

consultation

amendment to rules

–Benchmarks Regulation, MiFID 2 and advising on investments

10 October 2017

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responses

We welcome your feedback on these amendments to our voluntary jurisdiction. Please send your views and comments – to reach us by 5pm on 6 November 2017 – to:

consultations@financial-ombudsman.org.uk

Or write to:

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Stakeholder team – consultation responses
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We may want to publish the responses we receive to this consultation paper. In the interests of transparency, we encourage non-confidential responses.

If you do send us a confidential response, it would be helpful if you could tell us why you consider the information confidential. We cannot guarantee that confidentiality can always be maintained. We will not regard an automatic confidentiality disclaimer generated by your IT system, of itself, as binding.

We are subject to the Freedom of Information Act 2000, so information provided in response to this consultation may be subject to publication, disclosure or release to other parties.

introduction

This consultation sets out the amendments that we propose to make to our standard terms and scheme rules affecting businesses subject to our voluntary jurisdiction.

background and summary of proposed amendments

The ombudsman service currently has two jurisdictions –

- the compulsory jurisdiction (CJ):
 - covers financial businesses regulated by the Prudential Regulation Authority and the Financial Conduct Authority (FCA);
 - covers activities specified in rules made by the FCA; and
 - is mainly restricted to services provided in or from the UK.
- the voluntary jurisdiction (VJ):
 - covers financial businesses that volunteer to join it;
 - covers activities specified in rules made by the ombudsman service with the approval of the FCA; and
 - covers services directed at the UK from the European Economic Area, as well as services provided in or from the UK.

The FCA is responsible for making the rules for the CJ and the ombudsman service is responsible for making the rules and standard terms for the VJ with the FCA's approval.

It is generally the ombudsman service's policy to amend the activities covered by the VJ in line with amendments to the activities covered by the CJ. This is to minimise confusion for consumers and financial businesses, and for operational simplicity.

Chapter 2 of the 'Dispute Resolution: Complaints sourcebook' (known as DISP) sets the scope of the jurisdiction of the Financial Ombudsman Service. The FCA is proposing to make a number of changes to DISP 2 as a result of recent legislative changes. This consultation proposes to mirror these changes in the voluntary jurisdiction.

The FCA consulted on changes to DISP 2.3.1R to remove complaints about "administering a regulated benchmark" from the CJ, so that complaints about "administering a regulated benchmark" would not be in our CJ from 1 January 2018. It is our view that it would be appropriate to also exclude this activity from the VJ and we don't propose to retain it as an activity in the VJ.

The FCA will also make changes to DISP 1, which sets out how firms and VJ participants should handle complaints, and insert a new section after DISP 1.1 as a result of the revised Markets in Financial Instruments Directive (MiFID 2). The FCA is also amending DISP 2 to add activities in a new DISP 2.3.1A and 2.3.1B in the CJ which reflect the requirements of MiFID 2. These changes come into force on 3 January 2018. We propose amending DISP 2.5.1R and Annex 1 to DISP 2 to mirror changes being made to the scope of the CJ in the VJ. We are however not proposing to adopt the changes to complaints handling provisions in DISP 1 to the VJ.

As a result of changes to the definition of the regulated activity of “advising on investments” in the Regulated Activities Order (RAO), the FCA consulted on amendments to DISP 2.3.1R to add a new activity of giving “non-personal recommendation advice” to the CJ. The new activity would take effect from 3 January 2018. As a result, we consider it would be appropriate to amend DISP 2.5.1R and Annex 1 to DISP 2 to include the activity of giving “non-personal recommendation advice” in the VJ to provide clarity for consumers and businesses.

Further information on all the proposed amendments to the VJ are set out below.

proposed amendments

EU Benchmarks Regulation

The FCA published a consultation (Handbook changes to reflect the application of the EU Benchmarks Regulation CP17/17) in June 2017 proposing a wide range of Handbook changes to reflect the application of the EU Benchmarks Regulation (BMR), most of the provisions of which will apply from 1 January 2018. The consultation includes amendments to avoid overlapping between existing Handbook provisions and the BMR. For example, the BMR has separate complaint handling provisions. To that end, the FCA is proposing to amend DISP to exclude the regulated activity of “administering a regulated benchmark” from the CJ.

