



Response to FCA Consultation Paper on its approach to international firms (CP20-20)

1. Introduction

FIA welcomes the opportunity to provide feedback on the FCA's approach to international firms and the process of setting out the FCA's expectations of such firms operating in the United Kingdom (UK) under its framework.

FIA members firmly support the FCA's goal of ensuring that offering financial services to UK market participants is appropriately regulated and supervised and appreciates the process of setting out the minimum standards and the general expectation on how these firms will be assessed.

FIA's response has a focus on Q1 of CP 20-20 with the following comments on the FCA's proposed approach to international firms as currently drafted:

Q1: Do you have any comments on our general approach as set out in this paper?

Overall, FIA members welcome the FCA's efforts to foster a competitive and open financial system and appreciate the FCA's recognition that international firms contribute to open and vibrant UK markets and hereby helping the FCA to meet its objective. In addition, we strongly support the FCA in its goal to enable international firms to operate in a manner that ensures consumer protection and market integrity at all times. The FCA's early engagement with international firms to ensure appropriate understanding of its rules and framework is commendable.

It is clear that an international firm that meets all FCA requirements and has the appropriate risk mitigation mechanisms in place will be authorised while the FCA will address other specific challenges in cases where a firm does not meet the minimum standards. The FCA aims to address the supervision of such firm's conduct in the UK by paying close attention to potential insolvency situations, the role and accountability of the firm's senior management, and supervisory co-operation with the firm's home state regulator.

We would like to highlight the following issues and recommend further clarifications in the following areas:

Territorial scope of the FCA's approach

FIA members have **concerns about the territorial scope of the application of UK rules**. The scope is not entirely clear in all situations and leads to firms assuming the approach that the FCA is planning to take. This is particularly relevant when examining (a) the whole legal entity's activities and whether they are within the licensing scope; and (b) whether all UK client activities are within scope for authorisation and supervision. Whilst FIA members have sympathy for some of the issues the FCA is aiming to resolve, this approach does not appear aligned with the FSMA licensing scope, exclusions (e.g. the Overseas Person

Exemption the HMT is currently consulting on) and the ‘characteristic performance’ test which determines where services or activities are deemed provided in the UK (and hence where they are within the UK regulatory perimeter).

By way of example, not all of an entity’s activities would be licensable under UK rules for example:

- commercial lending that is not subject to the Consumer Credit Act is not licensed in the UK;
- deposit taking - provided “from and in” France is covered by French deposit taking requirements;
- execution activities are deemed provided in the location of the trader (which could be in the EU/elsewhere).

Therefore, FIA members would appreciate more clarity on what information the FCA may expect in relation to (i) a firm’s UK customer base and (ii) specific services and activities. Further clarity would be helpful relating to instances in which the FCA may exercise its powers to place limitations on a firm’s authorisation, which ultimately represents a significant measure on a firm’s activity and business model.

UK customer/client definition

Secondly, FIA members recommend the **FCA to outline a clear UK customer/client definition as CP 20-20 appears to take an overly broad concept of a UK customer or client** e.g. to include expatriates in the UK which is not defined within CP 20-20 or UK regulatory. In this context, FIA members would like to point to the “lessons learned” from the implementations of the definition of US Persons and the resulting extra-territoriality approach.

By way of explanation, it is not clear for each harm what the UK client/customer definition is, or what the audience is e.g. “UK customer” in various instances. Does it relate to UK MiFID II retail? Is it FSCS eligible complainants? How are UK CASS protections scoped? How does the FCA control and monitor distribution of products and clients in the UK? A product manufacturer uses a distributor and has certain MiFID II obligations but no interaction with a UK end client.

Application of the Senior Managers Certification regime

The approach taken in CP 20-20 raises SMCR considerations for UK regulatory oversight and the extent of responsibility of UK SMFs. We would like to draw particular attention to CP 3.9-3.11 where the FCA outlines that it requires UK personnel and decision making in the UK. Therefore, FIA members have remaining questions as to which entity the FCA is going to attach the obligation to? If it is an unlicensed entity it is difficult for such entity to restrict the activity that is not going through the UK branch. What is the SMF’s authority and how do they control it? Is this restricted to banking services (or what is the scope)? Will firms that provide services on a cross border basis need to have an SMF in relation to those activities and will that SMF have to be in the UK? Furthermore, this approach can be difficult to achieve in a pandemic environment, like the Covid-19 situation where movements of senior managers can be severely restricted.

FCA’s view on branches

FIA members would like to question and instigate further debate on the FCA’s view that **branches have an implied weakness**. A firm’s client management and related approach to messaging questions will remain the same, i.e. the credit rating of a European, US or Swiss firm will not change with Brexit, nor will the insolvency risk but some of the disclosures have the potential to generate market confusion.

From a client perspective, the overseas entity will likely be better capitalised than a separate UK subsidiary, and clients would likely prefer to transact with a better capitalised and well-established entity.

Solo & dual regulated firms

FIA members recommend providing more clarity around the **application/scope and delineation of solo and dual regulated firms**: the FCA should be clearer when it comes to the decision on which requirements apply to which firms. It is not clear in CP 20-20 whether the FCA has a more limited application for dual regulated firms or not. FIA recommends the FCA to calibrate the requirements according to firm type and potentially location of incorporation of the firm.

Effectiveness of the FCA's approach to international firms

FIA members would appreciate more guidance on how firms can plan and implement around the **timing** of the FCA's publication of the guidelines. Do firms have to assume that the requirements apply upon exiting the TPR given this relates to authorisations?

For example, querying the approach to insolvency disclosures (under CASS 14.5.1), FIA notes potential misalignment with the expectations of CP 20-20 around disclosing further items already covered by rule requirements including around insolvency outcomes where the FCA notes enhanced expectations (and there are timing questions over when those items will be clarified). FIA members recommend avoiding situations where firms would be in a position of providing multiple client communications around the same item, while at the same time CP 20-20 does not provide information on the required lead time and sufficient clarity.

There are similar questions concerning expectations around the scope and timing of insolvency opinions, which carry a significant cost for international firms.

Firms are making the assumption that the expectations will apply following the policy statement and in relation to exiting the TPR and following bilateral engagement with supervisors as regards the specific application and expectations for a particular firm.

Implementation

FIA members have outstanding queries on how the FCA can achieve the implementation of its approach to international firms considering that 1500 firms have already entered the TPR and additional non-EEA firms will need to be assessed.

We hope that this letter is helpful to your consideration of these issues. FIA and its members are available to discuss further the matters set out in this letter.

About FIA

FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries as well as technology vendors, lawyers and other professionals serving the industry. FIA's mission is to:

- support open, transparent and competitive markets,
- protect and enhance the integrity of the financial system, and
- promote high standards of professional conduct.

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