EVIA European Venues & Intermediaries Association

LEBA London Energy Brokers' Association

EVIA response to the Financial Conduct Authority's Consultation Paper 18/28 issued on 10th October 2018 on Brexit:

Proposed changes to the Handbook and Binding Technical Standards

Summary

On 29th March 2019, the UK will leave the EU and as part of this process, HM Treasury (the Treasury) has laid a Statutory Instrument (SI) under the EU Withdrawal Act 2018 (EUWA) giving the Financial Conduct Authority (FCA), the Prudential Regulation Authority (PRA), the Bank of England and the Payment Systems Regulator (PSR) responsibility for amending and maintaining EU-derived provisions in the Handbook and existing EU Binding Technical Standards (BTS) which will be incorporated into UK law by the EUWA to ensure they function effectively after exit day.

This Consultation Paper (CP) sets out the proposed changes to the Handbook and to the BTS as a result of Brexit. The CP principally addresses amendments to the Handbook and BTS which relate to those SIs made under the EUWA which have been published by the Government.

Most of the proposed changes are consequential in nature and follow the amendments the Government is proposing to make under the EUWA. The FCA's approach has not been to revisit previous policy decisions or use this as an opportunity to refine the Handbook provisions or amend BTS for purposes unconnected to Brexit.

These proposed changes to the Handbook address deficiencies arising from Brexit in line with the approach the Treasury has adopted within the various SIs.

The focus has been on ensuring they are correctly expressed in the Handbook and BTS and FCA seeks views from stakeholders on whether they have done that successfully.

For the most part, the amendments proposed are straightforward changes that update references to:

- EU legislation;
- UK law which relates to or refers to the EU;
- EU institutions and concepts; and
- the European Economic Area (EEA).

Questions

Q1: 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.

A1: EVIA emphasises that there may be a number of broad areas of the Handbook where a period of transitional relief and forbearance would be necessary for our member firms acting as MiFIR Trading Venues and as Limited Activity Investment Firms. Clearly these relate to the recent regulations and most especially to MiFIR and MAR where definitions and cross-references to EU terms and obligations become complex. We note that as the EU has developed a substantial layer of Level 3 guidelines to interpret the definitions and scope of which are not transposed, nor explicitly recognised in the Handbook translation, there is potential for compliance challenges based upon varying interpretations.

One key topic where the proposed changes would pose a significant risk to compliance at the outset for our members relates to Transaction Reporting obligations. The proposed approach requires the duplication of current reporting obligations where transactions have UK and EU counterparties, with that dual reporting being fulfilled by the trading venue or agent. There is no benefit we can surmise from duplicated reports, and there is clearly scope for errors compounding substantial operational burdens. Member firms would be required to make technical changes for categorisation and collection of key data from EEA firms in order to submit the same transaction reports being filed in the EEA. The mirror image would apply to our members per their EU capacities. We propose that the FCA enter an MMOU with the EU to obtain the counterparty reports under current rules or have a period of transitional relief and forbearance for MiFID II transaction reporting in order for firms to update their systems to comply with their obligations.

LEBA would welcome confirmation from the FCA that its approach to the supervision and rules applicable to energy commodities trading is aligned with that of OFGEM under REMIT.

Q2: 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 regarding our approach to these cross-cutting issues?

A2. EVIA welcomes confirmation from the FCA that both the UK and EU versions of FIRDS will be synchronised to enable each to co-ordinate between the two systems. This would remove a reliance on market infrastructure to ensure that data is included in one or both FIRDS systems, and should reduce the risk of under/over reporting and dual reporting.

We understand that whilst the FCA have reflected the relevant onshoring legislation, we recommend that the FCA also considers transposing or cross-referencing similar sets of guidance reflected in all the ESMA Q&A's guidance which are used by market participants to assist them in setting their control frameworks to the respective legislation.

Q3: Are there any proposed changes reflected in the instruments in Appendix 1 that are not cross-cutting in nature (see Chapter 3) or discussed in this chapter where you think we should re-consider our approach? If so, why?

A3: EVIA/LEBA would suggest that the FCA approach the energy commodities and commodity derivative trading should be reconsidered such that it defers to the approach taken by the UK Government ((BEIS)) and the relevant competent authority ((OFGEM)) in order to ensure coordination with on-shored REMIT.

Q4: 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?

A4: EVIA/LEBA would suggest that the FCA approach to energy commodities and commodity derivative trading should be reconsidered such that it defers to the approach taken by the UK Government ((BEIS)) and the relevant competent authority (OFGEM) in order to ensure coordination with on-shored REMIT. This is because the EU regulations around both Energy and Emissions have been drafted to be more wide-ranging and extra-territorial than the remainder of financial services regulation. Therefore, it may be the case that even under a harder Brexit, these physical networks and Paris Treaty ("ETS") related EU rulesets may still apply in the UK.

We also note that topics related to the definition of "OTC Derivatives" and "Traded on a Trading Venue" may benefit from direct cross referencing to and recognition within the EU counterpart markets. These hold consequential complications into the understanding of perimeter guidance for product sectors such as not only commodities but also FX, Repo and complex swaps.

