

EFFECTA'S ESSENTIAL INSIGHTS: A REGULATORY UPDATE

UK, July 2023

Welcome to EFFECTA's Essential Insights, a quarterly newsletter aimed at providing its readers with succinct overviews of some of the key regulatory issues currently faced by Firms.

2023 has been a busy year so far, with the Regulators grappling with how to oversee crypto assets and firms still looking to new jurisdictions in the aftermath of Brexit. With an increasing number of Firms looking to operate between the UK and UAE, EFFECTA has been perfectly positioned to support firms, providing advice on how to set up in the UAE and operate global models covering the critical time zones of Europe/US and Middle East/Far East.

As always, our newsletter reflects our consultants, diverse in background and knowledge base. We all enjoy assisting firms with their regulatory questions, but also hold very different areas of expertise, enabling us to cover a wide client base and bring more than one perspective to the table.

More information about our individual consultants can be found on our [website](#), but if you would like to discuss any of the topics covered in this newsletter and what implications they may have to your business, please do reach out to us on info@effectacompliance.com.

To review Effecta Middle East's Newsletter, [please click here](#).

In this newsletter EFFECTA UK covers the following topics:

1. Consumer Duty – One Month to Go

With the Consumer Duty Implementation date fast approaching, the FCA issued a Press Release on 28 June 2023 which provided a list of questions for Firms to answer. The purpose of these questions is to support Firms in assessing how prepared they are for the Consumer Duty.

[To understand more, please click here.](#)

2. The Aftermath of Brexit – Is progress finally being made?

On 27th June 2023, HM Treasury confirmed the UK has entered into a Memorandum of Understanding with the EU with regards to financial services. This act, combined with the Royal Assent of the Financial Services and Markets Bill suggests progress is being made in the aftermath of Brexit.

[To find out more, please click here.](#)

3. Governance – Culture continues to be an area of focus for the FCA

Conduct and Culture have been continued areas of focus for the FCA since 2017, with representatives from the Regulator regularly delivering speeches on their importance to the UK markets.

In June 2023, Emily Sheppard from the FCA, delivered such a speech at Westminster Business Forum. The focus on this occasion was around failures of UK Firms to properly assess the fitness and propriety of new recruits.

[To find out more, please click here.](#)

4. Financial Crime – The Julius Baer International Limited Case

In 2022, the FCA fined Julius Baer International Limited over £18 million for failings which resulted in improper payments being made to a third party. In addition, 3 of the Firms Senior members of Staff were banned from the financial services industry.

In 2023, the Upper Tribunal overruled the FCA's ban of the 3 individuals on the basis the individuals were negligent rather than reckless.

[For more information on the case and the failings by the Firm, please click here.](#)

5. FCA trading venue perimeter guidance: Are you affected?

In September 2022, as part of the Wholesale Markets Review ("WMR"), the FCA consulted on providing advice to Firms on the regulatory perimeter for trading venues. This consultation followed an acknowledgement by the Treasury that there was a greater need for clarity about the types of Firms which need to be authorised as a trading venue.

In July 2023, the FCA released its Policy Statement which has provided Firms with more tangible guidance on the trading venue perimeter, and which will result in a number of Firms analysing whether they have the correct regulatory permissions to conduct their existing activity.

[To find out more, click here.](#)



1. Consumer Duty – One Month To Go!

Background

The Consumer Duty will apply from 31 July 2023 for new and existing services that are open for sale or renewal.

The Financial Conduct Authority (FCA) has created, and maintains, a page on Consumer Duty ('Duty') to assist Firms with their implementation of the Duty. Originally published on 4 October 2022, the latest update was a press release on 28 June 2023.

What did the June 2023 Press Release say?

The Press Release set out ten key questions for Firms to consider in advance of the 31 July 2023 Consumer Duty Implementation deadline. The questions seek to help Firms assess how prepared they are for the Consumer Duty. The FCA expects Firms to consider these questions over the next few weeks and to develop a plan to remediate any gaps identified whilst considering these questions.

Within the Press Release, the FCA reported the findings from its recent Firm survey on readiness for the Consumer Duty. The results of this survey were that the majority of Firms (64%) believe they are on course to fully implement the Duty on time and 91% of Firms have a named person responsible for the Firm meeting the Duty (A 'Consumer Duty Champion').

What should Firms be doing now?

