests that the FCA provides guidance on what the temporary transitional power will apply to on top of what HMT have already provided.
The remainder of answer 1 sets out in further detail just some of the difficulties with progressing with the proposals in this CP and makes some general comments on the FCA's application of a transitional power.

Significant challenges presented by SIs and Handbook amendments

In terms of deciding how and when to ease the implementation challenge firms are facing (i.e. to use the transitional power) different approaches will of course be needed for different areas, especially to ensure that firms are able to rely on the FCA's stated aim not to require firms themselves to carry out detailed impact assessments and gap analyses in the very short timeframe between now and exit day.
From an initial assessment we see three types of changes that present different implementation challenges and would need to be considered in terms of how transitional power could be used. These are:

1. **Documentation changes** – The changes proposed to the FCA's rules and under the draft SIs will drive changes to a firm's suite of documentation. As with any major regulatory change project, firms' require time to process the changes and implement consequential drafting amendments. In particular, where the documents are individually negotiated or, require a variation to customer terms and conditions, this could be lengthy process.

2. **Policy and procedure changes** - These changes will entail not only updating documentation and system changes but also re-training staff as relevant. As above, UK Finance suggests that the FCA bear in mind in the time required to sign off policies and procedures (some of which require Board approval) and roll-out firm wide training programmes.

3. **Reporting changes** – The changes to firm's reporting requirements will trigger change in operational systems where firms and regulators will need to be operating from the same synchronised basis. UK Finance encourages the FCA to ensure firms have enough time to make these changes to their systems to align to new requirements.

In addition, we note that the proposed power would empower the regulators to waive or modify regulatory obligations that have changed as a result of onshoring financial services legislation. The scope of the FCA's power to waive or modify under the temporary transitional power legislation would therefore need to match the scope of the power to amend.

In terms of enforcement, as mentioned above, in respect of changes in relation to onshored EU financial services regulations or delegated regulations, for clarity the FCA should confirm that it will not enforce any such legal obligations during a designated period after a hard Brexit so that it would not be seen to be itself in breach of any of its own statutory enforcement duties which could be achieved for example by making a form of binding declaration.

In addition to the core points of Q1 18/28

The FCA has suggested that it does not expect firms to be compliant from day 1 after exit, however it is still unclear on what a 'reasonable' time for compliance with the Handbook will be if the FCA use its transitional powers to give firms time to implement the changes proposed in the CP. This will be key given some of the proposals will require amending large volumes of material to reflect the new regime on exit-day. It is difficult to give a precise window of time that would suffice as a regulatory transition window in the event of no-deal. We would however welcome follow up discussions with the FCA on the matter of timing.

Additionally, given the interconnected nature of financial services across Europe, we recommend that the FCA updates industry on progress to establish Memorandums of Understanding with regulatory authorities in member states, as well as other avenues it is exploring with their European counterparts. This will be key to provide further certainty on the legal and regulatory framework for data transfers across Europe. We also seek clarity on the extent to which the FCA is collaborating with the ICO on this.

Question 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.

Question 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:

(1) The Distance Marketing Directive

Suppliers offering distance contracts to UK consumers which relate to any service of a banking, credit, insurance, personal pension, investment or payment nature must provide certain pre-contractual information, provide all contractual provisions in a durable medium pre-contract and must also give the consumer a right to cancel the contract. Suppliers providing any service of a banking, credit, insurance, personal pension, investment or payment nature cannot require a person to pay for any financial services which are supplied without any prior request.

Location/status of supplier	A. Current scope (2004 Regulations and FCA Handbook)	B. Proposed scope post-Brexit (2004 Regulations and FCA Handbook)
1. The supply, making or performance of the financial service/distance contract is not FCA-regulated (or is exempt) and is carried on by a supplier operating from a UK establishment (whether authorised or not).	The 2004 Regulations apply to the supply.	The 2004 Regulations apply to the supply.
2. The supply, making or performance of the financial service/distance contract is regulated and is carried on by an FCA-authorised firm operating from a UK establishment.	The 2004 Regulations do not apply (Reg 4(2)). This is on the basis that the DMD requirements are contained in applicable FCA rules. FCA rules apply to distance marketing activity with or for a consumer in the UK or an EEA State, but do not apply to marketing to consumers in non-EEA States (firms must comply with local laws).	The 2004 Regulations do not apply (Reg 4(2)). This is on the basis that the DMD requirements are contained in applicable FCA rules. Firms coming within the ambit of the new temporary permissions regime will fall into this category, as they will have deemed Part 4A permission under Regulation 8 of the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018. The FCA says at paragraph 2.5 of CP18/36 that it has not identified a reason to depart from its baseline approach of treating EEA states the same as any third country and that, therefore, after exit day, its DMD-related Handbook provisions will generally no longer apply to UK firms' distance marketing activity with respect to consumers in EEA states. In other words, any FCA rules on distance marketing will apply to distance marketing activity with or for a consumer in the UK, but will not apply to marketing to consumers in EEA and non-EEA States. Where UK firms market financial services in other EEA States, they will need to comply with local laws.
3. The supply, making or performance of the	The 2004 Regulations do not apply, as the requirements of	The 2004 Regulations do not apply, on the basis that these firms will be

