

INVESTMENT CONSULTANTS MARKET INVESTIGATION

Summary of responses to the consultation on
the draft Investment Consultancy and
Fiduciary Management Market Investigation
Order 2019 and Explanatory Note

Introduction

1. On 12 February 2019, the Competition and Markets Authority (CMA) consulted on a draft order (the Order) and a draft explanatory note (the Explanatory Note) for the implementation of the remedies set out in the Investment Consultants Market Investigation Final Report (the Final Report).¹ The consultation closed on 13 March 2019 and the final Order (and final Explanatory Note) were issued on 10th June 2019.
2. In response to this consultation, the CMA received 21 submissions relating to the Order and the Explanatory Note. Non-confidential versions of the responses received are available on the CMA's [webpages](#). The CMA took account of each of these responses when preparing the final Order and Explanatory Note. This document sets out some of the main points raised in response to the consultation, particularly where the CMA's response to the points may not be apparent from the final Order and Explanatory Note. It sets out the main changes which have been made to the Order as a result of the submissions received and also gives reasons why certain suggested changes were not made. It does not seek to address each and every point considered by the CMA.
3. In addition, minor changes (such as correction of typographical and spelling errors, minor clarifications included in the Explanatory Note, and other consequential changes) are not discussed in this document. References to specific Articles in this document refer to the final Order published on the same date as this document rather than to any earlier drafts, unless stated otherwise. Capitalised terms in this document have the same meaning as defined in the final Order.
4. None of the modifications made to the Order is considered to be material so as to require further consultation.
5. Responses to the consultation can be categorised into the following broad categories:
 - (a) Comments relating to the Competitive Tender Process;
 - (i) The requirement on pension scheme trustees² to use 'best endeavours' places a more stringent requirement on trustees than provided for in the Final Report; and

¹ <https://www.gov.uk/cma-cases/investment-consultants-market-investigation#final-report>

² References in the remainder of this document to trustees are to pension scheme trustees.

- (ii) Further clarification is needed on the test required to prove compliance from a provider's perspective.
- (b) Comments relating to the 20% threshold that relates to the mandatory Competitive Tender Process;
 - (i) Only mandates that have been awarded to a single provider should be aggregated; and
 - (ii) The threshold should apply only to the appointment that takes total Assets under Management above the 20% threshold.
- (c) Comments relating to the exclusions from the application of the Order;
 - (i) Schemes which have in-house investment advisers; and
 - (ii) Group Personal Pensions.
- (d) Comments relating to Part 4 of the Order, which requires the separation of advice and Marketing Material in respect of Fiduciary Management Services;
 - (i) Definition of Marketing Material;
 - (ii) What is meant by the 'first page' of a Marketing Material document; and
 - (iii) Further clarification in relation to 'microsites'.
- (e) Other points raised by respondents;
 - (i) Definitions;
 - (ii) Article 16.6 (reporting non-compliance with the Order);
 - (iii) Guidance;
 - (iv) Points relating to fee reporting;
 - (v) Jurisdiction;
 - (vi) Commencement; and
 - (vii) Compliance reporting.

The Competitive Tender Process

6. Some respondents have suggested amendments to and/or sought clarifications on definitions and other drafting aspects in the Order and Explanatory Note in relation to the Competitive Tender Process.

The requirement on trustees to use 'best endeavours' places a more stringent requirement on trustees than provided for in the Final Report

7. Some respondents suggested amending the requirement on trustees to use their 'best endeavours' to obtain bids for the provision of Fiduciary Management Services from three or more unrelated Fiduciary Management Providers, to using 'reasonable endeavours'.
8. The CMA has noted these submissions and agrees that 'best endeavours' posed a more severe requirement on trustees than intended. Therefore, we have replaced 'best endeavours' with 'reasonable endeavours'.
9. Furthermore, the Explanatory Note clarifies what is meant by 'reasonable endeavours' in these circumstances. Further to one of the recommendations made in the Final Report, The Pensions Regulator will consult on draft guidance to assist trustees in conducting a Competitive Tender Process. We anticipate that this can be done within six months from the date the final Order is made.