With only a few weeks until implementation date, Firms must consider the 10 questions laid out by the FCA and which can be found [here](#).

The consideration of these questions should be documented, with the findings clearly communicated to the Board or equivalent management body of your Firm.

Remember, the FCA can ask to see documentary evidence of a Firm's approach to the Consumer Duty project. Therefore, Effecta strongly advises Firms to ensure they have all required analyses, project plans and key documentation relevant to the project filed and ready to be provided to the FCA if requested.

Firms which are not directly impacted by the Consumer Duty should still ensure they have documentation available which evidences their analyses of the Consumer Duty and why it is not applicable to the Firm. Effecta has a number of wholesale clients who have received FCA requests for such documentation.

How can Effecta help?

Effecta is supporting a number of clients with their Consumer Duty projects and can therefore offer Firms specialist advice on the applicability of the Consumer Duty, as well as practical advice on the types of steps which the Regulator expects to be taken to meet the new requirements.

If you would like advice on how the Duty impacts your Firm, or for a third party to review your documentation to assess its adequacy, please do not hesitate to contact Effecta.



2. The Aftermath of Brexit: Is Progress Finally being made?

Background

On 27 June 2023, HM Treasury published a Press Release confirming the UK and the EU would be signing a Memorandum of Understanding on financial services.

What is the significance of the Memorandum of Understanding?

The Memorandum of Understanding ("MoU") sets out plans for cooperation between the EU and UK.

Since the UK's departure from the EU, the level of co-operation between the UK and the EU has been undetermined and lacking certainty. This has resulted in many Financial Services Firms looking to other jurisdictions outside of the EU to set up group entities. Therefore, the signing of the MoU is a significant step in demonstrating a willingness and perhaps more importantly, a certainty, to co-operate on both the UK and EU side.

What does the Memorandum of Understanding cover?

The MoU is similar in nature to the Co-operation agreements the UK already shares with Japan, Singapore and the United States. Whilst it is a significant step in demonstrating a willingness to co-operate, similar to the existing MoU's, these agreements are more symbolic than substantive in nature. The HM Treasury Press Release very clearly repeated the MoU enables the UK and the EU to discuss voluntary co-operation on financial services issues, where appropriate. Perhaps the key point is the MoU does not create any rights of obligations for either the UK or the EU.

What changes are the UK making following Brexit?

As reported in Effecta's previous Quarterly updates, HM Treasury has been clear in its objective post Brexit – to ensure the UK remains a competitive hub for Financial Services. One of the ways in which the Treasury looks to ensure the UK market remains attractive post Brexit, is the review of certain pieces of EU legislation, with the intention to remove any unnecessary red

tape for Firms. As a result, the Treasury and the FCA have been consulting on several pieces of EU Regulation over the last few years, with proposed amendments now being publicised.

The Financial Services and Markets Bill receiving Royal Assent on 29 June 2023 demonstrates how committed the UK Government is to increasing the competitiveness of the UK economy. A clear provision of this Act is "to remove unnecessary restrictions on wholesale markets".

How can Effecta help?

Effecta has offices in the UK and the UAE and can advise clients operating in either jurisdictions. Effecta recognises the importance of Firms operating globally, and it is for this reason Effecta established a Global Brokerage Team earlier this year, which is Headed up by Clementine Bowyer, a Director with 15 years in house experience advising Firms with global operations.

If you need any support or advice on how to operate across multiple jurisdictions, or advice on the impact of Brexit on your Firm, please do reach out to the team here.



3. Governance – The FCA continues to focus on the importance of Culture in Westminster Business Forum Speech

Background

Conduct Risk and Culture have been areas of focus for the FCA since the Financial Crisis, with the Regulator publishing 'the 5 Conduct Questions' in 2017. The implementation of SMCR for the majority of Firms in 2019 sought to support the focus on Conduct and Culture further, with the Regulator highlighting the importance of tone from the top.

The FCA continues to focus on Conduct and Culture, with Emily Sheppard (Chief Operation Officer and Executive Director of Authorisations) delivering another speech on this area on 26 June 2023.

Why does the FCA focus on Culture?

