



Financial
Ombudsman
Service

amendment to rules (Benchmarks Regulation, MiFID2 and advising on investments)

March 2018

feedback statement

The consultation paper *amendments to rules (Benchmarks Regulation, MiFID 2 and advising on investments)* proposed changes to the rules, standard terms and guidance of our voluntary jurisdiction, as set out in the Dispute Resolution: Complaints sourcebook (DISP) of the Financial Conduct Authority Handbook.

The ombudsman service currently has two jurisdictions –

- the compulsory jurisdiction (CJ):
 - covers financial businesses regulated by PRA and FCA;
 - covers activities specified in rules made by 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 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 for the VJ. It is generally the ombudsman service's policy for the rules and standard terms for the VJ to match those for the CJ. This is to minimise confusion for consumers and financial businesses, and for operational simplicity.

Markets in Financial Instruments Directive 2 (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 has been revised. The new legislation known as MiFID 2 – which includes a revised MiFID and a new Markets in Financial Instruments Regulation – took effect from 3 January 2018.

We consulted on changes to DISP as a result of MiFID 2 between 10 October and 6 November but received no responses. The FCA made changes to DISP as a result of MiFID 2 (through the Conduct, Perimeter Guidance and Miscellaneous Provisions (MiFID 2) Instrument). Our consultation proposed mirroring the changes made in the CJ in the VJ by amending DISP 2.5.1 and Annex 1 to DISP 2, so as to ensure that complaints relating to MiFID 2 business are covered by the VJ. The FCA also amended the FCA Glossary as a result of MiFID 2 and we proposed adopting the relevant amendments to terms used in DISP.

Minor changes were made to the drafting of the instrument subsequent to consultation – for instance the drafting of the previous version incorporated the changes which would have been made by the delayed benchmarks instrument, because these changes would have come into force before the MiFID 2 instrument came into force. None of the changes are substantive. The FCA Board consented to and approved these rules on 7 December and our Board passed them on 12 December. The final instrument has been published by the FCA and is available [here](#).

Financial Advice Market Review (FAMR): implementation Part II

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 Regulated Activities Order (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 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 expected 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 added the activity of “non-personal recommendation advice” to the CJ by adding a seventh specified activity in DISP 2.3.1R.

We consulted on changes between 10 October and 6 November but received no responses. We proposed mirroring this change in the VJ by adding the activity to the list of CJ activities adopted into the VJ by DISP 2.5.1R. As the FCA made minor changes to its instrument, we also made minor changes our instrument to mirror the changes being made. None of the changes were substantive. The FCA Board consented to and approved these rule changes on 7 December and our Board passed them on 12 December. The final instrument has been published by the FCA and is available [here](#).

EU Benchmarks regulation

The FCA published a consultation on 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). The BMR concerns benchmarks such as LIBOR and EURIBOR. The consultation included 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 proposed amending DISP to exclude the regulated activity of “administering a regulated benchmark” from the CJ.

We don’t currently have any complaints about “administering a regulated benchmark” and don’t typically receive any. We are not aware of any VJ participants who carry on this activity. For these reasons, it is our view that it is not appropriate to retain the activity for VJ participants and have consulted on removing it. We consulted between 10 October and 6 November but received no responses.

We did not proceed with these rules updating the VJ rules, standard terms and guidance to exclude this activity from our VJ, as a statutory instrument to change the wording of the activity from “administering a registered benchmark” to “administering a benchmark” was yet to come into force. Now that it has we intend to proceed with the rules.