EVIA Response to HM Treasury regarding the Call for Evidence on the Overseas Framework

Introduction

i. The European Venues and Intermediaries Association ["EVIA"] welcomes the opportunity to contribute to the HM Treasury review into the future UK regulatory framework for financial services and concomitant regulatory coordination.

ii. EVIA originated directly back as a Bank of England market committee in the early 1960's and now represents the wholesale market venues, platforms and arranging intermediaries[1] across the widest scope of financial instruments, money markets, currencies, and commodities. Member firms typically operate MTFs and OTFs in the UK and Europe; SEFs and ATSs in the United States, RMOs in Singapore and a number of other organised venues in the G20 countries around the world. Their principal activity is to arrange and bring about wholesale liquidity for an institutional client base, the so-called Dealer-to-Dealer markets [*"D2D" or "Interdealer"]* which set marginal market prices, but effectively operate as a "size discovery" function or facility.

iii. Hitherto, these markets were commonly termed "OTC Derivatives." They are now organised marketplaces in conjunction with the Pittsburgh G20 declaration in 2009 and entail permissioned rulebooks, reporting and conduct supervision including AML and KYC requirements.

iv. Member firms operate multilateral markets in over 45 countries around the world, particularly across mainland China and the USA. Most firms have their biggest centres based in London. They also operate ancillary services such as data and index providers, derivative portfolio risk-reduction services and data services.

v. Wholesale markets are usually quoted as spreads, predominantly quoted in core-economic terms and are often episodic. Transactions will have multiple trades, many counterparties and contrary to popular media, take time to negotiate and work up. counterparty credit, contractual terms, which are often standardised, together with plumbing of post-trade infrastructures all really matter.

vi. EVIA has several sibling associations around the globe whereby wholesale market intermediaries in the post-war and later years initially coordinated market rules, shared market colour, and participated in central banking daily auctions or "fixings." However, none such have become global financial centres and hubs for member firms operating initially as Interdealer Brokers ["IDBs"] and subsequently as also automated trading systems and then MTFs, OTFs, OMPs, ATS, SEFs and RMOs to the extent that has applied to London.

[1] ***Mission**: EVIA promotes and enhances the value and competitiveness of Wholesale Market Venues, Platforms and Arranging Intermediaries by providing members with co-ordination and a common voice to foster and promote liquid, transparent and fair markets. It maintains a clear focus and direction, building a credible reputation upon 50 years of history, by acting as a focal point for the industry and providing clear direction to their members when communicating with central banks, governments, policy makers, and regulators. EVIA's core strength is the ability to consolidate views and data and act as a common voice for an industry operating in a complex and closely regulated environment, by acting as a central point for the industry and providing clear communication with central banks, governments, policy makers, and regulators. EVIA provides specific standards and maintains a clear focus and direction for the participants and stakeholders across the market ecosystem, building upon a credible reputation from over 50 years of experience.*

vii. It therefore remains germane to this call for evidence to understand why that has been the case. It is evident that the answers to this lies between the provision for global access, the utility of the common law, the availability of resources and skills, and the access to capital. Clearly current regime is consequent to those building blocks and in turn has contributed to the UK's position as a global financial centre. It remains important therefore to identify, retain and enhance the core tools and resources.

For all firms

viii. Overall, we remain strong supporters of the OPE, and believe it should be elevated as the principal route for overseas market participants to be able to access and contribute to an aggregation of trading interests under UK common law.

ix. For specific access in the other direction, that is by overseas trading venues to UK market participants the ROIE should be better purposed as set out in our trading venue response section below.

x. Clearly the OPE needs to be fit for purpose and there are a number of gaps overhanging from its initial drafting, and there are further matters arising from the market changes and evolution in the intervening period wherein the EU single market has restricted the main usage of the OPE to other third countries, predominantly the USA. These gaps and improvements are clearly and comprehensively set out in the IRSG Interim Report: The UK Regime for Overseas Firms and their response to this call for evidence and we defer to those comments.