The FCA's view on Culture has been clear since 2017 – Culture underpins Conduct. The Regulator believes Firms which have poor cultures are likely to make the wrong conduct decisions, resulting in potential harm to the UK market. It is for this reason the FCA believes Firms (in reality, Senior Management) should concentrate on ensuring a healthy culture exists within their organisations. Once a healthy culture exists, the FCA believe individuals are likely to make the right conduct decisions, reducing the risk of harm to the UK market.

What did the recent FCA Speech Focus on?

The speech reiterated the importance of Culture, and the direct link the FCA believes it has on market outcomes. The Consumer Duty and changes within the FCA were discussed but perhaps the biggest area of focus was the section on "Stopping repeat recruitment of bad apples".

The FCA noted concerns it has on Firms turning a blind eye to previous poor conduct and failing to fully investigate the integrity of individuals prior to approving them to be fit and proper.

The FCA stated "The best predictor of future behaviour is past behaviour", and specifically highlighted the requirement for Firms to take regulatory referencing more seriously.

What should Firms be doing?

Whilst the obtainment of regulatory references was specifically noted, this was not the only element raised by the FCA. Firms need to be able to demonstrate the proactive steps taken to obtain information about an individual, both from a previous employment and general conduct perspective, prior to certifying them to be fit and proper. All background screening checks are essential, including interviewing individuals to get an understanding of their approach to regulation and general conduct.

The FCA highlighted Firms should not be reticent to implement additional oversight on new recruits such as additional monitoring checks, restrictions on activity or the extension of probationary periods.

How can Effecta help?

Effecta is incredibly busy supporting clients in this area. Below is a list of the types of support Effecta can provide to clients in this area:

- Preparation and submission of Senior Managers application Forms to the FCA, including the provision of templates to support individuals to complete the 5 prescribed supporting documents.
- SMCR Handbook and Procedure documents, including annual fitness and propriety checklists and processes.
- Governance reviews to identify whether a Firms current Governance Structure meets the FCA requirements and UK Corporate Governance Code.
- Submission of Certified Staff to the FCA, as well as the removal of individuals from the FCA Register
- Mock FCA Interview and preparation for new SMFs of a Firm
- SMCR Training to Firms both online and in person

Should you require any support in this area, please reach out to Clementine Bowyer [here](#).



4. Financial Crime – The Julius Baer International Limited Case

Background

In February 2022, the FCA fined Julius Baer International Limited ("JBI") just over £18million for failing to conduct its business with integrity, failing to take reasonable steps to control its affairs and for failing to be open and cooperative with the FCA.

In addition to the fine against the Firm, the FCA banned three individuals who held senior positions at JBI from operating in the UK Financial Markets.

What were the FCA's findings?

The FCA actions related to its findings that JBI had made improper payments to a third party.

The Findings against the Firm highlighted JBI did not have adequate policies and procedures in place to identify and manage the risks associated with introducers/finders. Consequently, the FCA stated JBI did not have a sufficient control framework in place and failed to identify the risks associated with this activity.

In addition to the findings against the Firm, the FCA believed the 3 senior individuals turned a blind eye to the signs the payments were corrupt, resulting in the Firm being used for Financial Crime. The FCA also noted that the Firm failed to notify the FCA of its concerns once it suspected a potential fraud had been committed.

How did the Case end up in the Upper Tribunal?

Whilst the findings against JBI were not challenged, the 3 individuals who had been banned by the FCA appealed the decision, referring their Decision Notices to the Upper Tribunal for consideration.

On 13 June 2023, the Upper Tribunal overruled the FCA's decision to ban the individuals stating it did not accept the individuals' lacked integrity. Whilst the Tribunal was critical of the individuals conduct, it considered their actions negligent rather than reckless and did not believe their actions met the threshold to be considered unfit or improper to operate in financial services.

What can Firms learn from this case?

Whilst the FCA decision was overturned in this instance, there are several key issues raised in this case which Firms should consider.

1. **Introducers:** Whilst such arrangements are permitted, there are risks associated with payments related to introducers. Both recent case law and the FCA are clear it is the responsibility of the Firm making the payment to an introducer to ensure they are acting appropriately and within the appropriate parameters. If you have such arrangements in place, you must ensure you have identified the risks with the relationship and have adequate policies and procedures in place to mitigate them.
2. **Suspicious Activity:** Firms need to have sufficient systems and controls to identify suspicious activity and perhaps most importantly, need to understand the threshold for when a report must be made to a Regulator or appropriate organisation; it is when you have a reasonable suspicion, not when you can know the behaviour is the result of financial crime.
3. **Individual Responsibility/SMF:** Whilst the Upper Tribunal overruled the FCA's ban on the individuals, they did agree the individuals' behaviour had been negligent. The intention of the SMCR is for individuals to be held accountable for their actions and this case demonstrates the FCA are not scared to act against individuals who they believe have not met their responsibilities as a Senior Manager.

