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The Financial Conduct Authority
12 Endeavour Square
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Dear Sir or Madam,

Re: Consultation on guidance on the trading venue perimeter (CP 22/18)

The role of the Financial Markets Law Committee (the "**FMLC**" or the "**Committee**") is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed.

Background

On 22 September 2022 the UK Financial Conduct Authority ("**FCA**") published CP 22/18 consulting on proposed new guidance on the regulatory perimeter for trading venues ("**TV perimeter consultation**").¹ The consultation stems from HM Treasury's Wholesale Markets Review, which concluded that clearer guidance is needed on the types of firms that need to be authorised as a trading venue.

In the TV perimeter consultation, the FCA states that it would be beneficial to clarify how its new guidance will interact with Q&A issued by the European Securities and Markets Authority on the same topic² ("**ESMA Q&A**"). The ESMA Q&A was issued under the EU Markets in Financial Instruments package, which comprises the Directive on markets in financial instruments ("**MiFID II**")³ and the Regulation on markets in financial instruments ("**MiFIR**").⁴ In preparation for the UK leaving the EU, the FCA decided (after consultation)⁵ that this type of EU Level 3 non-legislative material would remain relevant on the basis most of the EU retained law to which such material relates was to be (and has been) on-shored under the European Withdrawal Act 2018. The FCA stated in its "Brexit - approach to EU non-legislative materials" ("**Brexit Approach**") that it would therefore "continue to have regard to other EU non-legislative material

¹ FCA, '[Guidance on the trading venue perimeter](#)' (CP22/18, September 2022).

² ESMA Questions and Answers on MiFID II and MiFIR market structures topics (ESMA70-872942901-38), the latest version of which was published in September 2022 and is available at https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-38_gas_markets_structures_issues.pdf. The FCA has regard to the version of the ESMA Q&A published before IP Completion Day. This version is dated 2 October 2019 and is available at https://www.handbook.fca.org.uk/L3G/MIFID/esma70-872942901-38_gas_markets_structures_issues.pdf.

³ Directive 2014/65/EU.

⁴ Regulation (EU) No 600/2014.

⁵ FCA, 'Brexit Policy Statement: Feedback on CP18/28, CP18/29, CP18/34, CP18/36 and CP19/2' (PS19/5, February 2019).

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where and if they are relevant, taking account of Brexit, and ongoing domestic legislation. Firms, market participants and stakeholders should also continue to do so."⁶ Although the FCA has stated that it will not follow some particular elements of EU non-legislative guidance, the result of this policy is that the FCA generally has regard to all of these particular ESMA Q&As.

In the TV perimeter consultation, the FCA proposes that it will no longer follow certain of ESMA's Q&As stating (at paragraph 3.7):

"We consider that asking firms, market participants and stakeholders to continue to have regard to the ESMA Q&As on the trading venue perimeter when we are issuing our own guidance could lead to uncertainty for firms as to how our new guidance and the ESMA Q&As fit together. Therefore, we propose that ESMA's Q&As dealing with the trading venue perimeter – Q&As 7, 10, 11 and 12 in Section 5 of the ESMA market structures Q&As – should not form part of our supervisory expectations following the issuance of our final guidance. We will continue to have regard to all other Q&As in the ESMA market structures Q&As, in line with our approach to EU non-legislative materials." [Emphasis added]

Uncertainty as to the application of ESMA Q&A 25

The wording from CP 22/18 set out above creates uncertainty regarding the market's current understanding that the FCA does not have regard to ESMA Q&A 25 in Section 3 of the ESMA market structures Q&As ("**Q&A 25**") given that it states that the FCA will continue to have regard to all other Q&As other than those named (which Q&A 25 is not).

Q&A 25 states non-EU firms (including non-EU firms licensed in an equivalent jurisdiction) or EU firms without a MiFID II licence are not allowed to provide to their clients so-called "direct electronic access" ("**DEA**") to regulated markets. In the UK, Q&A 25 has to date been considered incompatible with the UK's overseas persons exclusion ("**OPE**")⁷ and with Article 32(10) of the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 ("**UK MiFIR Brexit Regulations**").⁸

UK implementation of MiFID II (pre-Brexit)

In implementing the EU Markets in Financial Instruments package into domestic legislation the UK took the view that third-country firms may perform or provide DEA on UK exchanges. This implementation, which took into account the impact of Article 54(1) MiFIR (which provides that third-country firms may continue to provide services and activities in Member States in accordance with national regimes)⁹ was then codified for Brexit in Article 32(10) of the UK MiFIR Brexit Regulations:¹⁰

"In this regulation the provision of direct electronic access is in accordance with the law of the United Kingdom for the purposes of Article 54.1 (transitional provisions) of the

⁶ FCA, 'Brexit: our approach to EU non-legislative materials' (October 2020), available at <https://www.fca.org.uk/publication/corporate/brexit-our-approach-to-eu-non-legislative-materials.pdf>.

