



HM Treasury

# Overseas Framework: Response to the Call for Evidence

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# Chapter 1

## Introduction

### Background to the Call for Evidence

- 1.1 Leaving the EU provides an important opportunity to look at our overseas framework, and the regimes within it, to ensure that they continue to work effectively and support UK consumers, firms and markets. Our full framework for overseas access to UK markets includes many elements that cover mechanisms agreed as a part of the UK's membership of the EU and those developed and implemented domestically. Having developed over time, the regimes within the framework allow firms to access UK markets in different ways depending on the sector, type of activity, type of consumers, and the nature of the approach to the customer. In certain cases, access relies on arrangements determined both on a jurisdictional and firm basis – for example, as permitted through equivalence and recognition regimes. Others, such as the overseas persons exclusion provide for access by overseas firms without requiring any form of authorisation, recognition or registration. The overseas branching policies operated by the regulators – the Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) – are other aspects of the framework.
- 1.2 In December 2020, the Government published a Call for Evidence to start a conversation with stakeholders about how we best move forward as an independent nation and as a global centre for financial services. The Call for Evidence received 34 responses. Submissions came from stakeholders from a range of sectors spanning banking, legal, wholesale, trading venues, insurance and trade bodies. Respondents also comprised of stakeholders from a number of jurisdictions, including the UK, EU, Switzerland, Japan, US and Isle of Man.
- 1.3 This document summarises the submissions received in response to the Call for Evidence and, in light of the evidence gathered, outlines the Government's views and proposed next steps. The Government is grateful for all of the contributions made by respondents through the Call for Evidence process.

# Chapter 2

## Key themes

- 2.1 As noted in the Call for Evidence, there are some overlaps covered by some of the regimes within the UK's framework. The Call for Evidence specifically sought feedback on a number of regimes within our framework, namely:
- The overseas persons exclusion (OPE);
  - Investment services equivalence under Title VIII of the Markets in Financial Instruments Regulation (MiFIR);
  - Recognised overseas investment exchanges (ROIEs);
  - The Financial Promotion Order (FPO) in general, and specifically in relation to the distribution of certain overseas long-term insurance products in the UK.
- 2.2 The Call for Evidence was designed as an information gathering exercise about how the regimes within the UK's framework work in practice and how market participants navigate them and might think about using them in future. The Call for Evidence provided valuable feedback from respondents, indicating that the UK's regime is considered a valuable asset to the UK sector. However, information gaps still remain in particular around how firms use the OPE and how this may impact UK financial markets, including their resilience and safety.
- 2.3 Respondents to the Call for Evidence noted that, in relation to the UK's overseas perimeter, in many places the current guidance overlaps. Respondents highlighted their view that the presentation of information in the guidance can often be difficult to find and incomplete in areas. Respondents suggested that they would support the issuance of new guidance in order to allow overseas firms to understand what services they can provide to UK users of financial services, either with or without authorisation in the UK.
- 2.4 Respondents also noted that the UK should take the opportunity to make its approach to access to its market clearer and more coherent, in order to remove perceived barriers to overseas firms. In particular, respondents recommended that the Government should take this opportunity to review the overseas regulatory perimeter and consider whether the current balance is still right and, where possible, make the perimeter clearer.

### The overseas persons exclusions

- 2.5 The overseas persons exclusion (OPE) is an exclusion from the authorisation requirement which applies to 'overseas persons' under article 72 of the

Regulated Activities Order (RAO). The OPE applies to a range of regulated activities, including dealing in investments as principal, or as agent, arranging deals in investments, and agreeing to do those activities. As an exclusion from the RAO, there is limited UK oversight over these activities, including in relation to the volume and type of business conducted.

- 2.6 Respondents to the Call for Evidence supported the continued existence of the OPE and considered it to be a valuable asset to the UK financial services sector. In particular, respondents viewed its general availability to overseas firms as the OPE's key strength. Respondents cautioned against significant revisions to the OPE, in particular any amendments to the regime that would require significant operational changes for firms or changes that would restrict the OPE in relation to wholesale business.
- 2.7 However, respondents noted their support for some amendments to the regime, such as clarification of scope of activities covered by the OPE, which would increase its transparency and predictability for firms. Respondents have emphasised that there is a case for reducing the complexity of the OPE, allowing overseas firms to navigate it with a higher degree of legal certainty and at the same time allowing UK firms to transact with their overseas partners or service providers without unnecessary friction.