How can Effecta help?

Financial Crime is an area of focus for the FCA and for this reason Effecta has a specialist AML Department who can help advise Firms on any KYC or Financial Crime matters, including the review of internal policies and procedures or completing monitoring checks.

Please do reach out if you would like to discuss any AML/KYC or Financial Crime matters with a member of our AML team.



5. FCA trading venue perimeter guidance: Are you affected?

Background

The definition of a trading venue has long been an area of regulatory triage, with different Firms interpreting the various elements of a multilateral system entirely differently. This has resulted in an unlevel playing field, with some Firms in the UK operating similar businesses but holding different regulatory permissions.

Following the focus in the US on this same area, the FCA have sought to provide greater clarity on what constitutes a trading venue. The FCA has been clear, this policy statement is guidance only – it does not represent a change in legislation.

Who should read the Policy Statement?

Traditional trading venues are not the only types of Firms which have been impacted by the definition of multilateral trading. The impact has been far reaching, extending to Firms such as technology providers having to consider whether they fall within the perimeter. Therefore, Effecta strongly advises any entity which is involved in the provision or support of a system which brings together multiple party interests should read the paper. This includes technology providers, portfolio managers, and crowd funding platforms, to name a few.

What are the key take aways?

The Policy Statement repeats the legislation, highlighting there are four elements to consider when determining if a Firm is operating a trading venue. These are whether:

- i. the arrangements have the characteristics of a system or facility;
- ii. it comprises multiple third-party buying and selling trading interests;
- iii. such trading interests are able to interact in the system; and
- iv. those trading interests are in financial instruments.

The Policy Statement provides more granular guidance on each of these elements, confirming that if a person operates a multilateral system, it will require authorisation to operate a trading venue.

The above is nothing new in principle but readers will obtain a very detailed understanding of each of the elements, making it much easier to understand whether any platform you are operating meets the definition of a trading venue.

The Policy Statement does emphasise repeatedly that where a Firm does not meet the definition of a multilateral system, it will not require authorisation as a trading venue, but will need to consider whether it requires authorisation for other regulated activities, including arranging deals in investments and/or making arrangements with a view to transactions in investment. It is perhaps this latter element that is the most significant, drawing Firms' attention to the wider remit of activity which might require regulatory permissions.

The FCA has been clear in certain areas such as:

- i. Confirming there is a distinction between a technology provider and an operator of a venue;
- ii. Order Management Systems and Execution Management Systems are not by default trading venues, recognising that order routing systems are tools rather than characteristics of a trading venue. A similar approach has been recognised with internal matching systems operated by Portfolio Managers.
- iii. Voice broking is not a multilateral system unless such activity is done so under the rules of a system.
- iv. Bulletin Boards and Crowd funding platforms which simply introduce parties to potential interests do not amount to a multilateral system.
- v. RFQ Systems: The FCA confirmed the bilateral arrangement of a trade does not make an RFQ system bilateral. Instead, an RFQ system must be considered multilateral if, at the point of entry, one person is able to potentially interact with multiple others.

There are a number of other clarifications, with the above being only a handful of some of the specific comments.



What should Firms be doing?

The FCA is clear in its Policy Statement, the Final Guidance will come into force on 9 October 2023.

Firms must review the guidance and complete a full analysis not only on whether its platform meets the definition of a trading venue, but also whether any activity with regards to the operation of a platform constitutes arranging. It is perhaps this latter point which brings into question more analysis for Firms than originally expected.

How can Effecta help?

Effecta is a specialist in trading venues, and already offers regulatory advice to a number of clients in this area. Having recently completed a successful trading venue application, Effecta Compliance Limited has a strong understanding of the interpretations applied by the FCA and the types of issues Firms should consider in identifying whether they are operating a trading venue.

If you would like support in identifying whether your Firm is operating a Trading Venue, or should you require support in terms of drafting trading venue handbooks and control frameworks, please reach out to Clementine Bowyer [here](#).

