Overseas Framework Call for Evidence
International Policy & Partnerships Team
HM Treasury
1 Horse Guards Road
SW1A 2HQ

By email: overseasframeworkcfe@hmtreasury.gov.uk

11 March 2021

Dear Sir, Madam

Re: Overseas Framework: Call for Evidence

We are writing on behalf of the British Private Equity and Venture Capital Association ("BVCA"), which is the industry body and public policy advocate for the private equity and venture capital industry in the UK. With a membership of over 700 firms, we represent the vast majority of all UK based private equity and venture capital firms, as well as their professional advisers and investors. Between 2015 and 2019, BVCA members invested over £43bn into nearly 3,230 UK businesses, in sectors across the UK economy ranging from heavy infrastructure to emerging technology. Companies backed by private equity and venture capital currently employ 972,000 people in the UK and the majority of the businesses our members invest in are small and medium-sized businesses.

The BVCA is delighted to have the opportunity to respond to HM Treasury's call for evidence on the Overseas Framework. The BVCA considers that the Overseas Framework represents an important access route to the UK economy and agrees with HM Treasury's observation that open markets are vital to support economic growth, supporting the UK's position as a global financial centre. The BVCA also agrees that the financial services sector must be supported by effective, proportionate regulation and high standards. As a general comment, the BVCA considers that whilst the different access routes under the Overseas Framework can be seen as resulting in a degree of complexity, they each serve important purposes and are generally well understood by those market participants who rely on them. In particular, the BVCA considers that any overlap between the OPE, MiFIR Title VIII, ROIEs, the distribution of long-term insurance products and the FPO is imperfect and that to remove any one of these access routes, without codifying the exemptions contained in it elsewhere in the UK's financial services regulatory framework, could risk damaging firms' ability to access the UK market in an efficient way. We set out below responses to each of the specific questions in the Call for Evidence.

Q1: 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.

As noted above, the BVCA represents a large number of private equity and venture capital firms based in the UK. Different member firms operate different structures and different relationships between their UK and overseas entities (where those member firms have overseas entities). Many, but by no means all, private equity and venture capital firms will use limited partnership vehicles (or various overseas equivalents) as a fund vehicle to which external investors are admitted. Some structures will involve a UK entity providing delegated services to an offshore entity (for example, some member firms have a Luxembourg or Channel Islands fund structure with a fund manager based in Luxembourg

or the Channel Islands and a delegated investment manager or adviser based in the UK). Other member firms have a significant overseas presence and their UK entity may be a subsidiary of a parent venture capital or private equity firm based overseas (for example in the USA or elsewhere in Europe). Still other members advise, manage and/or operate fund structures which may themselves need to invest in overseas vehicles – whether directly in overseas companies or, particularly in the case of "fund of funds" structures, in funds located and/or managed overseas.

Q2: 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 [of the Call for Evidence]?

Whilst the range of different exemptions under the existing overseas framework can give rise to complexity, in our view the routes of access currently available to overseas persons are important to enabling the UK to meet the overarching principles set out in paragraph 1.7 of the Call for Evidence. Were the range of routes to access the UK market to be reduced simply for the sake of simplifying the regime we consider that economic damage could be done to the UK economy. We would in principle, however, be in favour of simplification that allowed for all the existing routes of access to be maintained and/or expanded, although we recognise that this may be difficult to achieve in practice.

Q3: Are there any specific risks that the current regimes for overseas firms do not adequately address?

We are not aware of specific risks which the current regimes for overseas firms do not address. However, economic and reputational risks could arise from restricting access to the UK market by tightening or removing any of the current regimes for overseas firms to access the UK market.

Q4: Are there specific complexities around the regime you think need to be addressed?

As noted in response to Q2 above, we would in principle be in favour of simplification that allowed for all of the existing routes of access to be maintained and/or expanded, although we recognise that this may in practice be difficult to achieve. In our view, the economic costs of any simplification that reduced routes of access to the UK market would outweigh any benefits of such simplification.

Q5: 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?

In our view, there is limited overlap between Article 47 of MiFIR and the OPE. Article 47 of MiFIR represents a specific route to UK access for overseas firms in respect of whose jurisdiction an equivalence decision has been made and who meet certain conditions in relation to supervision in their home jurisdiction and registration with the FCA in the UK. As such, in our view, Article 47 represents a form of regulatory mutual recognition, allowing (within clear limits) for overseas firms to undertake certain business in the UK that would otherwise require direct FCA authorisation in reliance on the equivalence of their home jurisdiction's regulatory system. In contrast, the OPE represents part of the territorial regulatory perimeter: delineating that certain activities that might otherwise fall within the UK regulatory perimeter do not do so where undertaken by an overseas person where the conditions of the OPE are met. Put another way, Article 47 in our view should represent a means of accessing the UK market where the OPE is not available and a firm would otherwise fall to be directly regulated in the UK: the OPE is part of setting the UK's regulatory perimeter; whereas Article 47 is one means of lawfully entering that perimeter.

Q6: Are there national exclusions/exemptions in other jurisdictions that provide benefits comparable to those provided by the UK's regime?

Most jurisdictions have legislation setting out the territorial perimeter of their regulatory regime and the precise details of those perimeters varies by jurisdiction and activity, typically using a combination of setting the perimeter through primary legislation and then creating applicable exemptions for particular scenarios, as the OPE does in the UK.

Q7: What changes do you think should be made to the operation of the OPE, and what would be the advantages and disadvantages?

We consider that the OPE broadly works as drafted. Additional clarity setting out the circumstances in which it is available in the FCA's perimeter guidance sourcebook could be helpful both to firms and the regulators. Any such guidance should take an expansive approach to the scope of the OPE so as to be consistent with the broad way in which it is drafted.