financial service/distance contract is <u>not</u> regulated (or are exempt) and is carried on by a supplier operating from an EEA State.	the DMD apply on a country of origin basis, so these services come within the jurisdiction of the home state regulator. This is, however, subject to the DMD having been transposed in that EEA State and the same rules applying locally to the supply.	supplying from a third country. These types of supply are outside the FCA's jurisdictional reach.
4. The supply, making or performance of the financial service/distance contract <u>is</u> regulated and is carried on by a firm operating from an EEA State.	The 2004 Regulations do not apply, as the requirements of the DMD apply on a country of origin basis, so these services come within the jurisdiction of the home state regulator. This is, however, subject to the DMD having been transposed in that EEA State and the same rules applying locally to the supply.	These firms will now need to have UK FCA authorisation in order to carry on these activities in the UK (subject to transitional provisions) and B2. (above) will apply to firms in EEA States which become UK authorised firms. However, 'relevant EEA AIFMs' and 'payments suppliers' do not fall within the temporary permissions regime for Part 4A permissions mentioned at B2. (above), so the 2004 Regulations will apply to these categories of firm (note that no Handbook rules apply to these categories of firm). We have queried whether it is correct that the 2004 Regulations will apply to both regulated and unregulated/exempt activities carried on by 'relevant EEA AIFMs' and 'payments suppliers', as this appears to be inconsistent with the approach at B2. and B3. above.

(2) The E-Commerce Directive

No additional comments

(3) References to the official language of the member state or to information being submitted in languages other than English

a. We consider that - for point 3 - 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.

Question 4

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

In the time available we have not found any material issues.

Question 5

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

In the time available we have not found any material issues.

Question 6

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

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

Question 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?

We agree 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".*

Question 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?

We agree 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".*

Question 9

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

N/A

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?

We understand that the result of this change to the free float requirements in the Listing Rules will be such that, when an issuer applies for admission of shares/depositary receipts over shares to the Official List, it must demonstrate that enough 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.

- We note the FCA's conclusion that in practice liquidity is largely independent of the geographical location of the holders of securities and the FCA's regular existing waivers from the free float requirement to allow inclusion of 'rest of world' investors in the free float calculation.
- We agree that counting holders from any jurisdiction towards the free float is necessary to ensure that there will be enough liquidity in the share class which is to be listed, and that changing the reference from 'EEA holder' to 'UK holder' would not provide an appropriate basis for assessing likely liquidity, due to the participation of overseas investors in UK markets.
- We understand that this approach is consistent with HMT's proposal in its policy note on the Official Listing of Securities, Prospectus and Transparency (Amendment) (EU Exit) Regulations 2018 that the UK's primary markets regime after Brexit should apply to all issuers that have securities admitted to trading on a regulated market in the UK or admitted to listing in the UK, or are making a public offer in the UK, regardless of the issuer's country of incorporation, and with the baseline approach that EEA States and non-EEA States be treated the same.

Disclosure Guidance and Transparency Rules (DTR)

Transparency requirements

Question 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?

We note 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 only apply to issuers with securities admitted to trading on a UK regulated market.

We understand 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 and central banks.

- Given that the FCA's proposals do not result in any change for our members, we agree with this approach. We note that an alternative would have been only to apply the exemption to UK entities, which would not be consistent with the changes which HM Treasury has proposed to make in its policy note on the Official Listing of Securities, Prospectus and Transparency (Amendment) (EU Exit) Regulations 2018.

Question 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?

We note 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 only apply to issuers with securities admitted to trading on a UK regulated market.

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 on issuers and their parent companies and could disincentivise them from choosing the UK for listings [(even more so if UK IFRS were to begin to diverge materially from EU IFRS)].
- We also understand that this change depends on the form (as yet unseen) of the Department for Business, Energy and Industry Strategy (BEIS) SI giving the UK the powers to adopt IFRS at and post-exit, due for publication in early 2019. We would welcome the opportunity to provide comments on this SI [(and would highlight the additional impact on our members were it to contemplate divergence between EU and UK IFRS)].