Further clarification on the test required to prove compliance from a provider's perspective

10. In relation to the two-limb test that needs to be satisfied prior to a Fiduciary Management Provider entering into an agreement with trustees where the 20% threshold is met, one respondent said that the Fiduciary Management Provider should not be penalised where limb a), which requires that the trustees have carried out a compliant Competitive Tender Process, is not satisfied.
11. This respondent said that a Fiduciary Management Provider does not have full visibility over the tender process that is adopted by trustees and should not be required to undertake detailed due diligence in order to assess trustees' compliance with tendering requirements. The Fiduciary Management Provider relies solely on written confirmation that a Competitive Tender Process has taken place and, as drafted in the draft Order, it would be in breach of the prohibition if limb a) had not been satisfied by trustees.

12. The CMA agrees with this point and has included additional wording in the Order, at paragraph 3.7 to address this point.

The 20% threshold that relates to mandatory tendering

13. Some respondents made drafting suggestions and/or sought clarification in relation to the application of the 20% threshold when a scheme first moves into FM.

Only the mandates that have been awarded to a single provider should be aggregated

14. Some of these respondents said that the 20% threshold should only apply when assets are held under fiduciary management mandates with one provider, not several. These respondents said that the selection of multiple Fiduciary Management Providers clearly evidences that the relevant trustees have taken active and informed decisions as to which Fiduciary Management Provider is best placed to meet their schemes' varying objectives, therefore there is no material incumbency advantage.
15. The CMA's view is that the current drafting is an accurate reflection of the decision in the Final Report. In the Final Report, the CMA concluded that the competitive pressure of a tender process for existing mandates is necessary to achieve as comprehensive a solution as is reasonable and practicable and will help trustees with an existing mandate to achieve a better deal either with their existing provider or a new provider. This remedy will reduce detriment in the market by reducing prices paid for fiduciary management services or improving value for money.
16. Furthermore, the CMA considers that tendering, in general, whether for existing or future mandates, is likely to lead to more competitive pricing, higher quality of services and better outcomes for schemes.
17. This remedy contributes to addressing the adverse effects on competition (AECs) and the resulting customer detriment we have found. Therefore, the CMA has decided not to make any changes to the Order.

The threshold should apply only to the appointment that takes total Assets under Management above the 20% threshold

18. One respondent said that the 20% threshold should operate so that any appointment which represents less than 20% of the scheme's assets is exempt from the Competitive Tender Process requirement both at the time at which it is awarded and subsequently. This respondent submitted that the

obligation to run a competitive tender should only take effect for an appointment which took the total assets under Fiduciary Management above the 20% threshold and then only in respect of the assets that are covered by the new appointment. Under this proposal, the respondent noted, trustees would still have the ability to carry out a competitive tender for assets under the 20% threshold if they consider it appropriate in the circumstances.

19. The CMA considers that the current drafting is an accurate reflection of the content of the Final Report. In the Final Report, the CMA concluded that obliging trustees to make an active and informed decision on which provider to appoint prior to moving into fiduciary management contributed to addressing the AEC found in relation to low customer engagement. This remedy will also contribute to addressing the customer detriment resulting from the AEC by ensuring that trustees actively test the market when selecting a fiduciary manager. This will encourage both the incumbent and alternative providers to compete more vigorously on price and quality.
20. Accordingly, the CMA has decided not to make any changes to the Order.

Additional exclusions from the application of the Order

21. Some respondents have suggested additional exclusions from the application of the Order.

Schemes which have in-house investment advisers

22. A number of respondents submitted that some large schemes with in-house investment advice or fiduciary management functions should be excluded from the CMA's remedies.
23. The CMA notes these respondents' submissions and agrees that the inclusion of such schemes does not align with the CMA's decision in this area. The CMA has, therefore, added paragraph 1.7 of the Order to provide an exclusion for such schemes.