For trading venues

xi. There is potential to improve the way that the UK, the US, Singapore, Japan, and Hong Kong approach the recognition of trading venues and permit access to trading venues.

   a. A simplified registration approach, backed by evidence of authorisation in the home states of the relevant trading venues and mechanisms for the exchange of information between national competent authorities, would overcome the main barriers to cross-border investment through overseas trading venues. It would ease access to overseas trading venues, allowing risks to be managed more effectively by opening up pools of liquidity.

   b. The Swiss model provides a tested basis for this approach. In the UK, this model can be adapted through changes to the ROIE regime to provide for the registration of overseas trading venues that have the characteristics of alternative trading systems without a physical presence in the UK.

xii. The challenge arises where trading venues are seen as providing a service into these jurisdictions when they have users/members/participants in them. This leads to competing claims for jurisdiction over the activity of the trading venues. The most practical way forward is to establish systems of registration, following the Swiss model, which are contingent on national regulators having cooperation arrangements in place to exchange information about the activity of the trading venues. In the UK, this could be accomplished

by the extension of the Recognised Overseas Investment Exchange mechanism to include trading venues without a physical presence but with users/members/participants in the UK.

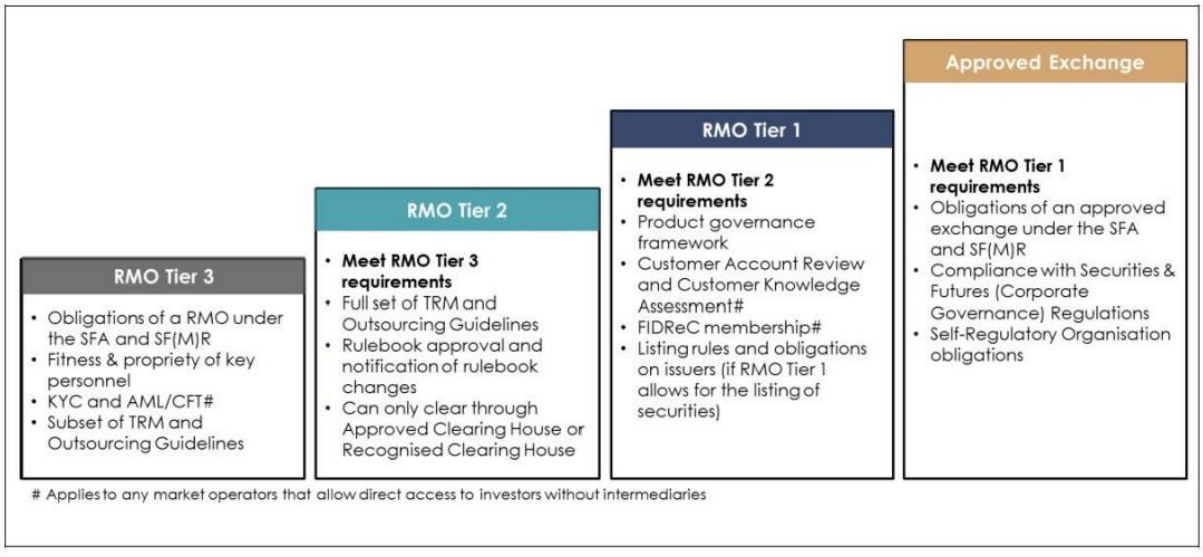
xiii. Current MTF Regime: the market function of MTFs is to allow liquidity to connect electronically and automatically, according to prescribed execution methods. OTFs, by contrast, generally (though not exclusively) involve human interaction. This arises because brokers operating as part of OTFs add value by linking their clients with each other and providing market colour that helps those clients to secure the best outcomes. There are currently thirty-nine MTFs in the UK. Recognition of MTFs in the relevant jurisdictions varies. In the US, MTFs most closely correspond to the concept of an "alternative trading system" (ATS) under SEC regulations. There are certain exceptions, but generally a non-US ATS with US-based participants is required to register as a broker-dealer with the SEC and becomes subject to a set of requirements that might conflict with the requirements under UK/MiFID II rules.

xiv. In Singapore, the national regime recognises two types of market operators: operators of "approved exchanges" (AEs); and "recognised market operators" (RMOs). The RMO designation roughly corresponds to the MTF arrangements in the UK and EU, while the AE regime corresponds to the RM regime.

xv. The MAS recently consulted on a subdivision of the RMO category, in order to specifically recognise:

a. Markets that service retail customers (Tier 1)
b. Markets that correspond to the current RMO regime (Tier 2)
c. Markets that are smaller in scale & might offer innovative services (Tier 3)

xvi. The following diagram from the MAS shows the proposed structures:



xvii. Non-Singapore trading venues can only access the Singapore market as Tier 2 RMOs. This requires them to comply with the set of requirements shown above. The challenges of conflicting requirements for overseas trading venues creates barriers to cross-border investment by creating an investment and regulatory burden for the operators of trading venues. Unless those burdens can be overcome through the rewards generated by market activity, it can be fairly assumed that trading venues would prefer to implement restrictions for cross-border users/members/participants.