The FCA proposes to make the following change to DISP 2 (underlined):

2.3 To which activities does the Compulsory Jurisdiction apply?

Activities by firms

2.3.1 R The *Ombudsman* can consider a *complaint* under the *Compulsory Jurisdiction* if it relates to an act or omission by a *firm* in carrying on one or more of the following activities:

(1) *regulated activities* (other than *auction regulation bidding* and *administering a regulated benchmark*);

We don't currently have any complaints about “administering a regulated benchmark” and don't typically receive any. The BMR also includes separate complaint handling provisions. For these reasons, it is our view that it is not appropriate to retain the activity for VJ participants. We are therefore proposing to exclude the activity from the VJ by removing it from the list of CJ activities adopted into the VJ by DISP 2.5.1R. The FCA is also proposing to make amendments to the Glossary and we propose to adopt the relevant amendments to terms used in DISP.

The proposed amendments to the VJ rules are set out in the instrument in annex A.

Markets in Financial Instruments Directive 2

The FCA has made changes to DISP through the Conduct, Perimeter Guidance and Miscellaneous Provisions (MiFID 2) Instrument as a result of MiFID 2.

The Markets in Financial Instruments Directive (MiFID) is the framework of European Union legislation for investment intermediaries that provide services to clients around shares, bonds, units in collective investment schemes and derivatives – collectively known as financial instruments. MiFID also regulates the venues and markets where financial instruments are traded. MiFID has applied in the UK since November 2007, but is being revised. The new legislation known as MiFID 2 – which includes a revised MiFID and a new Markets in Financial Instruments Regulation – is set to take effect from 3 January 2018.

The FCA has amended DISP 1 to include a new definition of “MiFID complaint” and a new separate set of rules for handling MiFID complaints (see the new DISP 1.1A). The new rules are similar to the existing DISP rules.

The FCA has made changes to DISP 2 as part of the implementation of MiFID 2. These changes affect the scope of the CJ. For example, the CJ has been amended to make clear that we can consider complaints relating to advice on or sales of structured deposits, where such services are provided by investment firms and certain credit institutions.

The FCA will make the following change to DISP 2 (underlined):

2.3 To which activities does the Compulsory Jurisdiction apply?

Activities by firms

2.3.1A R The Ombudsman can consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by

- (1) an investment firm authorised under MiFID when providing investment services or ancillary services;
- (2) a CRD credit institution when providing one or more investment services;
- (3) an investment firm authorised under MiFID or a CRD credit institution when selling structured deposits to clients, or advising clients on them;
- (4) a collective portfolio management investment firm when providing the activities permitted by article 6(3) of the UCITS Directive; and
- (5) a collective portfolio management investment firm when providing the activities permitted by article 6(4) of the AIFMD.

[Note: see article 1(1), 1(3) and 1(4) and article 75 of MiFID, and articles 1 and 26(5) of the MiFID Org Regulation]

2.3.1B G For the purposes of DISP 2.3.1AR, the Ombudsman can consider a complaint about an act carried out by a MiFID investment firm that is preparatory to the provision of an investment service or ancillary service which is an integral part of such a service. This includes, for example, generic advice given by a MiFID investment firm to a client prior to, or in the course of, the provision of investment advice or another investment service or ancillary service.

[Note: recitals 15 and 16 of the MiFID Org Regulation]

We propose to mirror the changes made in the CJ in the VJ by amending DISP 2.5.1 and Annex 1 to DISP 2 so that complaints relating to MiFID 2 business are covered by the VJ. The FCA has also amended the FCA Glossary as a result of MiFID 2 and we propose to adopt the relevant amendments to terms used in DISP.

However, we are not proposing to mirror the DISP 1 changes made to the handling of MiFID complaints. This will ensure that we have a single set of VJ terms for all complaints falling within the VJ. We propose to amend DISP 4.2.3R to reflect this. VJ participants should therefore continue to handle MiFID complaints which fall within our VJ in the same way as other types of complaint.

The proposed amendments to the VJ rules and Glossary terms to be adopted are set out in the instrument in annex B.

Advising on investments – changes to Article 53(1) of the Regulated Activities Order

The Financial Advice Market Review (FAMR) was launched jointly by the FCA and HM Treasury in August 2015 with the aim of identifying ways to make the UK's financial advice market work better for consumers. In February 2017, HM Treasury announced that, following consultation, it proposed to amend the RAO so that most authorised firms would be exempt from the regulated activity of “advising on investments” specified in Article 53(1) of the RAO unless the firm is providing a “personal recommendation”.

The FCA published a consultation (Financial Advice Market Review (FAMR): implementation Part II and insistent clients CP17/28) in August 2017 proposing, in part, changes to the Handbook, including changes to DISP, arising from the amendments to the RAO.

