



## AFB RESPONSE TO HM TREASURY - OVERSEAS FRAMEWORK: CALL FOR EVIDENCE

The Association of Foreign Banks (AFB) represents the interests of the foreign banking sector in the UK to industry stakeholders, including the Government, regulatory bodies and financial services organisations. The AFB's membership consists of approximately 200 international banking group members, representing around 80% of the UK's foreign banking market, providing financial services through branches, subsidiaries and representative offices. The AFB welcomes the opportunity to respond to the call for evidence.

We note that (some of) the questions in the call for evidence are intended to be answered by individual firms. As a trade association we are able to represent the general comments/views of our members, which are set out below, together with our brief responses to questions 1 to 7 from the section headed "For all firms". Regarding the more detailed information requested, please note that, by definition, members of the AFB are regulated in the UK through the establishment of a branch or subsidiary, although they are members of non-UK headquartered groups. Accordingly, the specific interest of our members in the operation of the overseas framework is informed by a group structure, which already has a UK-authorized presence through which such business can be undertaken. Further, the amount of information held by AFB members (branches, subsidiaries or both) on the amount of business undertaken into the UK via the overseas framework is affected by the fact that much of the group business will inevitably be undertaken by the UK branch or subsidiary instead.

### GENERAL COMMENTS

Given the global membership of the AFB, the UK's approach to overseas business is of critical importance to its members. An important pillar of the UK's position as a centre for financial services has been the UK's historically open approach to incoming business from overseas (without requiring reciprocity from other jurisdictions). The UK has benefited from maintaining an open financial system, encouraging international financial businesses to trade with the UK by minimising barriers and frictions. This has been consistent with having robust, high quality and proportionate regulation applying to UK-based businesses. The AFB supports this approach, based primarily on the words "in the UK" in section 19 of the Financial Services & Markets Act 2000 (FSMA) and the fact that, in its interpretation of this provision, the UK does not incorporate a solicitation test.

### RECOMMENDATIONS

#### A. RETENTION OF THE OVERSEAS PERSONS REGIME (WITHOUT AMENDMENT)

The AFB believes that the UK should continue to consider the characteristic performance of the activities regulated under FSMA when considering whether a UK licensing requirement has been triggered. This

means that the activity of dealing occurs where the *party which is dealing* is based and not where their client is based or where the instrument involved may be listed.

For example: (a) 'asset management' occurs where discretionary decisions are taken and not where the client whose assets are being managed is based or where those assets may be located; and (b) 'banking business' is provided where the bank, which is accepting the deposits and using those sums, is based, rather than where the customer which may (for instance) be borrowing the money, is based.

We believe that this approach is historically well understood by market participants, has proved sufficiently clear to be interpreted accurately, and has provided the UK with a competitive advantage over markets which focus on a solicitation test. Indeed, in the EU (with the possible exception of Republic of Ireland), the UK's approach was (pre-Brexit) uniquely open in that, provided the financial promotion regime was complied with, business could be conducted into the UK without a licensing requirement being triggered.

In practice, the financial promotion regime makes it relatively straightforward for non-UK based businesses to interact with professional clients and eligible counterparties in the UK, whilst providing a proportionate degree of protection for retail clients. In the view of the AFB members, any alteration to the scope of the overseas persons regime would be likely to both increase the complexity of the regime and restrict access unnecessarily, in particular for business being conducted with professional clients and eligible counterparties.

## B. REVIEW OF THE ONSHORED EQUIVALENCE REGIME

In our view, the onshoring of various EU directives which contain third country access provisions (often referred to as equivalence measures) creates an instability for the UK's approach to 'third country' access under the overseas persons regime.

The reason for this is because, for most countries in the EU 27, a finding of equivalence would be a liberalisation i.e., it would enable a 'third country' service provider, which had previously been prevented from accessing those EU markets, to solicit business in accordance with an equivalence mechanism. However, under the UK's overseas persons regime, access is already permitted (providing the regime is complied with) without the barriers and frictions which are contained within equivalence findings.

An example of this is the operation of equivalence determinations under MiFID/MiFIR. Whereas access for non-EU providers of MiFID services is generally not permitted by EU countries, a finding of equivalence would permit some access, although with important requirements such as registration with ESMA and compliance with national requirements. When an equivalence finding is made, no other form of access is permitted (after a transition period). As a result, a finding of equivalence by the UK under the onshored MiFID/MiFIR regime (which should, in principle, be a good thing) would, in fact, restrict the ability of third country providers to access the UK market compared to the frictionless approach permitted by the overseas persons regime.

Accordingly, we believe that either equivalence measures transposed into UK law should be repealed or (alternatively) the part of the equivalence mechanism that prevents access on any other basis should be deleted, such that the UK is free to make equivalence findings in respect of third countries, whilst in parallel continuing to permit access on the basis of the overseas persons regime where this is preferable.

## RESPONSES TO QUESTIONS (see also comments above)

**Please describe your business model, entities, and the types of financial services activity your firm (or group, where relevant) undertakes in relation to the UK, or will undertake after the end of the transition period.**

The AFB represents banks which are headquartered outside the UK but which have UK operations. Typical activities undertaken are banking activities, in the broadest sense, and securities activities of the types regulated in the EU under MiFID. Whilst AFB members typically have subsidiaries and/or branches in the UK to enable them to undertake some UK business, they currently access UK markets from overseas as part of their international operations using the overseas persons regime.

**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?**

Yes.

**Are there any specific risks that the current regimes for overseas firms do not adequately address?**

Yes, because equivalence findings will, in practice restrict rather than liberalise access to the UK market. We believe that legislation that prevents access on any alternative basis when a UK equivalence determination has been made should be deleted.

**Are there specific complexities around the regime you think need to be addressed?**

No.

**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?**

Please see our recommendation above.

**Are there national exclusions/exemptions in other jurisdictions that provide benefits comparable to those provided by the UK's regime?**

Most jurisdictions do not operate an overseas person regime that provides benefits comparable to those provided by the UK. We have not undertaken a survey, but measures that bear some comparison with the UK's regime are found in Switzerland and Ireland.

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

Please see our general comments above.

**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?**

We believe that the overseas persons regime enables businesses based outside the UK easily to access UK markets in order to interact with professional clients and eligible counterparties.

Association of Foreign Banks

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