



Brexit update for financial services firms – 21 December 2018 to 4 January 2019

In outline:

During the two holiday weeks covered by this update, the flow of Brexit publications relevant to financial services (FS) continued – more than 17 documents are listed below. Publications from the House of Commons/Lords cover topics such as the EEA, the UK Government's no deal preparations, the stability of the Union and whether the Withdrawal Agreement could be terminated under international law. These can be found in the "Other publications" section below.

With the ratification of the Withdrawal Agreement (WA) in doubt, the main focus has been on 'no deal' issues. In the UK, the progress of FS related NtA/onshoring¹ statutory instruments (SIs) continued with the publication of updated material on the financial services contracts regime (FSCR) – with an updated explanatory memorandum and two SI drafts - the Financial Services Contracts (Transitional and Savings Provisions) (EU Exit) Regulations 2019 (see Document 4 below). These SIs amend earlier SIs to introduce the FSCR which provides run-off mechanisms to compliment several temporary/transitional regimes which the UK is adopting for incoming EEA firms, including those for payment and e-money institutions and for central counterparties and trade repositories. (See [our previous commentary in last week's update](#) and the FCA publication on the FSCR at Document 4 of that update). The FSCR will allow EEA firms which are running off their UK business to continue to service pre-Brexit contracts after 29/3/19, even though they are not covered by one of the UK's temporary/transitional permissions regimes.

The explanatory notes have separate annexes explaining how the FSCR will operate for different types of firm/institution – one of these relates to FS firms that currently passport into the UK under FSMA 2000². These EEA firms will be able to obtain full authorisation through the Temporary Permission Regime (TPR), but those that do not do so will be able, under the FSCR, to 'continue to carry out business to the extent necessary to run off pre-existing contractual obligations in the UK, but not to undertake new business'. Unlike the TPR, entry into the FSCR is automatic for firms that do not enter the TPR at all or those that leave the TPR without full UK authorisation. There will be two types of run off – supervised run-off (SRO) and contractual run-off (CRO). SRO will apply to firms that have a UK branch, that enter TPR but exit without authorisation and those holding pre-Brexit top-up permissions. The SRO will operate like the TPR in that firms will be deemed to have a Part 4A authorisation for the limited purposes of run-off. Other firms that operate under the services passport (and have not entered the TPR and do not hold top up permissions) will operate under CRO. The CRO does not involve authorisation/UK regulation; these firms will continue to be supervised by their home state and will be covered by a limited exemption (from the section 19 prohibition) to enable them to conduct run-off.

The FMLC published 2 reports (see Documents 2 and 3 below) raising issues on 2 pieces of 'no deal' legislation - the Financial Services (Implementation of Legislation) Bill (see our previous commentary [here](#)) and the MiFID NtA SI.

You can access our database of all FS legislation (both EU and UK) for a no deal scenario [here](#).

Previous updates have covered the minimalist approach of the EU to transitional arrangements for a no deal scenario. In their December communication on implementing their no deal contingency plan, the EU announced two temporary and time limited equivalence decisions to cover central clearing services of UK central counterparties (CCPs) and, so called, notary and central maintenance services of central securities depositories (CSDs) - see our previous commentary [here](#). The European Commission has now adopted these 2 equivalence decisions in the

¹ Nationalising the Aquis

² Financial Services and Markets Act 2000

form of Implementing Decisions (see Document 1 below). They have time limits of 30 March 2020 for CCPs and 30th March 2021 for CSDs.

It is interesting to see that the EU has no difficulty, when it suits its policy objectives, in making equivalence decisions for the UK, whilst the UK is still an EU member (effective at exit if the WA is not in force). The decisions contain the normal review of the requirements for equivalence; these include equivalent regulation of UK CCPs/CSDs, the need for cooperation arrangements with the UK (the importance of which is emphasised in the decision recitals) and the need for UK law to contain a similar reciprocal recognition regime. On the first issue, the decisions note that the UK will have identical regulation as a result of the NtA/onshoring process under the European Union (Withdrawal) Act 2018. On the last point, the decisions note that the NtA/onshoring process has resulted in the UK having the same third country recognition regimes as the EU.

Given the UK's mirror of EU regulation at the point when it leaves the FS single market (either on exit or at the end of the WA transitional period), one might have thought that the EU would be obliged to have a full set of UK equivalence/recognition decisions in place at that point - see our [April 2017 report](#) for analysis of the EU's equivalence assessment and decision making process. One would have thought that the UK satisfies all the equivalence requirements. As we explained in our previous [update](#), however, the EU uses the possibility of granting, withdrawing or time-limiting equivalence decisions for broader political/negotiating objectives. As we explained, this issue has arisen in the context of the Swiss/EU negotiations, where the EU has now extended their equivalence/recognition decisions on Swiss trading venues but imposed a six-month time limit in order to maintain pressure on Switzerland to agree/ratify the new Swiss/EU institutional treaty – please [click](#) here to view the Commission's press release of 17th December 2018. If the Swiss fail to agree the treaty, the EU says there will be no further extension/renewal.