Regulated advice currently consists of two elements for the purposes of Article 53(1) of the RAO:

- Advice which constitutes a personal recommendation; and
- Any other regulated advice within Article 53(1) which does not amount to a personal recommendation.

The FCA has called the latter “non-personal recommendation advice” when done by a firm making use of the RAO exemption. For firms that make use of the RAO exemption, the FCA proposed that eligible complainants should still be able to refer complaints to the ombudsman service about things done by the firm in providing “non-personal recommendation advice”.

The FCA expects that most firms that will use the RAO exemption are likely to provide “non-personal recommendation advice” in connection with another regulated activity. So, complaints would be likely to come under the compulsory jurisdiction of the ombudsman service as ancillary to an activity covered by the CJ. But, to provide certainty to eligible complainants and businesses, the FCA is proposing to add the activity of “non-personal recommendation advice” to the CJ.

The FCA is therefore proposing to make the following change to DISP 2 (underlined):

2.3 To which activities does the Compulsory Jurisdiction apply?
Activities by firms

2.3.1 R The *Ombudsman* can consider a *complaint* under the *Compulsory Jurisdiction* if it relates to an act or omission by a *firm* in carrying on one or more of the following activities:

...

(7) giving *non-personal recommendation advice*;

or any ancillary activities, including advice, carried on by the firm in connection with them.

Like the FCA, we consider it likely that in most instances “non-personal recommendation advice” would be provided in connection with another activity covered by the CJ. This means we could consider it as an ancillary activity. However, as the FCA is proposing to add the activity to the CJ to provide clarity for consumers and businesses, our view is that it’s appropriate to add the activity to the VJ for the same reasons. It will provide clarity but also minimise operational complexity.

We propose to add the activity to the VJ by adding it to the list of CJ activities adopted into the VJ by DISP 2.5.1R. The FCA is also proposing consequential amendments to the Glossary and we propose to adopt the terms appearing in DISP to the VJ.

The proposed amendments to the VJ rules and Glossary terms to be adopted are set out in the instrument in annex C.

annex A

BENCHMARKS REGULATION AMENDMENT (FINANCIAL OMBUDSMAN SERVICE) INSTRUMENT 2017

Powers exercised by the Financial Ombudsman Service

A. The Financial Ombudsman Service Limited:

(1) makes (and amends) the voluntary jurisdiction rules and fixes (and varies) the standard terms for voluntary jurisdiction participants relating to the voluntary jurisdiction as set out in Annex 1 to this instrument; and

(2) fixes (and varies) the standard terms for voluntary jurisdiction participants relating to the voluntary jurisdiction to incorporate the changes to the Glossary made by the Financial Conduct Authority in the Benchmarks Regulation Amendment Instrument 2017 as set out in Annex 2 to this instrument.

in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):

- (a) section 227 (Voluntary jurisdiction);
- (b) paragraph 8 (Information, advice and guidance) of Schedule 17; and
- (c) paragraph 18 (Terms of reference to the scheme) of Schedule 17.

- B. The making (and amending) of the voluntary jurisdiction rules and the fixing (and varying) of the standard terms by the Financial Ombudsman Service Limited, as set out in Annexes 1 and 2 are subject to the approval of the Financial Conduct Authority.
- C. The Financial Conduct Authority approves the making (and amending) of rules and the fixing (and varying) of standard terms by the Financial Ombudsman Service Limited in this instrument.

Commencement

- D. This instrument comes into force on 1 January 2018.

Amendments to the Handbook

- E. The Dispute Resolution: Complaints sourcebook (DISP) is to be amended in accordance with the Annexes 1 and 2 to this instrument.

Citation

- F. This instrument may be cited as the Benchmarks Regulation Amendment (Financial Ombudsman Service) Instrument 2017.

By order of the Board of the Financial Ombudsman Service
[date]

Approved by the Board of the Financial Conduct Authority
[date]

Annex 1

Amendments to the Dispute Resolution: Complaints sourcebook (DISP)

In this Annex, underlining indicates new text and striking through indicates deleted text.

2 Jurisdiction of the Financial Ombudsman Service

...

2.5 To which activities does the Voluntary Jurisdiction apply?

2.5.1 R The *Ombudsman* can consider a *complaint* under the *Voluntary Jurisdiction* if:

...

(2) it relates to an act or omission by a *VJ participant* in carrying on one or more of the following activities:

...

(c) activities which (at ~~1 October 2016~~ 1 January 2018) would be covered by the *Compulsory Jurisdiction*, if they were carried on from an establishment in the *United Kingdom* (these activities are listed in *DISP 2 Annex 1G*);

...