Group Personal Pensions

24. One respondent requested greater clarity on whether group personal pensions are in scope, as these are purchased by the employer, not a trustee.
25. It was never the intention to include these schemes in scope. These schemes are out of scope and the CMA considers this to be clear from the Order's focus on Pension Scheme Trustees.

Part 4 of the Order, which requires the separation of advice and Marketing Material

26. The CMA notes one respondent's submission that material which seeks to provide a recommendation or guidance may also comprise an invitation or inducement to purchase Fiduciary Management Services. Therefore, in order to address this point, the CMA has amended the definition of Marketing Material. The current definition does not include material which constitutes advice on the merits of taking or not taking a specific course of action, or a recommendation or guidance to that effect.
27. This respondent also asked what was meant by the 'first page' of a Marketing Material document and the Explanatory Note has been amended to confirm that by this the CMA means the first page that the potential client sees.
28. Similarly, where the information is provided on microsites, assuming that there is a homepage or landing page, the Explanatory Note has been amended to confirm that the requirement is to put the wording on this page.

Other points raised by respondents

Definitions

29. Some respondents suggested changes to the definitions of Fiduciary Management Services and Investment Consultancy Services, including as follows:
 - (a) In relation to the definition of Fiduciary Management Services – a change to confirm that operational decision making and activities (e.g. cash management) are not caught in the definition of Fiduciary Management Services; and
 - (b) In relation to the definition of Investment Consultancy Services – a change to clarify that the services do not include the provision of advice on settlement activity including but not limited to buy in policies, longevity swaps and other insurance products entered into for the purposes of managing longevity risk.
30. The CMA disagrees with the exclusion of operational decisions. The CMA considers these to be closely linked to investment decisions and sometimes to form part of an investment decision, for example the decision to allocate a proportion of a scheme's funds into cash management and manage that alongside other asset allocations.

31. Similarly, the CMA considers that advice on settlement activity and insurance products forms part of the advice that investment consultants provide as part of their investment consultancy services package to trustees.
32. Furthermore, the remedies need to be capable of being monitored and enforced effectively. Therefore, excluding any subset of investment decisions, which is not defined, will risk undermining the effective monitoring and enforcement of the Order.
33. Another respondent said there may be circumstances where trustees seek to use their Investment Consultancy Provider to access a product solely for the purpose of gaining passive exposure. In this context, this respondent said that it had discretion to change the underlying manager of the passive fund, but the client did not delegate broader discretion. The respondent said that this should not fall within the definition of Fiduciary Management Services. We considered this point and agree with it. Further clarification has been provided in the Explanatory Note.
34. This respondent also suggested that arrangements such as Fiduciary Management Services provided jointly by two separate providers, with one firm providing the advice element and the other firm implementing that advice should not be captured by the Order. The CMA notes this point. However, it is the CMA's intention that such arrangements are in scope and it is for this reason that the definition of Fiduciary Management Services includes reference to partnerships, joint ventures and Interconnected Bodies Corporate.
35. One respondent sought further clarifications on the definitions of Investment Consultancy Services, Fiduciary Management Services and partial Fiduciary Management Services. In response, the CMA has provided further clarifications in the Explanatory Note.
36. This respondent also said that we should expand the definition of IC-FM to explain that an IC-FM firm can provide Investment Consultancy Services only, Fiduciary Management Services only or a combination of both services. The CMA notes this point and that the definition had been transposed from the Final Report. The definition now reads as follows: 'IC-FM' in relation to firms, means firms that offer both Investment Consultancy Services and Fiduciary Management Services to clients and includes an Investment Consultancy Provider which is an Interconnected Body Corporate of a Fiduciary Management Provider, or a partnership or joint venture with a Fiduciary Management Provider'.