The EU's tactics are very similar to its approach to the Brexit negotiations. With the exception of the two temporary decisions, it has refused to provide no deal equivalence decisions. The non-binding Political Declaration (PD) to accompany the WA (see the commentary in our previous update [here](#)) provides for the parties 'endeavouring' to complete equivalence assessments by the end of June 2020 (without any commitment as to the equivalence decisions themselves, when they would take effect or their duration etc.). In the context of a negotiated outcome – rather than a no deal scenario – this very vague commitment in a non-binding declaration seems a de minimis achievement by HMG (particularly given that this is the only commitment that HMG secured on DRC³ based access - and given that it had abandoned entirely its original objective of preferential access in FS). Another interesting aspect of the Swiss case (from a UK perspective) is that the EU has sought to assert objective grounds for their approach, namely that because of the close ties between EU and Swiss markets, reciprocity/equivalence is only appropriate if there is the strong institutional framework (as provided by the new treaty). There are obvious parallels with the UK position.

1. EC: BREXIT IMPLEMENTING DECISIONS

The following have been published in the Official Journal: Commission Implementing Decision (EU) 2018/2030 of 19 December 2018 determining, for a limited period of time, that the regulatory framework applicable to central securities depositories of the United Kingdom of Great Britain and Northern Ireland is equivalent in accordance with Regulation (EU) No 909/2014 of the European Parliament and of the Council and Commission Implementing Decision (EU) 2018/2031 of 19 December 2018 determining, for a limited period of time, that the regulatory framework applicable to central counterparties in the United Kingdom of Great Britain and Northern Ireland is equivalent, in accordance with Regulation (EU) No 648/2012 of the European Parliament and of the Council. The Commission Implementing Decision 2018/2030 can be accessed [here](#) and the Commission Implementing Decision 2018/2031 can be accessed [here](#).

2. FMLC: FINANCIAL SERVICES (IMPLEMENTATION OF LEGISLATION) BILL

FMLC has written to the Treasury (HMT) raising concerns with regard to legal certainty, specifically in relation to "in-flight" legislation. FMLC suggests that the Bill fails to take into account EU Level 2 legislation that does not come into effect before exit day and which will not therefore be retained under the Withdrawal Act and the list in Clause 1 of the Bill limits the scope of HMT's power to make regulations to implement "in-flight" legislation to only those identified in the list. The report can be accessed [here](#).

"The "in-flight" legislation listed in Clause 1(2) does not take into account those pieces of E.U. Level 2 legislation—like Commission Delegated Regulations which implement regulatory technical standards ("RTS") issued by European Supervisory Authorities in support of Level 1 legislation—that do not come into effect before exit day and will not therefore be retained under the Withdrawal Act. Anticipating this, HM Government has, by way of the Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 (the "Financial Regulators' Powers Regulations"), bestowed upon the Financial Conduct Authority (the "FCA"), the Prudential Regulation Authority (the "PRA"), the Bank of England and the Payment Systems Regulator (collectively the "regulators") the power to make "standards instruments" prescribing U.K. binding technical standards ("U.K.

³ Dual recognition coordination (DRC) is explained in Chapter 1 of our April 2017 Report. DRC is a broad term to cover a variety of techniques such as "mutual recognition", "home state recognition/supervision", "deference", "substituted compliance" and "passporting".

BTS"). "Onshoring" statutory instruments published under the Withdrawal Act contain provisions permitting regulators to make such BTS.

[...]

A second complexity arises because the list in Clause 1 of the Bill limits the scope of HM Treasury's power to make regulations to implement "in-flight" legislation to only those identified therein. The FMLC is given to understand that the list sensibly comprises only those pieces of "in-flight" legislation which would fall under the purview of HM Treasury. The effect of this, however, is that those pieces of "in-flight" legislation which are not specific to financial services but which nevertheless impose obligations and requirements on financial markets participants will not be implemented by this means post-Brexit."

3. FMLC: MARKETS IN FINANCIAL INSTRUMENTS - ONSHORING

FMLC's report considers legal uncertainties arising from the changes proposed by the Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018, including equivalence, information and thresholds published in the EU after exit day; and the new powers and functions given to FCA. The full report can be accessed [here](#).

"This paper considers legal uncertainties arising from the changes proposed by the draft Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018 (the "draft MiFI SI"). The draft MiFI SI makes amendments to retained law derived from Directive 2014/65/EU on markets in financial instruments ("MiFID II Directive") and Regulation (EU) No 600/2014 on markets in financial instruments ("MiFIR") (known collectively as "MiFID II"). These are the key pieces of E.U. legislation which govern the buying, selling and organised trading of financial instruments, such as shares, bonds, units in collective investment schemes and derivatives. MiFID II has been implemented in the U.K. through several pieces of domestic secondary legislation, including the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 (the "MiFI Regulations 2017"), the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the "RAO") and the Data Reporting Services Regulations 2017. Each of these is also amended by the draft MiFI SI."