...

2 Annex 1 Regulated Activities for the Voluntary Jurisdiction at ~~1 October 2016~~ 1 January 2018

This table belongs to *DISP 2.5.1R*

The activities which were covered by the *Compulsory Jurisdiction* (~~1 October 2016~~ 1 January 2018) were:

(1) for *firms*:

(a) *regulated activities* (other than *auction regulation bidding* and *administering a regulated benchmark*)

...

The activities which (at ~~1 April 2016~~ 1 January 2018) were *regulated activities* were, in accordance with section 22 of the *Act* (The classes of activity and categories of investment), any of the following activities specified in Part II of the *Regulated Activities Order* (with the addition of *auction regulation bidding* and *administering a regulated benchmark*):

...

Annex 2

Amendments to the Glossary of definitions made by the FCA in the Benchmarks Regulation Amendment Instrument 2017

Insert the following new definitions in the appropriate alphabetical position. The text is not underlined.

administering a regulated benchmark the *regulated activity* specified in article [63OX] of the *Regulated Activities Order*, which, in summary, means acting as the administrator of a benchmark as defined in article 3.1(3) of the *benchmarks regulation*;

benchmarks regulation Regulation (EU) No. 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014.

(<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1011>)

**DISPUTE RESOLUTION: MiFID 2 COMPLAINTS (VOLUNTARY JURISDICTION)
(FINANCIAL OMBUDSMAN SERVICE) INSTRUMENT 2017**

Powers exercised by the Financial Ombudsman Service Limited

A. The Financial Ombudsman Service Limited:

- 1) makes (and amends) the voluntary jurisdiction rules and fixes (and varies) the standard terms for Voluntary Jurisdiction participants relating to the voluntary jurisdiction as set out in Annex 1 to this instrument;
- 2) fixes (and varies) the standard terms for Voluntary Jurisdiction participants relating to the voluntary jurisdiction to incorporate the changes to the Dispute Resolution: Complaints sourcebook (DISP) and the Glossary made by the Financial Conduct Authority in the Glossary (MiFID 2) Instrument 2017 as set out in Annex 2 to this instrument;

in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000:

- (a) section 227 (Voluntary jurisdiction);
- (b) paragraph 8 (Information, advice and guidance) of Schedule 17; and
- (c) paragraph 18 (Terms of reference to the scheme) of Schedule 17.

- B. The making (and amending) of the voluntary jurisdiction rules and the fixing (and varying) of the standard terms is subject to the approval of the Financial Conduct Authority.
- C. The Financial Conduct Authority approves the voluntary jurisdiction rules made (and amended) and the standard terms fixed (and varied) by the Financial Ombudsman Service Limited in this instrument.

Commencement

D. This instrument comes into force on [3 January 2018].

Amendments to the Handbook

E. The Dispute Resolution: Complaints sourcebook (DISP) is to be amended in accordance with the Annex to this instrument.

Citation

F. This instrument may be cited as the Dispute Resolution: MiFID 2 Complaints (Voluntary Jurisdiction) (Financial Ombudsman Service) Instrument 2017.

By order of the Board of the Financial Ombudsman Service Limited
DATE 2017

By order of the Board of the Financial Conduct Authority
DATE 2017

[*Editor's note:* The text in this Annex takes into account the changes proposed by the Benchmarks Regulation Amendment (Financial Ombudsman Service) Instrument 2017, as if they were made.]

Annex 1

Amendments to the Dispute Resolution: Complaints sourcebook (DISP)

In this Annex, underlining indicates new text and striking through indicates deleted text.

2 Jurisdiction of the Financial Ombudsman Service

...

2.5 To which activities does the Voluntary Jurisdiction apply?

2.5.1 R ...

(1) ...

(2) it relates to an act or omission by a *VJ participant* in carrying on one or more of the following activities:

...

(c) activities which (at ~~1 January 2018~~ January 2018) would be covered by the *Compulsory Jurisdiction*, if they were carried on from an establishment in the *United Kingdom* (these activities are listed in *DISP 2 Annex 1G*);

...

DISP 2 Regulated Activities for the Voluntary Jurisdiction as at ~~1 January 2018~~ Annex 1 January 2018

This table belongs to *DISP 2.5.1R*.

The activities which were covered by the *Compulsory Jurisdiction* (~~1 January 2018~~ 3 January 2018) were:

...