xviii. Organised Trading Facilities; There are currently twenty-four OTFs in the UK. To a large extent, they continue to resemble interdealer brokerage as it existed in the over-the-counter markets prior to the implementation of MiFID II. OTFs wrap voice and hybrid broking in a trading venue structure, established rules for trading and provide for trading discipline. In their methods of execution, they are distinct from MTFs because they are not entirely neutral (there is a discretionary element to the handling of orders and execution of transactions). OTFs are described in the MiFID II legislation as having "users," rather than "participants" or "members," because the operators treat them, and they act as clients of the operating firms. This means that, when it comes to the assessment of the status of the OTF in each jurisdiction under consideration, the OTF does not fit neatly into the existing categories of trading venues (US: "marketplace"; Singapore: "RMO"; etc.). Recognition of OTFs in other jurisdictions is, as a result, uncertain and inconsistent.

xix. The main barriers to cross-border investment, arising from the approaches taken to the cross-border operation of trading venues, are as follows:

a. The risk that trading venues become subject to the jurisdictions of the countries where their users/members/participants are.
b. The risk that the requirements of those jurisdictions conflict with those of the trading venues' home states.
c. The risk that the requirements of those jurisdictions conflict with each other.

xx. In order to avoid these risks, trading venues have an incentive to restrict access to users/members/participants from their home states or other states which make less of a claim to jurisdiction over their activity.

xxi. A proposed solution is that the jurisdiction to be taken by the states where users/members/participants of trading venues are based should be limited. An example is provided by Switzerland, where FINMA, the national regulator, has the responsibilities to:

a. Authorise non-Swiss financial market infrastructure (including trading venues);
b. Authorise remote members of the exchanges present in Switzerland.

- (These models are described further below)

xxii. Authorisation of Trading Venues - The Swiss Financial Market Infrastructure Act, Art. 41, provides for a registration and recognition procedure to be followed by non-Swiss trading venues:

a. Trading venues domiciled abroad must obtain recognition from FINMA before granting Swiss participants supervised by FINMA access to their facilities.
b. FINMA shall grant recognition:
    i. if the foreign trading venue is subject to appropriate regulation and supervision; and
    ii. if the competent foreign supervisory authorities:
        1. do not have any objections to the cross-border activity of the foreign trading venue,
        2. guarantee that they will inform FINMA if they detect violations of the law or other irregularities on the part of Swiss participants, and
        3. provide FINMA with administrative assistance.
c. A trading venue is deemed recognised if FINMA finds that:

i. the state in which the foreign trading venue has its registered office regulates and supervises its trading venues adequately; and
ii. the conditions in paragraph 2 letter b are met.

- *(It should be noted that there is a reciprocal condition embedded in the Swiss legislation)*

d. FINMA may refuse recognition if the state in which the foreign trading venue has its registered office does not grant Swiss trading venues actual access to its markets or does not offer them the same competitive opportunities as those granted to domestic trading venues. Any deviating international commitments are reserved.

e. Once recognised by FINMA (or deemed to be recognised by FINMA), the operator of the non-Swiss trading venue may provide direct access to its trading systems to Swiss members/participants.

xxiii. Authorisation of Remote Members of Swiss Trading Venues; With respect to authorisation of a foreign participant of a Swiss trading venue, the Swiss Financial Market Infrastructure Act, Art. 40, provides:

a. FINMA shall grant authorisation to a foreign participant wishing to participate in a Swiss trading venue but which has no registered office in Switzerland:

i. if it is subject to appropriate regulation and supervision;
ii. if it observes a code of conduct and record-keeping and reporting duties equivalent to the duties set out in Swiss regulations;
iii. if it ensures that its activities are separate from the activities of any authorised Swiss units; and
iv. if the competent supervisory authorities:
1. do not have any objections to the participant's activity in Switzerland,
2. provide FINMA with administrative assistance.

b. In effect, the Swiss approach is to limit the extra-territorial application of its own rules to non-Swiss trading venues or remote members of Swiss trading venues.

xxiv. Adaptation of the Swiss Model; The UK approach, in contrast to the Swiss model, does not speak to the access arrangements for overseas trading venues. S. 25DA of the RAO implements MiFID II by controlling "the operation of an organised trading facility," but it does not indicate whether an OTF in another jurisdiction may operate with clients in the UK.