⁷ The OPE is contained in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, Article 72.

⁸ S.I. 2017/701.

⁹ Article 54(1) of MiFIR was amended in 2019 by Regulation (EU) 2019/2033 on the prudential requirements of investment firms. The Committee does not believe that these changes impact the arguments presented in this letter. It currently states (additions are shown in blue and deletions in red): "Third-country firms ~~shall be able to~~ may continue to provide services and activities in Member States, in accordance with national regimes, until three years after the adoption by the Commission of a decision in relation to the relevant third country in accordance with Article 47. Services and activities not covered by such a decision may continue to be provided in accordance with national regime."

¹⁰ This provision was amended during the onshoring process in preparation for Brexit by the Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018/1403. The Committee does not believe that the changes impact the arguments in this letter. It currently states: "In this regulation the provision of direct electronic access is in accordance with the relevant law of the United Kingdom ~~national regime~~ for the purposes of Article 54.1 (transitional provisions) of the markets in financial instruments regulation if it is an activity subject to the exclusion in Article 72 (overseas persons) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2000".

markets in financial instruments regulation if it is an activity subject to the exclusion in Article 72 (overseas persons) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2000",

and in Schedule, Part 1, paragraph 3C(a)(v) of the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001 ("**Recognition Requirements**"). This appears to reflect a deliberate policy choice by the UK to allow the provision of DEA under the OPE.

Although the Committee recognises such statutory instruments will prevail over the FCA's guidance, for the sake of certainty and clarity it is important that the FCA's guidance should not undermine those statutory instruments or suggest that a different policy approach is being adopted on this point.

Recommendation

If the text in paragraph 3.7 of the CP becomes an FCA policy statement in the proposed format, this could result in an unintended endorsement by the FCA of ESMA Q&A 25. The FMLC therefore recommends that the FCA also carves out ESMA Q&A 25 from its endorsement of ESMA's Q&A, reflecting the status quo of law and regulation in this area. The FCA, as it states in its Brexit Approach, has already opted not to apply certain of the ESMA guidelines,¹¹ and maintains its approach regarding the determination of non-UCITS retail schemes as complex or not for the purposes of the appropriateness test.¹² Therefore there is precedent for the FCA to adopt the FMLC's recommendation.

An appropriate amendment would, for example, read as follows:

"... Therefore, we propose that ESMA's Q&As dealing with the trading venue perimeter – Q&As 7, 10, 11 and 12 in Section 5 of the ESMA market structures Q&As – should not form part of our supervisory expectations following the issuance of our final guidance. [We note that Q&A 25 in Section 3 of the ESMA market structures Q&As has not formed part of our supervisory expectations as a result of the availability of the overseas persons exclusion under Article 72 of the Financial Services and Markets Act 2000 \(Regulated Activities\) Order 2001 as reconfirmed pursuant to Article 32\(10\) of the Financial Services and Markets Act 2000 \(Markets in Financial Instruments\) Regulations 2017.](#) We will continue to have regard to all other Q&As in the ESMA market structures Q&As, in line with our approach to EU non-legislative materials." [Emphasis added]

I and Members of the Committee would be delighted to meet you to discuss the issues raised in this letter. Please do not hesitate to contact me should you wish to arrange a meeting or if you have any questions.

Yours faithfully,



Brian Gray

Chief Executive¹³

¹¹ See paragraph 13 of the Brexit Approach which sets out the particular aspects of certain EU guidelines (namely the ESMA short selling guidelines, the European Banking Authority's sound remuneration principles and internet payment security guidelines, and the Acquisition Directive Guidelines) that the FCA continues not to adhere to.

¹² See paragraph 5 of the Brexit Approach and the FCA's policy statement on implementing this topic - FCA, 'Markets in Financial Instruments Directive II Implementation – Policy Statement II' (July 2017, PS17/14).

¹³ FMLC acknowledges the assistance of Thomas Donegan of Sherman and Sterling LLP in writing this letter.