Answers to Questions

Chapter 3

Question 1: Do you agree with our approach to restating obligations from the MiFID Org Reg into our Handbook? [Agree, neutral, disagree] Please explain your answer.

Yes, EVIA broadly agrees with the approach taken to restating the obligations from the MiFID Org Reg into the Handbook, and supposes no other practical first step could have been rationalised. That said, firms shall still need to devote resources to adapt, redocument, and reprogram to these changes and therefore we hope that the FCA will offer a transitional period such that any work in this regard may be conjoined with other regulatory changes.

This is clearly subject to ongoing considerations not only about the content and scope of the policy but also the way the Handbook itself works and is presented. Ideally this could evolve toward semantic labelling and logic behind the rules in guidance such that whilst on one level it may become fully machine readable, on a human level it draws together other related clauses, cross-references, FAQs, and use-case examples. To this end, the entire benefit of the transition of the MiFID Org Reg into the FCA Handbook is the agility it affords both in terms of subsequent tailoring as well as in meaningful articulation and presentation.

Clear these comments are duly subject to any detailed and specific comments to the subsequent questions below.

Question 2: Do you agree with our approach to maintain recitals as guidance, and remove references to the MiFID Org Reg where we have replicated the recital in full previously? [Agree, neutral, disagree] Please explain your answer.

In principle we agree because recitals usually offer valuable context. Clearly the details as to their role, logic and context is more meaningful than the principle.

Question 3: Do you agree with our proposed changes to SYSC? [Agree, neutral, disagree] Please explain your answer.

Yes, EVIA broadly agrees with the approach taken to the transposition of SYSC, although we would welcome a confirmation that the approach to third country firms is no more onerous than prior despite the extension beyond insurance firms.

In general we would take this opportunity to flag that the extent of the requirements around conflicts of interest being transposed into SYSC are adequate to mitigate rules around such conflicts of interest elsewhere which create duplication; most particularly concerning the more extensive and onerous restrictions around PFOF.

Question 4: Do you agree with our proposed changes to COBS? [Agree, neutral, disagree] Please explain your answer.

Yes, EVIA broadly agrees with the approach taken to the transposition of COBS.

Question 5: Do you agree with our proposed changes to MAR? [Agree, neutral, disagree] Please explain your answer.

Whilst EVIA does not object to the approach taken to the transposition of MAR, it is clear that the consequential construction of MAR 5A.6.1 for MTFs and in MAR 5A.8.1 for OTFs is not as simple as it should be in relation to the same or similar provision within the UK Market Abuse Regulation. We therefore welcome the upcoming proposed simplification by HMT and ask that the FCA consider the singular holistic approach to be principled and one that defers the detailed requirements down to the market operators.

Question 6: Do you agree with our proposed changes to REC? [Agree, neutral, disagree] Please explain your answer.

Yes, EVIA agrees with the approach taken to the transposition of REC.

Question 7: Do you agree with our proposals to change DISP? [Agree, neutral, disagree] Please explain your answer.

No comment.

Question 8: Do you agree with the Financial Ombudsman's proposal to mirror the FCA's proposed changes to DISP into its voluntary jurisdiction? [Agree, neutral, disagree] 41 Please explain your answer.

No comment.

Question 9: Do you agree with the Financial Ombudsman's proposal to adopt the FCA's proposed changes to the Glossary into its scheme rules where those Glossary definitions are used in the FOS scheme rules? [Agree, neutral disagree] Please explain your answer.

No comment.

Question 10: Are there any inconsistencies in the derivations table that might affect your compliance or understanding of the changes? Yes/No Please explain your answer.

No inconsistencies are apparent in the derivations table.

Question 11: Do you agree with our proposed approach to the future of each provision of the MiFID Org Reg as outlined in the derivations table in Annex 4? [agree, neutral, disagree] Please explain your answer.

Yes, EVIA agrees with the approach taken towards the future of each provision.

Question 12: Are there any provisions not currently proposed for restatement in the Handbook that you think should be included? [Yes, no, if yes please specify which provision] Please explain your answer

No absences are apparent across the scope of the proposed restatements.

Question 13: Do any of our proposed changes amount to a change in the scope or application of a provision? [Yes, no, if yes please specify which provision]

No.

Question 14: Are the provisions in the legal instrument clearly aligned with the policy objectives outlined in this consultation paper? Please highlight any areas requiring clarification. Yes/No Please explain your answer.

No comment.

Question 15: Do you agree with our decision not to include a CBA in this consultation paper? [agree, neutral, disagree] Please explain your answer.

Yes, EVIA agrees with the approach taken towards cost/benefit considerations in this situation.

