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Overseas Framework Call for Evidence
International Policy & Partnerships Team
HM Treasury
1 Horse Guards Road
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By email: overseasframeworkcfe@hmtreasury.gov.uk

11 March 2021

Dear Sir or Madam

HMT Call for Evidence – Overseas Framework

The City of London Law Society ("**CLLS**") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

This letter has been prepared by the CLLS Regulatory Law Committee (the "**Committee**"). The Committee not only responds to consultations but also proactively raises concerns where it becomes aware of issues which it considers to be of importance in a regulatory context.

We welcome the opportunity to respond to this Call for Evidence relating to the ways in which overseas financial services providers access UK markets and potential clients in the UK. Our comments below focus on the questions numbered 5 and 7 in Chapter 3 of the Call for Evidence, although our comments bear also on questions 2 to 4. In the experience of Committee members the current framework plays an important role in demonstrating that the UK is "open for business" for financial services in the global context.

1. The Overseas Persons Exclusions

In the experience of the members of the Committee, the current Overseas Framework has been a particularly useful tool in enabling financial services providers from outside the UK to interact with UK markets and participants. In particular, in our experience, the overseas persons exclusions ("**OPE**") in the Regulated Activities Order have been heavily relied on over many years, despite the complexities in applying them to particular circumstances, and have, for example, enabled international financial groups to the use the UK as a global or regional hub as part of a complex network of international affiliates relying upon the OPE

Although the OPE can be complex in its application, it is a regime with which we, and many of those we have advised, have become familiar over time. In our experience, the way in which non-UK firms have adapted their business to make use of the OPE has been highly tailored to work well for that business, and therefore increase business done with the UK. As a consequence even apparently minor changes, or intended simplification or improvement, could give rise to significant unintended consequences to firms relying on the OPE, and even seemingly minor changes may have significant cost and other implications for them. In particular the interaction with the Financial Promotions Order will frequently result in overseas firms adopting policies and procedures designed to restrict their interactions to whom financial promotions may legitimately be made. As we noted in our submission to the HMT consultation on the Regulatory Framework for the Approval of Financial Promotions (https://www.citysolicitors.org.uk/storage/2020/10/CLLS-Reg-Law-Comm-Final-response-to-HMT-Financial-Promotions-Consultation.pdf) changes to the FPO can have unintended consequences for the OPE. In addition, the changes to the OPE that have been made since the Financial Services Act 1986 originally introduced the framework have been relatively limited but for example, changes to how the regulatory scope addresses "agreeing to" carry out activities (now treated as a regulated activity in its own right, whereas previously it was part of the relevant primary activities) have in our experience added to complexity of the OPE even where that may not have been the intention.

The Committee's view therefore is that the OPE should not be revised unless there is a particular identified need for a change, and even then any change should be very carefully considered to avoid unnecessary, and unintended, consequences of the change. Currently the Committee is not aware of any particular need for changes.

2. The MiFIR Equivalence Regime

As the Call for Evidence notes, this regime has been incorporated into UK legislation as a result of the on-shoring of an EU single market regime (i.e. MiFIR). The relevant MiFIR provisions were adopted by the EU with a view to harmonising the access of EU markets to third country firms in the light of a variety of approaches adopted to this by Member States. The Committee considers that retaining the regime may be useful in the context of equivalence assessments as between the EU and the UK, but outside that context, its advantages are not readily identifiable.

As the Call for Evidence notes, there is a considerable overlap in the activities covered between this regime and the OPE. However, the MiFIR equivalence regime (if adopted for a particular third country) imposes a number of regulatory burdens on firms looking to do business with or into the UK, which would not apply to a firm that is able to make use of the OPE. Potentially therefore activating the MiFIR equivalence regime for a country whose regulatory regime is deemed equivalent (i.e. at least as strong) as the UK's regulatory regime, imposes more obligations on firms from that country than for firms from another country whose regulatory regime is considered inferior.

The Committee considers that this result as counter-intuitive, and that accordingly if the MiFIR equivalence regime is retained, it is important that it is only operated in parallel with the availability of the OPE – i.e. that the MiFIR equivalence regime is amended so that the OPE is not "switched off" if it is brought into force in relation to one or more non-UK jurisdictions. That would, in effect, bring the MiFIR equivalence regime into line with the UK ROIE regime (as described in the Call for Evidence) which, as HMT note is an option alongside the OPE for overseas exchange operators.

The Committee considers that there may be advantages perceived by firms from a jurisdiction determined as equivalent in seeking registration, through their ability to state that they have a formal UK registration when dealing with UK-based clients and prospects. That being so, the Committee does not consider that there is a compelling case for the UK to drop the legislative framework for the MiFIR equivalence regime altogether.

3. Other comments

While, the focus of the Call for Evidence on the OPE, MiFIR equivalance regime, and the ROIE regime, helpfully highlights a number of important issues, the Committee notes that these elements of the UK regulatory framework address only whether or not a licence is required from the UK regulators. There are other aspects of the regime that could inhibit the UK meeting elements of the overarching principles articulated in Chapter 1 of the Call for Evidence. For example, the recently introduced trading obligations as a result of MiFIR (while not applying to all instruments traded with or in the UK markets) might be viewed as an inhibition to an open and globally integrated market, and might mean that the OPE is of limited practical use even though technically available.

If you would find it helpful to discuss any of these comments then we would be happy to do so. Please contact Karen Anderson by telephone on +44 (0) 20 7466 2404 or by email at Karen.Anderson@hsf.com in the first instance.

Yours faithfully

Karen Anderson
Chair, CLLS Regulatory Law Committee

THE CITY OF LONDON LAW SOCIETY
REGULATORY LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

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