xxv. The Recognised Overseas Investment Exchange Regime; The current Recognised Overseas Investment Exchange (ROIE) regime provides a route for trading venues that are qualified as "overseas investment exchanges" to obtain exempt person status from the FCA. It provides a measure of deference to the supervisory and regulatory arrangements in the home jurisdiction of the exchange.

a. It is not clear, from the existing materials, whether a post-Brexit EU MTF or OTF, or a US SEF or Singaporean RMO, can be recognised as an ROIE. The list of "overseas investment exchanges" is populated by what might be called traditional exchanges:
b. ICE, CME, NYSE, and so on. The alternative trading systems appear not to have applied for this status, although there is no formal bar to them doing so.
c. The same situation prevails when the list of EEA market operators who have applied for ROIE status is consulted: without exception, they are regulated markets for the purposes of MiFID II.

d. Nevertheless, there is an argument that REC 6 is sufficiently flexible to accommodate all forms of non-UK trading venues regulated by the relevant jurisdictions, provided that the essential conditions are met for regulation and investor protection.
e. The ROIE structure does not currently provide for a simplified registration regime for overseas trading venues, as does the Swiss model, but it could be readily changed to provide such a mechanism.

xxvi. Changes in the US, Japan, Hong Kong, and Singapore; similar changes would ideally be made to the existing arrangements in the US, Japan, Hong Kong, and Singapore, as well; allowing UK-based MTFs and OTFs to accept users/members/participants from these jurisdictions without the need to seek authorisation in them as if they had a physical presence.

Answers to Questions

xxvii. *Question 2: Do you think that the route of access to the UK market provided for by the overseas framework adequately advances the principles set out in paragraph 1.7?*

It follows from our comments in [vii] above that we consider that the UK overseas regime to be a sound basis for an effective, open, and globally integrated financial system. Whilst mutual recognition should remain the foundation of the approach, it is important that the UK does not seek a ridged approach to equivalence which may exclude many emerging regions. The exclusions from the existing approach to "With and Through" are concisely identified in the IRSG paper and this also needs to be revised to allow non-financial firms adequate market access. We would endorse an approach similar to that previously applying to commodity firms including the "OMPs" and "EMPs" regime.

xxviii. *Question 3: Are there any specific risks that the current regimes for overseas firms do not adequately address?*

We do not consider that there are currently any specific risks that these regimes do not address. Rather general standards set by appropriate institutions, especially with respect to Anti Money Laundering, cyber-crime, client identity, disclosures and global sanctions would be the best way to mitigate emerging risks.

xxix. *Question 4: Are there specific complexities around the regime you think need to be addressed?*

It follows from our comments from [xi] above that the general OPE regime should be clarified in the case of multilateral trading venues and the general understanding of where the perimeter of such activity is commonly understood. Because of the more specific rule-sets and the mutual licensing requirements across this segment we would therefore commend a broader intersection of an expanded, standardised, and specified ROIE regime with the OPE approach. This is likely also necessary to fulfil existing G20 commitments.

xxx. *Question 5: Please could you comment on the overlap between article 47 of MiFIR and the OPE. If an article 47 decision was issued, how may this affect your decisions to undertake activity in the UK?*

We note the example of Ireland where an OPE regime sits alongside adherence to *article 47 of MiFIR* in a manner that pre-existed in the UK, such that where the latter does not apply so the former would be the default position. Therefore, access to provide investment services into Ireland from the UK in the absence of an Article 47 equivalence is illustrative of the country-by-country approach which pertains.

In terms of trading venue operations, if an article 47 decision was issued then the requirement for any country-by-country approach would largely be negated. In particular, the article 47 approach would facilitate all firms to access cross boarder on-venue liquidity rather than any restrictions to those authorised under FSMA or CRR firms in the EU.

The intrinsic relationship between Articles 46 and 47 MiFIR should be noted at this juncture, together with the rather untested and untried approach under these provisions; most especially when compared to the much more longstanding, but distinctly separately purposed provisions under Article 42 and Recital 111 of MiFID2.

xxxi. *Question 6: are there national exclusions / exemptions in other jurisdictions that provide benefits comparable to those provided by the UK's regime?*

Yes, there are certain provisions including the Republic of Ireland as mentioned before which offers a version of the OPE itself under their "Safe Harbour" regime, whilst the approach of Switzerland is set out above. Whilst other European countries have versions of cross border licensing regimes akin to the OPE or aspects thereof, including Luxembourg, the Netherlands and Germany; we would commend the activity-based approaches of Australia and in particular of Malaysia as better target models. In these cases, a broader activities-based perimeter applies, which is more appropriate than that of MiFID and where the permissions apply via mutual recognition to foreign service providers to operate should they be subject to a sufficiently adequate home regulatory regime.