Q5: Do you agree with our proposal to amend the term 'regulated market' as it applies in INSPRU? – N/A applies to Insurance

A5: No comments.

Q6: Do you agree we should continue to permit exposure to stock-lending transactions with EEA-authorised counterparties on the same basis as under the current rules in INSPRU 3.2

A6: INSPRU 3.2.36R, INSPRU 3.2.36A R and INSPRU 3.2.37G set conditions under which stock-lending transactions are approved (including in relation to permitted links). The rules limit stock-lending to transactions where the counterparty is either authorised in the UK or another EEA state, or is a person authorised by certain authorities in the USA.

The rules also exempt firms that make transactions through Euroclear Bank SA/NV's Securities Lending and Borrowing Programme from having to obtain collateral from the counterparty.

EVIA therefore propose to continue to permit exposure to stock-lending transactions with EEA-authorised counterparties on the same basis as the current rules.

Q7: Do you agree we should continue to allow exposure to stock-lending transactions with EEA-authorised counterparties on the same basis as under the current rules in COBS 21.3? N/A Insurance companies

A7: No comments.

Q8: Do you agree we should continue to allow exposure to loans or deposits made with an approved financial institution on the same basis as under the current rules in COBS 21.3?

A8: No comments.

Q9: Do you agree with our proposed changes to COBS 2, 3, 6, 9, 10 and 22?

A9: Whilst EVIA understands that the scope of this CP is purely in relation to the onshoring of current EU rules, we note that the wholesale servicing of local authorities was complicated in MiFID II by the introduction of an elective approach and would commend the FCA to revert to the prior approach to enable such entities to simply be treated as a wholesale market participant.

Q10: Do you agree that UK UCITS schemes should have the same freedom to invest in EEA (non-UK) assets as they do now?

A10: No comments.

Q11: Do you agree with our proposal to amend FUND and COLL to remove references to a depositary of an authorised fund that is a UK branch of an EEA firm?

A11: No comments.

Q12: Do you foresee any specific challenges in implementing the changes described

A12: Yes, EVIA does foresee scale, technological, cost and accuracy for UK trading venues, arranging and agency transaction reporting for EEA firms (third country) post Brexit. This will result in the following challenges:

1) The collection and permanency of the Branch Identifier will become paramount for UK trading venues. Onshoring means that it will be essential to identify the branch of a firm. A more granular means to differentiate between the branches of an entity is required. LEIs by themselves will no longer be sufficient as an entity identifier. ISDA stand ready to discuss this matter further with the FCA. This new data will

need to be consumed as part of firms' routing logic and therefore will be part of the development requirement for most (if not all) firms.

2) Post trade changes to the client trading entity, and consequently also to the static data set, would appear to us likely become pervasive. Therefore, all TV obligations should be deferred until end T+1 to facilitate client changes to the drafted confirmation.
3) Internal client static data changes to recategorise EEA client firms as third country.
4) A significant rise in the number of transaction reports to the FCA will result in technical systems changes.
5) Collection, validation and submission of personal information ('PII') data from EEA firms will require resources and costs to achieve data sets more effectively swapped directly by the FCA with EU NCAs.

Q13: How long do you anticipate it will take to implement the changes? Please describe which changes you are referring to.

A13: EVIA notes that when MiFID II went live in January 2018, there were a number of transaction reporting issues arising, some of which are still being addressed today almost a full year into the regime. Therefore, we would consider approximately 15 -18 months to implement the changes with a transactional no action relief during this implementation.

We request that the FCA continue to support the use of UST as the core timeclock reference as firms have adopted this throughout all their reporting obligations and, therefore, to move this to any other time zone will pose significant challenges.

We would echo other industry comments to the effect that, with a phased-in approach, the industry will be able to focus resource on the first tranche of changes and so deliver those more quickly rather than a situation in which all of the changes are required to be delivered at the same time.

Q14: Are there any other impacts that you have identified

A14: No comments.

Q15: 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 3? Are there any proposed changes in the instruments in Appendix 2 or discussed in Chapter 5 where you think we should reconsider our approach?

A15: No comments.

Q16: Do you have any comments on the proposed guidance on our approach to EU Level 3 materials set out at Appendix 3 to this CP?

A16: EVIA agrees in general with the FCA's proposed approach to EU Level 3 materials, subject to the following comments:

- reporting validation rules need to be explicitly set out

- supervisory incubation of the EU Level 3 rules needs to be applied uniformly between firms.

Q17: Have you identified any specific provision in EU non-legislative material 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.

A17: *Codes of Conduct*. In certain areas, such as FX, short dated investments and benchmarks, EVIA would propose that the Guidelines and Recommendations embedded in those codes of conduct which the FCA intends to formally recognise (and apply under SMCR) are also taken into the Handbook. These would enable further, and better, conduct and perimeter definitions by market participants.

Q18: Have you identified any specific provision in EU non-legislative material 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.

A18: No comments.

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