4. DRAFT FINANCIAL SERVICE CONTRACTS (TRANSITIONAL AND SAVING PROVISION) (EU EXIT) AND DRAFT FINANCIAL SERVICE CONTRACTS (TRANSITIONAL AND SAVING PROVISION) (EU EXIT) (NO. 2) REGULATIONS 2019

Draft Regulations laid before Parliament under paragraphs 1(1) and (2) and 12(1) of Schedule 7 to the European Union (Withdrawal) Act 2018, for approval by resolution of each House of Parliament. The first draft SI can be accessed [here](#) and the second draft SI can be accessed [here](#). The explanatory note for the regulations can be accessed [here](#).

"Upon exit from the EU, EEA financial services providers who hold existing EEA passporting permissions to carry out regulated activity in the UK will lose these rights. This means that where these providers do not enter the UK's temporary permissions regimes (as set out in previously published policy notes) they may not be able to meet existing contractual obligations, as performing regulated activities in the UK without these permissions could be a criminal activity. This could lead to, for example, EEA firms lacking permissions to pay insurance claims to UK consumers. In addition, there are risks to UK firms if CCPs or TRs do not enter, or are removed from, the relevant temporary regime without the necessary permissions to continue to provide services in the UK.

This SI provides a run-off mechanism to several temporary regimes which will allow existing contracts to continue being serviced post-exit:

- the Temporary Permissions Regime (TPR) for FSMA firms
- the TPR for payments and e-money institutions
- the Temporary Recognition Regime (TRR) for CCPs and the Temporary Registration Regime (TRR) for Trade Repositories (TRs)

This will mitigate the risk of a residual cliff-edge for providers that are not captured by the above temporary regimes."

Other publications from the RegZone Brexit news feed

HoL: Withdrawal Agreement: Section 13(1)(c) of the European Union (Withdrawal) Act 2018

This HoL library briefing paper has been prepared in advance of a debate scheduled to take place on 9, 10 and, provisionally, 14 January 2019 on "section 13(1)(c) of the European Union (Withdrawal) Act 2018, taking note of the negotiated withdrawal agreement and the framework for the future relationship". The full paper can be accessed [here](#).

Draft Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019

Explanatory notes in relation to this SI have been published and they can be accessed [here](#).

ESMA: Joint meeting of the Board of Supervisors and the SMSG

ESMA has now published a note of a meeting held on 8 November 2018. Topics include: no-deal Brexit, fintech and MiFID II implementation. The note can be accessed [here](#).

ECB: Interview with Sabine Lautenschläger

ECB has published the text of an interview conducted on 30 December 2018. Topics include ECB and preparations for no-deal Brexit. The full text can be accessed [here](#).

ECB: Supervisory priorities for 2019

ECB has set out its supervisory priorities for 2019, which include Brexit preparations, how banks measure and manage risks such as cyber risk and credit risk. The full publication can be accessed [here](#).

HoC: What if there's no Brexit deal?

This updated HoC library briefing considers how a no-deal Brexit might come about, the constitutional implications for the UK and the devolved administrations, and what the impact might be in a range of policy areas (including financial services). The full briefing paper can be accessed [here](#).

HoC: The EEA

This library briefing paper outlines the institutional structure of the EEA, its pros and cons and the debate over withdrawal from the EEA. The full paper can be accessed [here](#).

HoL: Leaving the EU: stability of the UK's union

This library briefing has been prepared ahead of a HoL debate on 17 January 2019. The full paper can be accessed [here](#).

HoC: Could the Withdrawal Agreement be terminated under international law?

This HoC Library briefing note considers provisions in the Vienna Convention on the Law of Treaties for terminating and denouncing treaties and arguments about whether these might apply in this particular case. The full report can be accessed [here](#).

Department for Exiting the EU: UK government's preparations for a 'no deal' scenario

This guidance note has been updated and can be accessed [here](#).

HMT: Record of the meeting between BoE and HMT of 12 December 2018

HMT has now published the record of the meeting between Mark Carney and Philip Hammond to discuss the November 2018 financial stability report. Topics include: the resilience of the UK financial system to Brexit. The full publication can be accessed [here](#).

Draft Insurance Distribution (Amendment) (EU Exit) Regulations 2019

Draft Regulations laid before Parliament under paragraph 1(1) of Schedule 7 to the European Union (Withdrawal) Act 2018, for approval by resolution of each House of Parliament. The draft SI can be accessed [here](#).

The Mortgage Credit (Amendment) (EU Exit) Regulations 2019

Draft Regulations laid before Parliament under paragraph 1(1) of Schedule 7 to the European Union (Withdrawal) Act 2018, for approval by resolution of each House of Parliament. The draft SI can be accessed [here](#).

[CMS RegZone](#) publishes weekly updates (available via email, on-line and via Twitter) on Brexit developments for financial services firms. These provide analysis and commentary on significant developments during the week in question. A daily digest of Brexit news (without analysis or commentary) is also available by email [here](#) and online via the RZ news wizard [here](#) (both of these can be filtered using the Brexit topic). Links to publications are contained in each update; publications released before the updates commenced in April 2018 can be found in a bibliography [here](#). CMS RegZone publication 'Where we stand' provides an overview of the current position in a single report; this is updated regularly to take account of the key developments from the weekly updates.

Contact



Paul Edmondson

Partner (UK)
+44 (0)20 7367 2877

paul.edmondson@cms-cmno.com

621957828

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