EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL MARKETS UNION

Brussels, 14 July 2020
REV1 - replaces the notice dated
8 February 2018

NOTICE TO STAKEHOLDERS

WITHDRAWAL OF THE UNITED KINGDOM AND EU RULES IN THE FIELD OF POST-TRADE FINANCIAL SERVICES

Since 1 February 2020, the United Kingdom has withdrawn from the European Union and has become a "third country".[1] The Withdrawal Agreement[2] provides for a transition period ending on 31 December 2020. Until that date, EU law in its entirety applies to and in the United Kingdom.[3]

During the transition period, the EU and the United Kingdom will negotiate an agreement on a new partnership. However, it is not certain whether such an agreement will be concluded and will enter into force at the end of the transition period. In any event, such agreement would create a relationship which will be very different from the United Kingdom's participation in the internal market.[4]

Moreover, after the end of the transition period the United Kingdom will be a third country as regards the implementation and application of EU law in the EU Member States.

Therefore, all interested parties, and especially economic operators, are reminded of the legal implications that the end of the transition period will have on their activities.

Advice to stakeholders:

Counterparties to derivatives and securities financing transactions, as well as stakeholders issuing financial instruments constituted under the law of a Member State in UK Central Securities Depositories (CSDs), are advised to assess the consequences of the end of the transition period in the light of this notice and take appropriate action to ensure

1 A third country is a country not member of the EU.

2 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L29, 31.1.2020, p. 7 ("Withdrawal Agreement").

3 Subject to certain exceptions provided for in Article 127 of the Withdrawal Agreement, none of which is relevant in the context of this notice.

4 In particular, a free trade agreement does not provide for internal market concepts (in the area of goods and services) such as mutual recognition.

that they comply with all the applicable legal requirements.

Please note: This notice does not address

- EU rules on conflict of laws and jurisdictions ("judicial cooperation in civil and commercial matters");
- EU company law;
- EU rules on personal data protection.

For these aspects, other notices are in preparation or have been published.[5]

This notice should be read in conjunction with the Commission Communication "Getting ready for changes - Communication on readiness at the end of the transition period between the European Union and the United Kingdom" of 9 July 2020,[6] and in particular section II.B.1 thereof.

After the end of the transition period, EU rules on financial markets, in particular Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR),[7] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (MIFIR),[8] Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012 (SFTR),[9] Regulation (EU) No 909/2014 on improving securities settlement in the European Union and on central securities depositories (CSDR),[10] and Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (SFD),[11] no longer apply to the United Kingdom. This has in particular the following consequences:

1. DERIVATIVES

- After the end of the transition period, derivatives traded on a UK regulated market will no longer fulfil the definition of exchange traded derivatives (ETDs) under EU law. According to Article 2(32) of MIFIR, ETDs are derivatives traded on an EU

5 https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/future-partnership/getting-ready-end-transition-period_en.

6 COM(2020) 324 final.

7 OJ L 201, 27.7.2012, p. 1.

8 OJ L 173, 12.6.2014, p. 84.

9 OJ L 337, 23.12.2015, p. 1.

10 OJ L 257, 28.8.2014, p. 1.

11 OJ L 166, 11.6.1998, p. 45.

regulated market, or on a third-country market considered to be equivalent.[12] Thus, under EU law[13], after the end of the transition period, ETDs traded on a UK regulated market will be over-the-counter (OTC) derivative contracts. The Commission is empowered by Article 2a of EMIR to declare a third country market equivalent. While the assessment of the UK's equivalence in this area is ongoing, the assessment has not been finalised. All stakeholders thus have to be informed and ready for a scenario where derivatives traded in the UK regulated markets are treated as OTC derivatives.

- An ETD that becomes an OTC derivative will thus become subject to all EMIR requirements applicable to OTC derivatives transactions. With the exception of hedging transactions entered into by non-financial counterparties, all OTC derivatives transactions count towards the calculation of the clearing threshold in accordance with the provisions of EMIR, and will be subject to the EMIR clearing obligation, provided that the product concerned has been made subject to that obligation,[14] as well as certain risk mitigation techniques (notably the exchange of margins).

  OTC derivatives that are subject to the clearing obligation must be cleared by a central counterparty (CCP) which is authorised and established in a Member State of the EU or a CCP established in a third-country and which is recognised by the European Securities and Markets Authority (ESMA) under Article 25 of EMIR to clear that class of OTC derivative.[15] The Commission is empowered to declare a third country's regulatory and supervisory frameworks equivalent. Such an equivalence decision is a pre-condition for a recognition of a third country CCP by ESMA. Without equivalence and recognition, after the end of the transition period, a CCP established in the United Kingdom cannot be used to fulfil the clearing obligation. While the assessment of the UK's equivalence in this area is ongoing, the assessment has not been finalised. All stakeholders thus have to be informed and ready for a scenario where counterparties will not be able to fulfil their clearing obligation under EMIR in CCPs established in the United Kingdom.

- The obligation to clear transactions through an authorised CCP established in the EU or a recognised CCP established in a third country also applies to counterparties established in third countries, where the contract has a direct, substantial and foreseeable effect within the EU or where such an obligation is necessary or appropriate to prevent the evasion of any provisions of EMIR.[16]

---

12 An ETD is "a derivative that is traded on a regulated market or on a third-country market considered to be equivalent to a regulated market […], and as such does not fall within the definition of an OTC derivative as defined in Article 2(7) of EMIR", see Article 2(32) of MIFIR.