We reiterate are hope that the FCA therefore allows firms to rework their policies and approaches to the transposition together with work being undertaken for other changes over a period of time so as not to divert resources. Any tools for the common templating of changes to provisions could prove helpful.

Question 16: Do you agree with our proposed approach to the application of rights of action under section 138D of FSMA? [Agree, neutral, disagree] Please explain your answer.

No comment.

Question 17: Please provide any other feedback on this Consultation Paper.

No comment.

Chapter 4

Question 18: Are there any specific rules that are challenging to navigate or apply to any particular type of firm or activities? Do any of our rules (or related level 3 or other FCA materials) impose operational costs or other disadvantages that are disproportionate to the client protection they provide? If so, please state which rules and why.

Yes, there are a number of instances suitable for either removal or simplification.

1. Best execution - Very specific and granular requirements which in practice are not used by clients. For example, would be great to remove or rationalise best execution monitoring, which costs to implement but clients do not use.
2. Inducements - Need better and more consistent clarity around the requirements. In particular, payment for order flow regulations in the UK are administratively burdensome and out of line with international standards.
3. Order Execution Policies - The requirements are not helpful to clients and rarely accessed. Reflected in the fact that every firm's OEP looks the same.
4. Client Classification – The current approach to Classification resembles a three-lane ["S3"] carriageway where oncoming traffic incur road traffic accidents by middle lane collisions. We would urge the FCA to simplify to a Retail and a Wholesale basic approach with provisions within these two carriageways for designated use-cases such as limited and specific opting-up or down.

We would like to focus on the burdens, the partiality, and non-competitive outcomes consequent to the FCA application of Payment of Order Flow ["PFOF"] restrictions to arranging trades ECP and to Professional Counterparties consequent and several to the rules COBS 2.3.1R(1); COBS 11.2.1R; SYSC 10.1.3R, 10.1.4R, 10.1.7R, 10.1.8R, 10.1.9G, 10.1.10R. These have been guided by marketwatch-51.pdf (2016); Market Watch 56 (2018); Payment for Order Flow (PFOF) (2019); TR14/13 - Best execution and payment for order flow (2014); and FSA - FG12/13 (2012).

We refer to prior dialogue with the FCA, and restate that in our opinion, firms with permission to arrange and bring-about transactions ["Interdealer Brokers" or "Wholesale Brokers"] are subject to supervisory interpretations to the above rules to mitigate harms which do not exist, whilst the rules themselves should be restated to only apply to Retail customers, unless specific measures and applications are identified. This would converge the FCA Handbook to the

approach across the EU under MiFID II and MiFIR where PFOF restrictions are applicable to the trading of equities by Retail customers.

Mindful that neither SYSC nor COBs refers explicitly to PFOF in the manner adopted by EU legislation, likely the simplest approach to enacting the necessary changes would be to place those specified seven Rules and single Guidance under the restricted application to Retail customers. Clearly other routes would be to reissue level 3 guidance or the Market Watch series; or to narrow the product application to cash equities. However these latter approaches appear more complex.

Removing or narrowing PFOF by undertaking changes to SYSC 10.1, rather than to the body of guidance would most simply also confer the following benefits:

i. remove inconsistencies arising from the registration of trades onto exchanges and the self-selection under the term "market-maker" or "liquidity-provider."
ii. remove inconsistencies arising from the practice of pre-arranging trades and registering onto trading venues.
iii. remove confusion arising from the elusive and ill-defined notion of "exclusive liquidity."
iv. remove the confusion arising from the notion that wholesale dealers are not provided with arranging and liquidity services in order to both quote prices and to lay-off their risk.
v. enable UK based wholesale brokers to compete internationally.

Question 19: Do any MiFID derived conduct or organisational rules create challenges in their interaction with other FCA rules or international standards?

Clearly the FCA application of Payment of Order Flow ["PFOF"] is utterly at odds with third country approaches as set out in answer to Question 18.

We would also note that the FCA approaches to conduct issues such as Diversity and Inclusion metrics; to non-financial misconduct; towards third country senior managers and until recently to 'name & same,' all represent significant conduct related "Gold Plating" not parallelled in any other jurisdictions. Whilst all may be helpful to domestic retail controls, they are ill-fitting for wholesale markets where clients have every capacity to shop around, both within the UK and internationally. However, since none of these are delineated in the handbook transposition they are likely outside the scope of this discussion. We would urge the FCA to focus on disclosures rather than rules in these matters.