xxxii. *Question 7: What changes do you think should be made to the operation of the OPE, and what would be the advantages and disadvantages?*

As described in [x] above we would defer to the detail within the response of the IRSG which sets these out succinctly. We would again simply add that wholesale market participation on member platforms and liquidity pools is diverse, broad-based, and global and therefore not limited to FSMA authorised nor CRR firms or entities.

xxxiii. *Question 8: Which aspects of the overseas framework are relevant to the conduct of your business; how easy they are to use and how well do they suit the nature of your business?*

As mentioned in our responses above, the broad wholesale financial markets aspect of the OPE are utilised by member firms and trading venues. Clearly prior to Brexit this was particularly relevant for the operation of USD denominated liquidity pools in financial instruments and derivatives wherein the US provided an exemptive approach to provide

for mutual recognition and access. Going forward, such a template is envisioned for a more multilateral basis.

xxxiv. *Question 9 (e): Please comment on your current and future use of the OPE, ROIE and FPO exemptions specifically, as well as any other specific regimes under the access framework, setting out in particular whether, and if so how, your use of these regimes enables you to manage business between different group entities, for example for risk management, or is used in conjunction with other group entities or structures as an alternative means of access or to expand the range of services that may be offered?*

It follows from the preceding discussion that the OPE has been widely used and is expected to be deployed more broadly, whereas the ROIE has not been taken up outside the DCM "exchange" operators thus far. As set out above [xi – xxvi] we could foresee a wider and more productive role for the ROIE which would foster and encourage more wholesale activity in the UK.

We would welcome the opportunity to discuss these and any related issues further with you and are also very happy to answer any questions you may have in the meantime.

Regards,

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Annex: Forward Advocacy around UK Financial Market Structure

As the EU Commission's review for MiFID2 and MiFIR gears up, the UK is also considering how best to shape its financial market structures post Brexit. As UK MiFIR venue operators, we would consider our immediate priorities to be the following.

xxxv. Trading Venue Perimeter

a. We are supportive of the FCA's initial proposals, and the FSA approach under the prior "ISD," that multilateral systems should operate under a venue authorisation according to an activity basis rather than solely on the occurrence of legal trade execution in solely financial instruments.
b. This will help in ending confusion and regulatory arbitrage caused by the current MIFIR wording and will provide the FCA with the tools it needs to ensure a uniform understanding of what constitutes activity requiring authorisation. We have shared a preferred definition previously.
c. EVIA members suffer real commercial damage from competition by unregulated platforms that for all intents and purposes perform the same activities as regulated EVIA members.

xxxvi. Open Access (art. 35/36 MIFIR)

a. EVIA members strongly believe that fair and open access to trading and clearing infrastructure as mandated by the existing MiFID2/R rules is vital for integrated, safe, efficient, and continuous markets. Open access leads to better governance, lower costs, deeper pools of liquidity, improved service levels, greater capital efficiency and more innovation.
b. We believe that such a system is necessary to support a vision of a UK partner to Capital Markets Union that combines integrated pan-European markets, together with a diversity of market participants, business models and capital market eco-systems across all European countries.
c. There should therefore not be any changes to the current application of the Open Access requirements which came into force at New Year. We note that in the EU, the current one-year delay expires on July 4, 2021.

xxxvii. Consolidated Tape & Transparency (pre- and post-trade)

a. For wholesale markets, the review should focus on the effectiveness of post-trade transparency and of the consolidated tape for appropriate bond instruments. Pre-trade transparency obligations are not used, over complex and should be removed.
b. The governance of the entity providing the tape is of key importance. Firstly, venues & APAs contributing to the tape should share in its revenues. This ensures that they have a commercial incentive to make the tape a success, which will unleash their creativity to help overcome potential hurdles. Finally, all types of stakeholders need fair representation in the governance framework, avoiding situations where certain specific interest groups with a voting majority would unfairly (financially) disadvantage a minority.

xxxviii. Equities on OTF

a. Both as a further transitional step towards more harmonised and open markets with common perimeters, but also mindful of the growth of single dealer dark-pools and the MiFID I debate around Broker Crossing Networks ["BCNs"], the OTF licence should be unrestricted to include the arrangement of all financial instruments including equities. Ends