## **UK Markets in Financial Instruments Regulation (MiFIR) – Title VIII**

- 2.8 The Markets in Financial Instruments Directive II (MiFID II and including MiFIR) is the EU legislation that regulates firms which provide services to clients and markets linked to 'financial instruments' and the trading venues where those instruments are traded. The UK onshored the EU third-country equivalence regime for investment firms in MiFIR Title VIII. This registration regime includes some regulatory powers as well as a certain level of oversight in relation to the relevant activities.
- 2.9 A Title VIII equivalence decision taken by HM Treasury would allow overseas firms from equivalent jurisdictions to provide cross-border MiFID activities and services to wholesale counterparties and clients without requiring UK authorisation, although they would have to register with the FCA and report on specified activities. Amongst other things, the FCA has the ability to withdraw a firm's registration under specific circumstances, for example where a firm is acting in a manner which is clearly prejudicial to the interests of investors or the orderly functioning of markets. Under equivalence, HM Treasury can also withdraw a decision in accordance with its own processes for withdrawal.
- 2.10 There is considerable overlap between the activities covered by Title VIII and the OPE. However, the different conditions mean they are not fully substitutable. If the UK were to make a positive equivalence determination under MiFIR Title VIII provisions, after a three-year period the OPE would not be available for firms undertaking those overlapping activities into the UK from the relevant jurisdiction.
- 2.11 Respondents to the Call for Evidence saw benefit in the UK maintaining the equivalence provisions in Article 47 of the onshored MiFIR. However,



respondents highlighted that if the UK were to make a positive equivalence determination under MiFIR Title VIII provisions then firms using that equivalence determination would be subject to higher regulatory burdens than firms from other jurisdictions who were servicing UK clients via the OPE, and who hadn't been deemed 'equivalent' by the UK. Respondents noted that it would be beneficial to allow MiFIR Title VIII to be used in conjunction with the OPE. Respondents recommended that the Government consider removing the rule that turns off access to the OPE three years after a positive equivalence determination under MiFIR Title VIII provisions to allow all overseas firms to rely on the OPE in the same way, even if an equivalence determination has been made in respect of their home jurisdiction.

## **Recognised overseas investment exchanges**

- 2.12 The UK regime allows for overseas exchanges to be recognised and thereby exempt from the need to be authorised for any activities which form part of the exchange's business as an investment exchange. These exchanges are referred to as ROIEs and are granted this status through a recognition order by the FCA deriving from section 295 of FSMA.
- 2.13 Respondents to the Call for Evidence support retaining the ROIE regime in its current form and have noted it is a valuable mechanism for market access.
- 2.14 Respondents noted that, in places, the current guidance makes it difficult to identify a clear set of criteria which a ROIE application will be tested against. Respondents supported a clearer, more streamlined approach to the application process as well as a more transparent process in legislation or FCA guidance. In particular, respondents stated that the current guidance created ambiguity over whether MTFs are able to apply to get ROIE status. Respondents called for the Government to consider changes to the ROIE regime to ensure that MTFs and OTFs can be eligible for, and subject to, the ROIE regime alongside other trading venues.

## **Financial Promotion Order 2005 (FPO)**

- 2.15 The financial promotion restriction (section 21 of FSMA) sets out that a financial promotion must be made or approved by an authorised person, unless the communication falls under one of the exemptions listed in the FPO. The FPO links in with the OPE, as one of the bases on which the OPE applies in certain cases is when the overseas person deals with the UK person through a 'legitimate approach', which involves activities covered by the FPO exemption.
- 2.16 Respondents to the Call for Evidence noted that the thresholds for what constitutes a high net worth individual are now out of date and have recommended that the Government review these thresholds included in Article 48 of the FPO. Respondents also stated that the FPO exemptions could be updated and called on the Government to consider whether there is scope to allow a wider range of financial promotions to be made into the UK by overseas firms who are not authorised in the UK.