Q8: 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?

BVCA members and their overseas affiliates / counterparts will use different aspects of the overseas framework depending on their structure. However, the flexibility afforded by the multiple routes to access under the current overseas framework are important to maintaining firms' ability to access the UK and structure their international businesses in ways that are efficient from an operational and financial perspective. Any narrowing of the scope of the routes to access the UK under the overseas framework could damage firms' ability to access the UK and be of detriment to the UK's position as a major financial market, particularly following the expiry of the Brexit transitional period.

Q9: Please comment on your current and future use of the OPE, the ROIE and FPO exemptions specifically, as well as any other specific regimes under the access framework, setting out in particular:

a) Your primary location.

The BVCA represents UK venture capital and private equity firms. In terms of international footprint, these firms range from entirely UK based firms with UK based fund structures through UK headquartered firms with (some or all) overseas fund structures to firms where the UK entity forms part of a larger overseas headquartered group.

b) The type of client/counterparty you interact with in the UK.

Many BVCA member firms will interact primarily with professional investors and regulated institutions at investor level, although others admit a broader range of investor including (where applicable suitability requirements are met) retail investors. All BVCA member firms are likely to interact with a wide range of businesses in the UK – and frequently overseas – as investee companies / vehicles or counterparties to transactions.

c) The type of activity conducted and through which regime (please be as specific as possible).

This will vary between BVCA member firms. However, many firms will act as an alternative investment fund manager (an "AIFM"); some will act as an investment manager regulated under MiFID; and some will act as an adviser / arranger firm (that is, a firm with regulatory permission to provide investment advice and arrange transactions in investments). Most BVCA member firms will have one or more FCA authorised entities within their group with one or a combination of the above permissions and potentially others. Many, although by no means all, firms will also have one or more overseas regulated entities which will typically (but not necessarily) interact with a UK entity, for example some BVCA member firms might have a Luxembourg AIFM or a Channel Islands general partner vehicle which delegates the provision of investment management or investment advisory services to a UK FCA authorised entity within their group. These structures allow the efficient allocation of activities, including risk management, between international entities within a member firm's structure and often facilitate the marketing of fund products into particular markets.

d) Whether you have regulatory permission in your home state.

Please see the response to c) above.

e) Whether, and if so how, your use of these regimes enables you to manage business between different group entities, for example for risk management, or is used in conjunction with other group entities or structures as an alternative means of access or to expand the range of services that may be offered?

Please see the response to c) above.

f) How your use of these regimes may change in future?

Where necessary, BVCA member firms have implemented planning to enable them to carry on business following the expiry of the UK's Brexit transitional period. Now that period has expired, it is likely that we will continue to see a gradual evolution in fund, and fund management, structures.

Specifically, if the OPE is used:

g) Volume of business of different types connected to the OPE per annum.

As noted above, different BVCA member firms will operate different structures which will make use of the OPE to varying degrees. However, the availability of the OPE is important to enabling firms to continue to access the UK market both practically and also in the signal that the availability of the OPE sends to overseas markets about the extent to which the UK is "open for business" following Brexit.

h) Benefits accruing from the OPE, including capital treatment or access to clients.

Please see the response to g) above.

i) How important is the existence of the OPE for your current business model, booking arrangements and your use of the UK as a risk management hub? Please explain its advantages and any disadvantages.

Please see the response to g) above.

j) The type of approach used. Please be specific about using 'with or through' or 'legitimate approach'. If using a 'legitimate approach' please also be specific about the legal basis on which you rely not to breach the financial promotion regime.

Please see the response to g) above.

k) Whether you could rely on different approaches to the one your firm uses. If so, which approaches would be available to you? This includes not only relying on 'with or through' instead of a 'legitimate approach', as well as different legal bases for making a legitimate approach.

Please see the response to g) above.

l) If there are several different approaches available to you, could you comment on why you have chosen the approach you rely on?

Please see the response to g) above.

m) Does the OPE raise any practical challenges for you, either generally or more specifically in terms of ensuring your firm's compliance with it from a systems and controls point of view?

Please see the response to g) above.

n) Are there specific aspects of the OPE which give rise to uncertainty, for example over its application in some circumstances, and how might these be remedied?

Please see the response to question 4 above.

o) To what extent is your use of the OPE driven by tax residence considerations and/or any other non-regulatory consderations?

Please see the response to c) above.

p) If you are an overseas firm, do you use the OPE as a basis for undertaking business with other entities within your group and, if so, how do you use it?

Please see the response to c) above.

q) If you are a firm authorised in the UK, what business benefits do you get from dealing directly with overseas firms which rely on the OPE?

Please see the response to c) above.

r) How important is the intragroup exemption for your current business model, booking arrangements and your use of the UK as a risk management hub? Please explain its advantages and any disadvantages?

Please see the response to c) above.

Questions 10 to 11 are specifically addressed to insurers and insurance intermediaries whilst questions 12 to 19 are specifically addressed to trading venues. Accordingly, we have not provided responses to those questions. However, some of our member firms are users of trading venues (for example, when seeking to list shares on an exit from an investment or purchasing shares in the context of a transaction with a public component such as a "public to private" acquisition). In that context, we consider that continued flexibility in the ability of trading venues (including both formal exchanges and other trading venues) to access the UK market is important. Accordingly, we would welcome any proposals that enhance that access but would discourage any proposals that narrow the routes to access UK markets for overseas trading venues.

We would be very keen to discuss the contents of this letter with you and look forward to hearing from you in order to establish whether a meeting of this sort is possible.

Yours faithfully,

Tim Lewis
Chair, BVCA Regulatory Committee