(7) for investment firms authorised under MiFID:

(a) providing investment services;

(b) providing ancillary services;

(c) selling structured deposits to clients; and

(d) advising clients on structured deposits;

(and, in the case of *investment services* and *ancillary services*, this includes any acts which are preparatory to the provision of an *investment service* or *ancillary service* which are an integral part of such a service).

(8) for a *CRD credit institution*:

- (a) providing *investment services*;
- (b) selling *structured deposits to clients*; and
- (c) advising *clients on structured deposits*;

(and, in the case of *investment services*, this includes any acts which are preparatory to the provision of an *investment service* which are an integral part of such a service).

(9) for a *collective portfolio management investment firm*:

- (a) providing the activities permitted by *article 6(3) of the UCITS Directive*; and
- (b) providing the activities permitted by *article 6(4) of the AIFMD*;

and, in the case of such activities, this includes any acts which are preparatory to the provision of an *investment service* which are an integral part of such a service).

The activities which (at ~~1 January 2018~~ ^{3 January 2018}) were *regulated activities* were, in accordance with section 22 of the *Act* (The classes of activity and categories of investment), any of the following activities specified in Part II of the *Regulated Activities Order* (with the addition of *auction regulation bidding* and *administering a regulated benchmark*):

...

4 Standard terms

...

4.3 Standard terms

...

Application of DISP 1 to DISP 3

4.2.3 R The following rules and guidance apply to *VJ participants* as part of the *standard terms*, except where the context requires otherwise:

- (1) *DISP 1* (Treating complainants fairly), except:

...

- (d) DISP 1.1A (Complaints handling requirements for MiFID complaints);

...

Annex 2

Amendments to the Glossary of definitions made by the Glossary (MiFID 2) Instrument 2017

In this Annex, underlining indicates new text and striking through indicates deleted text.

Amend the following as shown.

<i>advising on investments (except P2P agreements)</i>	<p>the <i>regulated activity</i>, specified in article 53(1) of the <i>Regulated Activities Order</i> (Advising on investments), which is in summary: advising a <i>person</i> if the advice is:</p> <p>...</p> <p>(2) advice on the merits of their doing any of the following (whether as principal or agent):</p> <p>(a) <i>buying, selling</i>, subscribing for or underwriting a particular <i>investment</i> which is a <i>security, structured deposit</i> or <i>relevant investment</i> (that is, any <i>designated investment</i> (other than a <i>P2P agreement</i>), <i>funeral plan contract, pure protection contract, general insurance contract</i> or right to or interests in a <i>funeral plan contract</i> <u>or structured deposit</u>); or</p> <p>...</p>
<i>ancillary service</i>	<p>(1) (except in <i>CONC</i>) any of the services listed in Section B of Annex I to <i>MiFID</i>, that is:</p> <p>(a) safekeeping and administration of <i>financial instruments</i> for the account of <i>clients</i>, including custodianship and related services such as cash/collateral management <u>but excluding maintaining securities accounts at the top tier level, ('central maintenance service') referred to in point 2 of Section A of the Annex to CSDR;</u></p> <p>...</p>
<i>arranging (bringing about) deals in investments</i>	<p>the <i>regulated activity</i>, specified in article 25(1) of the <i>Regulated Activities Order</i>, which is in summary: making arrangements for another <i>person</i> (whether as <i>principal</i> or agent) to <i>buy, sell</i>, subscribe for or underwrite a particular <i>investment</i> which is:</p> <p>...</p> <p>(e) <i>rights to or interests in investments</i> in (b), (c) or (d) <u>; or</u></p> <p>(f) <u>a structured deposit.</u></p>
<i>auction regulation</i>	the <i>regulated activity</i> of <i>bidding in emissions auctions</i> where it is carried