In general the FCA may also want to consider the inclusion of activities concerning "Non-Investment Products" under the scope of the Handbook. Specifically, prior to MiFID II the Handbook provided for meaningful exclusions for the wholesale activities in products such as FX, Commodities, Money Markets and Funding trades. These were treated under the, now retired, "NIPs Code." We note that in most third countries, financial rules on investments do not extend to these commercial and funding products in general and certainly not when dealt on "own account."

We have previously formally requested that the FCA exclude any aspects of the "Consumer Duty" from wholesale markets. The FCA has refused to undertake this simplification, presumably preferring to leave is as an unwritten rule and scope. We consider that whilst not applied in practice, the Handbook would benefit from the explicit simplification.

Question 20: What are the likely benefits of any rationalisation or improvements you would propose, for example reduced compliance costs or improved competition?

We could not emphasise enough the accrued benefits from any reduced costs of compliance, or improved competitiveness position on outcomes for member firms.

It follows from our comments in answer to questions 18, 19, that the benefits of any rationalisation would be to reassert to competitiveness of the UK in providing arranging and trading services to wholesale and global liquidity pools. We would refer to quantitative work done by ISDA, AMFE, ICMA, ERCC, OSSTRA, the Corporation of London and Zyen to demonstrate time-series for international competitiveness across wholesale markets and liquidity.

Question 21: Do you agree that it would benefit firms to rationalise SYSC 10?

Yes we firmly agree that that aspects of SYSC 10.1.8 and 10.1.9 would greatly benefit from rationalisation and simplification. In particular, due to our discussion in question 18 concerning the Level-3 derivation of PFOF rules from the broad approach to the management and the disclosure of conflicts and inducements, its imperative that these are robust, centralised and should apply differentially to those parts of the group or the firm for which they are relevant.

To be clear, we consider that the effective management and disclosure of conflicts of interest can facilitate the simplification of many other FCA rules, especially those in Level-3 and associated guidance.

Question 22: What differences between conflicts rules for different types of activity do you think need to be maintained in a rationalised SYSC 10?

We note that firms operating trading venues and wholesale brokers are subject to the same types of activity under SYSC 10, and consequently have no further suggestions.

Question 23: Do you agree that it would be beneficial to rationalise these requirements?

As we understand the scope of COBs 11.2 – 11.7 these provisions would not apply to a UK trading venue or a wholesale broker that does not admit retail clients.

We would however appreciate either guidance or rationalisation as to the application to any *full-scope UK AIFM* seeking to participate directly on an MTF or OTF or to use the MiFID services of a UK wholesale broker since the intent appears not to be their market side actions where classified at a Professional Client (or indeed an ECP).

Question 24: Do you have any specific suggestions for which disclosure requirements could be rationalised? This does not include CCIs. [If yes, please explain your answer, including which disclosure requirements should be prioritised for review, and why.]

Whilst we understand that the disclosure requirements within COBs 2.2, COBs 6 and COBs14 would not apply to a UK trading venue or a wholesale broker that does not admit retail clients. If any other interpretation should be drawn we would request the FCA to clarify.

We understand that the disclosure requirements within COBs 16 would apply to a UK trading venue or a wholesale broker that does not admit retail clients.

Ongoing disclosures – We underscore that it remains administratively burdensome to undertake ongoing disclosures under COBs 16 to wholesale market participants. Rules for brokerages distribution should be rolled back e.g. product governance. No one reads them and not used by professional clients.

Question 25: Do firms that act on behalf of clients tend to request to opt down to professional status? Should such firms be removed from the list of entities that can be treated as per se ECP? Would this help clearer calibration of client protection rules?

i. Regime should be simplified into to two categories: "*Retail*" (for the application of the "Consumer Duty") and "*Wholesale*" for institutional activities. We consider that this simplification into a binomial foundation would alleviate many or most of the topics raised across questions 25 – 30. Clearly exemption and flagged use-cases would still be needed, but in principle these could be ascribed to the practice standards of the firm of the segment resulting in a much simplified Handbook.
ii. Asset managers, Hedge Funds and Family Offices: Buy-side clients are treated as per se professionals and not ECPs. Buy-side are very sophisticated clients and this an outdated provision. They should be either be ECPs or the categories should be combined. Opting up to ECPs requires clients to fill in lots of consent firms and compliance burden in making use of exemptions from investor protections afforded to per se professionals. Clearly it follows that the merging of PC and ECP categories would simplify and eradicate this burdensome complexity.
iii. Entities within groups: New entities within broader group needs to be treated as a retail client due to the balance sheet test. Should be a provision within the rules for entities within a large group. Clients will typically opt-up anyway but there is administrative burden involved in this process. Again, it follows that the merging of PC and ECP categories would simplify and eradicate this burdensome complexity.
iv. Exceptions: One use-case in particular for an exceptional flagging would be the treatment of local authorities. The treasury functions of said of local authorities may not

hold the competencies and capabilities usually required by UK trading venues and wholesale brokers when conducting onboarding and CDD for non-financial firms. However clearly the proportionality of the types of business to be undertaken and its impact on the wholesale market place, driven by experience as well as disclosures, should afford a comply or explain routing.