- We note that the impact on issuers will be mitigated in a no-deal scenario, where HMT expresses the intention in its policy note 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 a 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, we note that HMT's policy note states that the UK "will keep this decision under review" and would urge the FCA to consider together with HMT our members' strong preference for continuity and certainty in this regard.
- We also note HMT's policy, as stated in its policy note, that "all issuers" will also be able to continue to prepare financial accounts using EU-adopted IFRS for financial years beginning before exit day.
    - However, we note that the reflection of this policy by the FCA in the draft DTR 4.1.6R Transitional Provisions requires the parents of UK-incorporated issuers, as well as UK-incorporated issuers which do not need to prepare consolidated accounts, to prepare accounts for the financial year beginning before exit day "in accordance with the law of the UK", and
    - we also note that the relevant "Transitional Provision: dates in force" column has square brackets around "[From [exit day] to [to be confirmed]".

  Is the reason for the above drafting in the DTR Transitional Provisions section due to uncertainty in relation to the external variables of the BEIS SI and HMT's equivalence decision? We would be grateful for clarification that all issuers (and their parents) will indeed, as stated in HMT's policy note, be permitted to prepare financial accounts under EU-adopted IFRS for financial years starting before exit day.

We understand that the proposed change to DTR 4.1.7R simply reflects the fact that, after exit, auditors based in the EEA will become subject to the requirements currently applicable to third country auditors, including registration with the UK Financial Reporting Council, when used by UK-traded EEA and non-EEA issuers to provide the audit report in respect of their annual financial statements.

- While this change could be administratively burdensome for EEA auditors and for some issuers, we note that, by way of initial mitigation, for financial years beginning before exit day, the FCA proposes that the current provisions allowing the use of an EEA auditor without registration will remain in force (though we also note that the relevant "Transitional Provision: dates in force" column currently has square brackets around "[From [exit day] to [to be confirmed]").

- It should be highlighted prominently to issuers and auditors that registration for financial years beginning on or after exit day will be required in time for the auditor to sign the relevant audit report.

Question 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?

We note 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 only apply to issuers with securities admitted to trading on a UK regulated market.

We understand that the change to DTR 5, to exempt only the Bank of England (instead of, as currently, members of the ESCB) 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. Given that the FCA's proposals do not result in any impactful change for our members, we agree with the narrowing of the exemption.

We also note that HMT's policy note states that its approach post exit date in relation to central banks' ability to withhold disclosures of major shareholdings in the context of carrying out their functions as monetary authorities is to make this exemption only available for the Bank of England.

Question 14

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

We note 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 only apply to issuers with securities admitted to trading on a UK regulated market.

We understand 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.

We would ask 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.

Compliance with this requirement by exit day will be challenging for [some/many of] our members and they request that the FCA recognise that an appropriate degree of regulatory forbearance will be necessary after exit day whilst members work to implement this change.

Question 15

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

We note in relation to the DTR 1B.1.3R and 7.1 requirements in relation to audit committees, that 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.

We understand 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 ask 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.

Question 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.

Question 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) Instruments 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).

Question 18

Do you agree with our proposals for applying the SM&CR to dual-regulated branches?

NB There are 2 different versions of Q18:

Q18 (at p.32): Do you agree with our proposals for applying the Senior Managers & Certification Regime (SM&CR) to EEA branches <u>while they are in the Temporary Permissions Regime (TPR)? If not, why not?</u>

Q18 (at p.50): Do you agree with our proposals for applying the SM&CR to <u>dual-regulated</u> branches?

We note that the FCA is proposing substantive changes to cover the application of the SM&CR within the TPR for consistency with the baseline approach for EEA branches to be treated as third country branches in the long-term.

We also note that FCA CP 18/29 already describes the application of the SM&CR to an EEA firm with a UK branch during the TPR and proposes maintaining the current requirements for these branches under the SM&CR (and APR) throughout the firm's time in the TPR.

- We would accordingly reiterate the comments we have already made in response to FCA CP 18/29 in relation to the application of the SM&CR to an EEA firm with a UK branch during the TPR, i.e. that:

    - "*it will become very difficult for firms to comply with the senior managers and certification regimes as they apply to EEA firms (as proposed by the FCA) and to third country firms (as proposed by the PRA) at the same time. We urge the FCA to engage with the PRA to ensure a consistent supervisory approach is taken*."

We note that FCA CP 18/36 consults on and amends the branch regime for firms in the TPR as follows:

- ***SM&CR for dual-regulated EEA branches in the TPR***: We understand that the FCA's approach is for the additional functions and requirements (set out in table 3 at para 3.13) that apply to third country branches to start to apply only upon the EEA branch becoming fully authorised as a third country branch in the UK.

    - As the SM&CR already applies to dual-regulated EEA branches (with banking branches subject to the SM&CR since March 2016 and insurers from December 2018) we agree that there should be no immediate major changes for these firms from the FCA's perspective until they are fully authorised and leave the TPR.