- bidding* on by ÷
- (a) a *firm* that is exempt from *MiFID* under article 2(1)(i); ~~or~~ (j)
 - (b) ~~a *MiFID investment firm* (other than a *UCITS investment firm*) on behalf of its *clients* in relation to a *two-day emissions spot* .~~
- complaint* ...
- (2) (in ~~*SUP 10* and *DISP*~~, except *DISP* 1.1 and ~~the *complaints handling rules* and the *complaints record rule* in relation to *MiFID-business* (in relation to *collective portfolio management*)~~ in the *consumer awareness rules*, the *complaints handling rules* and the *complaints record rule*, and in *CREDS* 9) any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a *person* about the provision of, or failure to provide, a financial service or a *redress determination*, which:
 - ...
 - (3) (in ~~*DISP* 1.1, the *complaints awareness rules* only~~ and (in relation to *collective portfolio management*) ~~and in the *consumer awareness rules*, the *complaints handling rules* and the *complaints record rule* only in relation to *MiFID-business* and *collective portfolio management*) any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a *person* about the provision of, or failure to provide, a financial service or a *redress determination*, which alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience.~~
- consumer* ...
- (7) (in the definitions of *cross-border dispute*, *domestic dispute*, *sales contract* and *service contract*, and in *DISP* 1.1A.42R, *DISP* 2.7.3R and *DISP* 2.7.9AR) has the meaning in regulation 3 of the *ADR Regulations*, which is an individual acting for purposes which are wholly or mainly outside that individual's trade, business, craft, or profession.
- [Note: article 4(1) of the *ADR Directive*]
- ...
- customer* ...
- (A) ...
 - (B) in the *FCA Handbook*:
 - (1) (except in relation to *ICOBS*, a *credit-related regulated activity*, *MCOB* 3A, an *MCD credit agreement* ~~and~~ *CASS* 5 and *PRIN* in relation to *MiFID* or equivalent *third country business*) a *client* who is not an *eligible*

counterparty for the relevant purposes.

...

- (6) (for the purposes of PRIN in relation to MiFID or equivalent third country business) has the meaning given in COBS 3.2.

dealing in
investments as
agent

the *regulated activity*, specified in article 21 of the *Regulated Activities Order* (Dealing in investments as agent), which is in summary: *buying, selling, subscribing for or underwriting designated investments* (other than *P2P agreements*), *pure protection contracts* ~~or~~ *general insurance contracts* or structured deposits as agent.

...

final response

...

- (3) (in *DISP*) either:
- (a) in relation to a MiFID complaint, a response in accordance with DISP 1.1A.29EU, DISP 1.1A.30EU and DISP 1.1A.31R; or
- (b) in relation to all other complaints, has the meaning given in *DISP 1.6.2R(1)*.

firm

...

- (8) (in *SYSC 18* with the exception of the ~~guidance~~ guidance in *SYSC 18.3.9G*):

...

- (9) (in *FEES 4*) includes a recognised investment exchange and a data reporting services provider (other than an incoming data reporting services provider) in accordance with *FEES 4.1.1AR*.

investment firm

- (1) any ~~person~~ person whose regular occupation or business is the provision of one or more *investment services* to third parties and/or the performance of one or more investment activities on a professional basis.

[Note: article 4(1)(1) of *MiFID*]

...

investment service

any of the following involving the provision of a service in relation to a *financial instrument*:

...

- (h) operation of ~~multilateral trading facilities~~ an MTF; and
- (i) operation of an OTF.

...

making arrangements with a view to transactions in investments

the *regulated activity*, specified in article 25(2) of the *Regulated Activities Order* (Arranging deals in investments), which is in summary: making arrangements with a view to a *person* who participates in the arrangements *buying, selling*, subscribing for or underwriting any of the following *investments* (whether as *principal* or agent):

...

- (g) general insurance contract; or
- (h) a structured deposit.

managing investments

the *regulated activity* specified in article 37 of the *Regulated Activities Order* (Managing investments), which is in summary: managing assets belonging to another *person* in circumstances which involve the exercise of discretion, if:

- (a) the assets consist of or include any *security, structured deposit* or *contractually based investment* (that is, any *designated investment* (other than a *P2P agreement*), *funeral plan contract, structured deposit* or right to or interest in a *funeral plan contract*); or

...

MiFID

~~The European Parliament and Council Directive on markets in financial instruments (No. 2004/39/EC).~~
 See also *MiFID Regulation* and *MiFID implementing Directive Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending the Insurance Mediation Directive and AIFMD*.

operating a multilateral trading facility

...

In this definition “MiFID instrument” means any investment:

- (a) of the kind specified by articles 76, 77, 78, 79, 80, 81, 82B, 83, 84 or 85 of the *Regulated Activities Order*; or
- (b) of the kind specified by article 89 of the *Regulated Activities Order*, so far as relevant to an investment falling within (a);₂

that is a *financial instrument*.

regulated activity

in the *FCA Handbook*: (in accordance with section 22 of the *Act* (Regulated activities) the activities specified in Part II of the *Regulated Activities Order* (Specified Activities) which are, in summary:

...

(gg) ...

(gga) operating an organised trading facility (article 25DA);

(gh) ...

senior personnel

(1) those *persons* who effectively direct the business of the *firm*, ~~or CBTL firm, recognised investment exchange or data reporting services provider~~ which could include ~~a firm's or CBTL firm's or the membership of the governing body~~ and other ~~persons~~ individuals who effectively direct the business of the ~~person firm or CBTL firm~~.