## FPO: Overseas Insurance

- 2.17 There are a number of exemptions in the FPO relating to insurance distribution. However, article 10 of the FPO provides that the exemptions are only available in relation to certain contracts of long-term insurances with an insurer who is:
- Authorised in the UK as an insurer, or exempt from such authorisation;
  - Authorised as an insurer in the Bailiwick of Guernsey, the Isle of Man, the Commonwealth of Pennsylvania, the State of Iowa, and the Bailiwick of Jersey.
- 2.18 From 1st January 2021, this exemption no longer applied in respect of insurers authorised in EEA states (unless they are also authorised as insurers in the UK).
- 2.19 Respondents to the Call for Evidence found the FPO exemption for overseas insurance to be sufficiently broad; however, they noted their desired for EEA-firms to be re-added to the list of exempt jurisdictions in article 10 of the FPO. Respondents also asked that, if any other jurisdictions are to be added or removed to the list of exempt states in article 10 of the FPO, an open and transparent consultation process should be followed.

# Chapter 3

## Conclusion and next steps

3.1 The Government has noted the feedback from respondents to the Call for Evidence on the UK's overseas framework.

3.2 In light of these responses, the Government is committing to the following next steps:

3.2.1 HM Treasury, working closely with the Financial Conduct Authority, the Bank of England and the Prudential Regulation Authority, will review the overseas regulatory perimeter, which for the purposes of this document refers to the territorial scope of the prohibition on carrying on a regulated activity in the United Kingdom (under section 19 of FSMA) and the restriction on financial promotions capable of having an effect in the United Kingdom (under section 21 of FMSA). This review will seek to identify:

- Whether the balance of the overseas perimeter remains appropriate for the UK following the UK's exit from the EU in order to ensure resilient and safe financial markets;
- Whether there are elements of the overseas regulatory perimeter that need updating to reflect modern working patterns and advancements in technology, such as the 'in the UK' test which is the first consideration for firms assessing their regulatory compliance; and
- Areas of the overseas perimeter that could be clarified to allow greater transparency and clarity for firms.

3.2.2 Following this review, HM Treasury will initiate consultation on potential changes to the UK's regime for overseas firms and activities in Q4 2021. In particular, the Government will look to consult on:

- Any proposed changes to the overseas regulatory perimeter following this review, including changes aimed at making the UK's overseas perimeter more coherent and easier to navigate;
- Any proposed changes to the OPE, including the option to remove the overlap between the OPE and equivalence provisions under MiFIR Title VIII;
- Whether the current operation of the regime appropriately balances openness whilst mitigating risks to the resilience and safety of financial markets, the protection of consumers and market integrity, and the promotion of competition; and whether further regulatory powers are needed for the ROIE and OPE to address any deficiencies in regulatory oversight; and

- Options for amendments to the FPO exemptions relating to insurance distribution with an overseas element.

3.3 In considering how best to move forward, the Government wants to be fully informed about the views of stakeholders. We would emphasise the importance of further evidence being provided on how these regimes are used and how market participants navigate them so we can ensure they continue to support the principles that guide our approach to cross-border financial services.

3.4 The Government remains committed to the principles that guide our approach to cross-border financial services. Any changes to the framework for overseas firms and activities should:

- facilitate the benefits of maintaining an open and globally integrated financial system, enabling international financial services business by reducing barriers and frictions where practicable;
- consist of robust, high-quality and proportionate regulation, guided by and consistent with international standards;
- ensure resilient and safe financial markets and firms in a way that supports financial stability, market integrity and consumer protection;
- support the transition to sustainable finance;
- be transparent and predictable;
- provide a stable and reliable arrangement for cross-border market access;
- enable effective cooperation with international partners.

# Annex A

## List of respondents

A.1 The following organisations submitted responses to the Call for Evidence.

Association of British Insurers	Invesco
AFB	ISDA
AFME	IRSG
AILO	LME/LME Clear
Allston Capital	Lombard International Assurance
Association of Propriety Traders	LSEG
Aviva Investments	Manx Insurance Association
Bloomberg	Personal Investment Management & Financial Advice Association
BVCA	Phoenix Group
Canada Life International Assurance	PWC
Cboe Europe	RSI Securities
CLLS Regulatory Law Committee	SMBC Bank International
Credit Suisse International	SSW Trading
Deutsche Borse Group	St James's Place Wealth Management
ESMA	Swiss Bankers Association
EVIA	UK Finance
ICE	Zurich Insurance

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