    - However we note the FCA's reminder that dual-regulated EEA branches in the TPR must also have regard to information published by the PRA in this area – and in this regard:

        - dual-regulated firms will look for consistency between information published by the PRA and that published by the FCA

        - it is highly unfortunate that the PRA's approach differs from that of the FCA. The PRA currently proposes[1] to apply the SM&CR rules for UK branches of third country firms to firms in the TPR. This will cause significant compliance issues for dual-regulated firms, who would need to comply at the same time with the SM&CR regimes as applicable to EEA firms (as proposed by the FCA) and also as applicable to third country firms (as proposed by the PRA)

        - thus, while we welcome the FCA's 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

[1] At para 7.8 of PRA CP26/18 at https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/consultation-paper/2018/cp2618-complete.pdf?la=en&hash=2A1C385C5C157974FDDE36FC5D72F515AD667AA1

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 SM&CR was designed to ensure no gaps or overlaps in firms' governance structures. This should be the overarching principle when considering how to apply the SM&CR under the TPR.

We would accordingly urge the FCA to engage with the PRA to ensure a consistent supervisory approach is taken.

- ***APR and SM&CR for solo-regulated EEA branches in the TPR***:
    - We welcome the proposed approach where APR 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.
- ***Moving from the EEA to third-country SM&CR:*** We understand that, once authorised by the FCA, firms will move out of the TPR and be authorised as a third country branch, so firms will need to apply to the FCA for approval for individuals to hold any additional functions that will apply to them under the third country branch regime at the same time as applying for authorisation, and then on an ongoing basis as applicable.
    - We understand that any additional controlled functions and requirements applying under the third-country regime under SM&CR and APR will apply as soon as a firm has been fully authorised and has left the TPR. As table 3 at paragraph 3.13 of FCA CP 18/36 shows, firms moving out of the TPR upon authorisation as a third country branch will face an immediate and substantial increase in the number of Senior Management Functions.
    - We would ask that the FCA flags this significant change to firms as soon as they enter the TPR in order to allow them sufficient time to comply with this cliff edge resulting from their change in status.

- We would also note that the third country branch SM&CR will apply to non-TPR[2] dual-regulated branches from exit day, which means that these firms will face a cliff edge after exit day in terms of an immediate and substantial increase in the number of Senior Management Functions. Compliance with this requirement will be challenging for some of our members and they request that the FCA recognise that an appropriate degree of regulatory forbearance will be necessary after exit day whilst members work through the impact of and implement these changes.

    - In this regard, we also look forward to commenting on the FCA's upcoming consultation in early 2019 on the new Financial Services Contracts Regime and the FCA's use of its discretions to treat individuals as approved under the sections of FSMA relevant to the SM&CR regime.

Question 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?

We agree with the FCA's approach.

Question 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?

The scope and wording of the proposed guidance are unclear. In particular, as customers of TP firms will be covered by the FSCS, the intent of the communication would be to inform customers of changes in their coverage as opposed to "changes in home state investor compensation scheme coverage". It would also be helpful if the FCA clarified its expectations around the timing of these particular client communications. We suggest that the timing of these communications be consistent with the FCA's (and PRA's) proposed approach to onshoring legislation and exercising their transitional powers, under which firms will not generally need to prepare to implement onshoring changes by exit day.

---

[2] E.g. firms which have not submitted a TPR notification to the FCA before the notification window has closed; or are winding down their UK business; or where a firm's application for full authorisation (or application for variation if it has a top-up permission) is refused and its temporary permission ends automatically based on the FCA's decision notice; or a firm does not apply for full authorisation (or for variation if it has a top-up permission) during its landing slot or withdraws its application without submitting another and the FCA cancels the firm's temporary permission.

Question 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?

See comment for Q20

Question 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?

In the time available we have not identified any issues

Question 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?

In the time available we have not identified any issues

Question 24

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

In the time available we have not identified any issues

Question 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.

Our 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)?

We 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

Our 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[3]), that venue is deemed equivalent, the EEA investment firm does not need to make that trade post-trade transparent.

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, our 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?

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

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. We 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, we 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, we 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)?

We 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~~ <u>UK</u>."

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 (ADT) for an instrument, which in turn is used to determine tick sizes. The transitional provisions to calculate ADT 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 ADT (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 ADT 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 ADT 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 ADT 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 could be operational difficulties to consume and adopt ADT data/tick sizes at very short notice, were the FCA to publish ATD on 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.

Question 26

Do you agree with our proposed approach about the exemption for UCITS manufacturers from producing a PRIIPs KID?

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)

We agree 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.

Question 27

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

In the time available we have not identified any material issues

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 UKF 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.

Question 29

Do you agree that our proposals to amend DEPP and EG reflect the changes made by legislation? If not, why not?

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 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).

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.

Question 30

Do you agree with our approach to amending forms? If not, why not?

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 with our approach to amending forms? If not, why not? (Q30 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[4]. 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.

Question 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.

Question 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.

[4] 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.