13 OTC derivative contracts are those not traded on an EU regulated market or traded on third-country regulated market that is not subject to an equivalence decision. See Article 2(7) and Article 2a of EMIR.

14 The following products are currently subject to a clearing obligation: interest rate swaps in Euro, Japanese Yen, US Dollar, Norwegian Krona, Polish Zloty and Swedish Krona; and index credit default swaps.

15 See Article 4(3) of EMIR.

16 For further details, see Article 4 EMIR and Commission Delegated Regulation (EU) No 285/2014 of 13 February 2014 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the

- The loss of EU authorisation of CCPs established in the United Kingdom will affect their ability to continue performing certain activities (e.g. compression) and fulfilling certain obligations (e.g. default management) with regard to contracts concluded before the end of the transition period.

- A higher capital charge will apply to exposures resulting from positions in derivatives held by credit institutions and investment firms established in the EU in non-recognised CCPs established in third countries.[17] This is because only authorised CCPs established in the EU and recognised CCPs established in a third country are qualifying CCPs[18] (QCCPs), which have a favourable capital treatment under CRR.[19]

- Counterparties in the EU and counterparties in third countries to which the clearing obligation applies should therefore examine their derivatives portfolios. All counterparties (including counterparties established in third countries), be they a financial institution or a non-financial company above the clearing threshold, should ensure that they fulfil the clearing requirements. Where derivatives are concluded via an intermediary or cleared via an intermediary (i.e. clearing member, client of a clearing member or an indirect client), counterparties should ensure that their contract with that intermediary duly complies with the applicable legal requirements. This also applies to clearing relationships within banking groups.

2. TRADE REPOSITORIES AND REPORTING

- Derivatives or securities financing transactions which are subject to the reporting obligation under EMIR or SFTR must be reported by CCPs or counterparties to an EU registered trade repository or to a third-country trade repository recognised by ESMA.[20] The Commission is empowered by Article 77 of EMIR and Article 19 of SFTR to declare third country's regulatory and supervisory frameworks equivalent. Such an equivalence decision is a precondition for a recognition of a third country trade repository by ESMA. Without equivalence and recognition, after the end of the transition period, trade repositories established in the United Kingdom cannot be used to fulfil the reporting obligation. While the assessment of the UK's equivalence in this area is ongoing, the assessment has not been finalised. All stakeholders thus have to be informed and ready for a scenario where the UK established trade repositories cannot be used to fulfil the reporting obligation under EMIR and SFTR.

Council with regard to regulatory technical standards on direct, substantial and foreseeable effect of contracts within the Union and to prevent the evasion of rules and obligations, OJ L 85, 21.3.2014, p.1.

17 See Articles 300 to 311 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (CRR).

18 See Article 497 of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (CRR).

19 See Article 4(1)(88) of CRR, subject to the transitional provisions of Article 497 of CRR and Commission Implementing Regulation (EU) 2017/2241 of 6 December 2017 (transitional period lasts for third-country CCPs until 15 June 2018).

20 See Article 9 of EMIR and Article 4 of SFTR.

- The obligation to report a derivative contract to a duly registered or recognised trade repository is addressed to the CCPs and to the counterparties. Counterparties responsible for the reporting, be they financial or non-financial, must ensure that this requirement is fulfilled. Where reporting to a trade repository is delegated to a third party, counterparties should ensure that their contract guarantees compliance with all applicable legal requirements in EMIR and/or SFTR.

- The requirement for counterparties to keep a record of any derivative contract that has been concluded and of any modification thereto must continue to be fulfilled by counterparties for at least five years following the termination of the contract.[21]

3. CENTRAL SECURITIES DEPOSITORIES AND SECURITIES SETTLEMENT SYSTEMS

- CSDs operate securities settlement systems. They settle (finalise) transactions concluded on the market. CSDs also ensure the maintenance of securities accounts that record how many securities have been issued by whom and each change in the holding of those securities.

- Third-country CSDs must apply for recognition to ESMA where they intend to provide certain core CSD services (issuance and central maintenance services related to financial instruments governed by the law of an EU Member State) or where they intend to provide their services in the EU through a branch set up in a Member State.

- The Commission is empowered by Article 25 of CSDR to declare third country's regulatory and supervisory frameworks equivalent. Such a decision is a precondition for a recognition of a third country CSD by ESMA. Without equivalence and recognition, after the end of the transition period, CSDs established in the United Kingdom cannot continue to provide issuance and central maintenance services related to financial instruments governed by the law of an EU Member State or provide their services in the EU through a branch in an EU Member State. UK CSDs cannot benefit from the grandfathering provision under Article 69(4) of CSDR. While the assessment of the UK's equivalence in this area is ongoing, the assessment has not been finalised. All stakeholders thus have to be informed and ready for a scenario where UK established CSDs cannot provide issuance and central maintenance services related to financial instruments governed by the law of an EU Member State or provide their services in the EU through a branch in an EU Member State.

- Systems will no longer be able to be designated by the United Kingdom under the Settlement Finality Directive.[22] After the end of the transition period, systems currently designated by the United Kingdom will lose their designation under the Settlement Finality Directive along with the rights and benefits that entails for them

[21] See Article 9(2) of EMIR.

[22] See Article 2(a) of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (SFD).

and their participants. This is without prejudice to any specific provisions in national law of Member States.[23]

The website of the Commission on Post-trade services (https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/post-trade-services_en) provides for general information concerning post-trade services. These pages will be updated with further information, where necessary.

European Commission
Directorate-General for Financial Stability, Financial Services and Capital Markets Union

[23] See Recital 7 of the SFD.