(2) (in relation to a *management company*) and in accordance with article 3(4) of the *UCITS implementing Directive*) the *person* or *persons* who effectively conduct the business of the *management company*.

structured deposit

~~a deposit paid on terms under which any interest or premium will be paid, or is at risk, according to a formula which involves the performance of:~~

~~(a) an index (or combination of indices) (other than money market indices);~~

~~(b) a stock (or combination of stocks); or~~

~~(c) a commodity (or combination of commodities).~~

(in accordance with article 3 of the *Regulated Activities Order*) a deposit which is fully repayable at maturity on terms under which interest or a premium will be paid or is at risk, according to a formula involving factors such as:

(a) an index or combination of indices, excluding variable rate deposits whose return is directly linked to an interest rate index such as EURIBOR or LIBOR; or

(b) a financial instrument or combination of financial instruments; or

(c) a commodity or combination of commodities or other physical or non-physical non-fungible assets; or

(d) a foreign exchange rate or combination of foreign exchange rates.

[Note: article 4(1)(43) of *MiFID*]

summary

either:

*resolution
communication*

- (1) in relation to a *MiFID complaint*, a response in accordance with *DISP 1.1A.24EU*, *DISP 1.1A.25EU* and *DISP 1.1A.26R*;
or
- (2) in relation to all other *complaints*, has the meaning given in *DISP 1.5.4R*.

annex C**ADVISING ON INVESTMENTS (ARTICLE 53(1) OF THE REGULATED ACTIVITIES ORDER) (CONSEQUENTIAL AMENDMENTS) (FINANCIAL OMBUDSMAN SERVICE) INSTRUMENT 2017****Powers exercised by the Financial Ombudsman Service**

A. The Financial Ombudsman Service Limited:

(1) makes (and amends) the voluntary jurisdiction rules and fixes (and varies) the standard terms for voluntary jurisdiction participants relating to the voluntary jurisdiction as set out in Annex 1 to this instrument; and

(2) fixes (and varies) the standard terms for voluntary jurisdiction participants relating to the voluntary jurisdiction to incorporate the changes to the Glossary made by the Financial Conduct Authority in the Advising on Investments (Article 53(1) of the Regulated Activities Order) (Consequential Amendments) Instrument 2017 as set out in Annex 2 to this instrument.

in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000:

- (a) section 227 (Voluntary jurisdiction);
- (b) paragraph 8 (Information, advice and guidance) of Schedule 17; and
- (c) paragraph 18 (Terms of reference to the scheme) of Schedule 17.

- C. The making (and amending) of the voluntary jurisdiction rules and the fixing (and varying) of the standard terms by the Financial Ombudsman Service Limited, as set out in Annexes 1 and 2 are subject to the approval of the Financial Conduct Authority.
- D. The Financial Conduct Authority approves the making and amending of rules, and the fixing and varying of standard terms, by the Financial Ombudsman Service Limited in this instrument.

Commencement

- E. This instrument comes into force on 3 January 2018, immediately after the Dispute Resolution: MiFID 2 complaints (Voluntary Jurisdiction) (Financial Ombudsman Service) Instrument 2017.

Amendments to the Handbook

- F. The Dispute Resolution: Complaints sourcebook (DISP) is to be amended in accordance with the Annexes 1 and 2 to this instrument.

Citation

- G. This instrument may be cited as the Advising on Investments (Article 53(1) of the Regulated Activities Order) (Consequential Amendments) (Financial Ombudsman Service) Instrument 2017.

By order of the Board of the Financial Ombudsman Service
[date]

By approval of the Board of the Financial Conduct Authority
[date]

Annex 1

[*Editor's note:* The text in this Annex takes into account the changes proposed by the Dispute Resolution: MiFID 2 Complaints (Voluntary Jurisdiction) (Financial Ombudsman Service) Instrument 2017, as if they were made.]

Amendments to the Dispute Resolution: Complaints sourcebook (DISP)

In this Annex, underlining indicates new text and striking through indicates deleted text.

2 Jurisdiction of the Financial Ombudsman Service

...

2.5 To which activities does the Voluntary Jurisdiction apply?

2.5.1 R The *Ombudsman* can consider a *complaint* under the *Voluntary Jurisdiction* if:

...

(2) it relates to an act or omission by a *VJ participant* in carrying on one or more of the following activities:

...