Question 26: Could the per se categories be simplified in other ways, eg, replacing different types of authorised firm listed separately with 'authorised person'? Or harmonising the differences in certain thresholds within the wholesale categories which differ for MiFID and non-MiFID business?

See answer to Question 25.

Question 27: How important is it to your clients to have the ability to opt up to professional client status? What are the benefits to clients of opting up eg is there a cost saving from lower fees and /or better pricing?

In general UK trading venues and wholesale brokers only provide services to properly wholesale market counterparties, although these are often Non-financial and third country firms. We therefore focus our comments on treasury products such as certificates of deposit, commercial paper, REPO, SFTs, FX forwards and short term debt instruments.

Clearly for local authorities, some charities and similar types of organisations that may normally consider themselves to be retail, but in matter of fact tend to manage significant treasury and cash-management functions; then the capability to participate in the institutional money markets is very important. Often these treasury operations are activities outside the MiFID perimeter, and usually in Non-investment products ["NIPs"] and funding instruments ["SFTs"].

There is clearly therefore a requirement for limited, simple, and specified opting up. We would also note that should the FCA exclude NIPs and residual SFTs from the perimeter of MiFID then these cases would become rare.

Question 28: Do you think we should change our rules in relation to opting clients up to professional status? If yes, would you support any of the approaches suggested above, or a combination of these? Are there any alternative approaches you would suggest?

Please see our answer to question 27 above. This is of limited scope to UK trading venues and wholesale brokers, but a limited, simple, and specified route for opting up would be welcome.

We would not see any use for the FCA suggestions in these narrow use cases.

Question 29: Where possible, please quantify the effect changes would have. For example, estimate the additional potential investment in UK capital markets from certain client groups as a result of any proposed change in the opt up rules.

No comment.

Question 30: In what circumstances do clients opt up to be treated as elective professionals for the purpose of exemption from certain financial promotion rules only?

No comment.

Question 31: To what extent do firms treat corporate finance contacts as elective professional clients for the purpose of complying with the financial promotion rules?

No comment.

Question 32: How do firms navigate the process of opting up while ensuring that contacts are not under the impression that they are receiving a service in the relation to a designated investments (and related protections) from the firm?

No comment.

Question 33: To the extent you rely on the venture capital contacts regime, please provide answers to the questions we have asked for corporate finance contacts.

No comment.

Question 34: Are there any areas where you think sector specific changes are needed? If yes, please explain your answer.

We do agree with the FCA that often the same requirements apply to vastly different businesses. This is even the case for limited activity firms, but especially so where the same but on-venue, trade registration and XOFF transactions are considered and compared.

We therefore support and urge the FCA to consider further proportionality in setting requirements for wholesale firms or their activities, depending on the risks as identified by the firm. For the avoidance of doubt, such disclosed risks of harm should be those presented by their business model under the ICARA statement, rather than by any legacy MiFID or non-MiFID template.

Consequently the Prudential discussion deserves a place in the MiFID Org Regulation in due course, however any such identification of risks and harms as already codified need to allow for distinctions between the business models within the relevant group or firm.

For instance, as became clear under the development of IFPR, UK trading venues and wholesale brokers should not be subject to the same MiFID Org Regs as banks, asset managers and insurance underwriters; but rather should be regulated according to the (significantly less) risks that they both evidence quantitatively and pose going forwards.

Where regulation can be made smarter, more agile and proportionate activities, so the valuable deliverable must be to increase the quality, quantity and price of those services. This becomes urgent as the technological and geopolitical paradigm shifts offer and demand significant changes to prior models.

One example here, even outside the emerging opportunities via new financial technologies, would the very restrictive rules inherited in the UK around the arrangement of securities under the matched principal model. Smarter and reconsidered rules would enable these markets far better work to match and arrange wholesale liquidity with non-latent trading interests.

Question 35: To the extent not already raised in your response to the Consumer Duty CFI, are there any MiFID derived rules, that we should consider tailoring differently for Article 3 firms? Are there any improvements we could make to our Handbook to make it easier for Article 3 firms to navigate?

No comment.

Question 36: In the event of future reform, would you plan to take advantage of any removal of the activity restrictions to offer more services to your clients? What, if any, proportionality would need to be added to any current rules relating to these additional activities to better tailor them to the risks presented by your business?

No comment.

Ends