37. One respondent said that the definition of Fiduciary Management Agreement was ambiguous as it could capture asset management. The CMA agrees and has therefore removed the definition of Fiduciary Management Agreement from the glossary and replaced it with 'agreement with a Fiduciary Management Provider'.

Article 16.6 (reporting non-compliance with the Order)

38. One aspect of Article 16.6 in the draft Order was questioned by several respondents. They interpreted the drafting as an intention to impose a 'whistleblowing' obligation on trustees, in the event of a breach by a Fiduciary Management Provider.
39. In relation to this point, the CMA has amended the final Order. It was never the intention to impose a whistleblowing obligation on trustees, therefore the words 'on their own part' (in respect of an Investment Consultancy Provider or a Fiduciary Management Services Provider) have been added to Article 16.6 to clarify this.

Guidance

40. Some respondents made suggestions to how guidance should be drafted to assist trustees and providers in complying with the Order. The CMA will not itself be preparing any guidance in this respect because the Final Report contained a recommendation that trustee guidance should be produced by The Pensions Regulator. Our understanding is that The Pensions Regulator will consult on draft guidance after the Order is made.

Points relating to fee reporting

41. One respondent said that the Explanatory Note needs to set out the methodology used for calculating transition costs. This respondent suggested that this should be explained by each fiduciary manager, setting out clearly where any further transaction cost leakages may be experienced. The CMA considered this point and decided that although it might be useful to have the methodology for the calculation of transition costs, the Order must be aligned to what was concluded in the Final Report, which required Fiduciary Management Providers to itemise all the fees that trustees must pay for their services but not to show the methodology used to calculate those fees.
42. Some respondents made various other points about the wording of the fee reporting requirements set out in Parts 5 and 8 of the Order. The changes suggested would have represented deviations from the requirements set out in the Final Report and have therefore not been made.

UK pension schemes

43. One respondent said that the scope of the Order should be restricted to the purchase and supply of Investment Consultancy Services and Fiduciary Management Services by and to UK pension schemes. The CMA agrees with this and has amended the definition of Pension Scheme Trustees to include the UK element (in line with the relevant part of section 1 of the Pension Schemes Act 1993).

Commencement

44. Some respondents sought further clarification regarding the commencement dates of Articles 4.3 and 12.2. The CMA considered these submissions and decided that Article 12.2 should be removed from the Order (as on reflection it was not required) and Article 4.3 will come into force 6 months from the date on which the Order is made (for consistency with the commencement of Article 4.2).

Compliance reporting

45. One respondent said that the period of one week between the end of the relevant reporting period and the date by which the relevant compliance statements must be submitted to the CMA is too short and submitted that the period should be extended to four weeks. The CMA considered this representation and agrees that in some circumstances this time period may be too short. Subsequently, the CMA has amended Article 15 to state that compliance statements should be submitted to the CMA within '12 months and four weeks' from the date on which each article comes into force and annually thereafter.

Appendix 1:

Respondents to the consultation on the draft Order and draft Explanatory Note

1. The CMA received 21 responses. These were from:

- (a) AON
- (b) Association of Pensions Lawyer
- (c) Barnett Waddingham LLP
- (d) Capita
- (e) Cardano
- (f) Ernst & Young
- (g) First Actuarial LLP
- (h) Gowling WLG
- (i) JH & FW Green Ltd
- (j) Jardine Lloyd Thompson Group
- (k) Kempen
- (l) Lane Clark & Peacock LLP
- (m) Mercer
- (n) Muse Advisory
- (o) Pensions and Lifetime Savings Association
- (p) River & Mercantile Group
- (q) Schrodgers
- (r) The Investment Association
- (s) Universities Superannuation Scheme
- (t) Willis Towers Watson
- (u) XPS Investment

Non-confidential versions of these responses can be found on the Investments Consultants Market Investigation case page.