(c) activities which (at 3 January 2018) would be covered by the *Compulsory Jurisdiction*, if they were carried on from an establishment in the *United Kingdom* (these activities are listed in *DISP 2 Annex 1G*);

...

...

2 Annex 1 Regulated Activities for the Voluntary Jurisdiction at 3 January 2018

This table belongs to *DISP 2.5.1R*

The activities which were covered by the *Compulsory Jurisdiction* (3 January 2018) were:

(1) for *firms*:

...

(j) giving non-personal recommendation advice;

...

Annex 2

Amendments to the Glossary of definitions made by the FCA in the Advising on Investments (Article 53(1) of the Regulated Activities Order) (Consequential Amendments) Instrument 2017

In this Annex, underlining indicates new text and striking through indicates deleted text.

Insert the following definitions in the appropriate alphabetical positions.

- non-personal recommendation advice
- (1) advice given to a person which is the regulated activity specified in article 53(1) of the Regulated Activities Order and which is not a personal recommendation.
 - (2) for the purposes of (1), article 53(1A) of the Regulated Activities Order is to be disregarded.

Amend the following definitions as shown.

- advising on investments (except P2P agreements)*
- the *regulated activity*, specified in article 53(1) of the *Regulated Activities Order* (Advising on investments), which is in summary:
- advising a *person* if the advice is:
- (1) given to ~~the~~ a person in their capacity as an investor or potential investor, or in their capacity as agent for an investor or a potential investor; and
 - (2) advice on the merits of their doing any of the following (whether as principal or agent):
 - (a) buying, selling, subscribing for, exchanging, redeeming, holding or underwriting a particular *investment* which is a *security, structured deposit or relevant investment* (that is, any *designated investment* (other than a *P2P agreement*), *funeral plan contract, pure protection contract, general insurance contract, right to or interests in a funeral plan contract or structured deposit*); or

- (b) exercising or not exercising any right conferred by such an *investment to buy, sell, subscribe for or underwrite, exchange or redeem* such an *investment*,

but excluding the provision of non-personal recommendation advice where the person providing that advice is appropriately authorised (see article 53(1A) to (1D) of the Regulated Activities Order).

advising on investments

- (1) (except in SUP 10A (Approved Persons), ~~and APER and CONRED 2~~) the *regulated activities*, specified in articles 53(1) to (1D) and article 53(2) of the Regulated Activities Order (Advising on investments), which are:

...

- (2) (in SUP 10A (Approved Persons) and APER) the *regulated activities* specified in articles 53(1) to (1D) and article 53(2) (Advising on investments) of the Regulated Activities Order. For these purposes, *advising on investments* includes any activities that would be included but for the exclusion in article 72AA (Managers of UCITS and AIFs) of the *Regulated Activities Order*.

- (3) (in CONRED 2) has the meaning in force on 1 April 2013.

...

personal recommendation

- (1) (except in CONRED and in relation to *advising on investments (except P2P agreements)*):

a recommendation that is ~~*advice on investments*~~ *advice on P2P agreements, advice on conversion or transfer of pension benefits, or advice on a home finance transaction* and is presented as suitable for the person to whom it is made, or is based on a consideration of the circumstances of that person.

A recommendation is not a personal recommendation if it is issued exclusively to the public.

For the purposes of this definition, references in the *Handbook* to making *personal recommendations* on, or in relation to, *P2P agreements* should be understood as referring to making *personal recommendations* involving *advice on P2P agreements*.

[~~Note: article 9 of the MiFID Org Regulation~~]

- (2) (in CONRED) a recommendation that is *advice on investments*

and:

...

- (3) (in relation to *advising on investments (except P2P agreements)*) a recommendation:
- (a) made to a *person* in their capacity as an investor or potential investor, or in their capacity as agent for an investor or a potential investor;
 - (b) which constitutes a recommendation to them to do any of the following (whether as principal or agent):
 - (i) *buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular investment which is a security, a structured deposit or a relevant investment (that is, any designated investment (other than a P2P agreement), funeral plan contract, pure protection contract, general insurance contract, right to or interests in a funeral plan contract or structured deposit); or*
 - (ii) *exercise or not exercise any right conferred by such a relevant investment to buy, sell, subscribe for, exchange or redeem such an investment;*
 - (c) that is:
 - (i) *presented as suitable for the person to whom it is made; or*
 - (ii) *based on a consideration of the circumstances of that person; and*
 - (d) that is not issued exclusively to the public.

[Note: article 9 of the *MiFID Org Regulation* and article 53(1C) of the *Regulated Activities Order*]