

Context

The European Union (Withdrawal) Act 2018 (EUWA 2018), as amended by the European Union (Withdrawal Agreement) Act 2020 (EUWAA 2020), converts into UK domestic law the existing body of directly applicable EU law at the end of the Transition Period. The purpose of the EUWA 2018 is to provide a functioning statute book at the end of the Transition Period.

The EUWA 2018, as amended, gives Ministers powers to make Statutory Instruments (SIs) to prevent, remedy or mitigate any failure of retained EU law to operate effectively, or any other deficiency in retained EU law. This process for financial services legislation is referred to as 'onshoring'.

HM Treasury is using these powers to ensure that the UK has an independent and coherent financial services regulatory regime at the end of the Transition Period. This SI is part of this work. It is not intended to make policy changes, other than to reflect the UK's new position outside the EU.

Notice

The attached draft SI is intended to provide Parliament and stakeholders with further details on our approach to onshoring financial services legislation. The draft instrument is still in development. The drafting approach, and other technical aspects of the proposal, may change before the final instrument is laid before Parliament.

Policy background and purpose of the SI

What does the underlying EU regulation and UK law do?

The European Market Infrastructure Regulation (EMIR) lays down rules on over the counter (OTC) derivatives, central counterparties (CCPs) and trade repositories (TRs). EMIR is the EU's response to the G20 Pittsburgh commitment in 2009 that more derivatives trades should be cleared through CCPs and reported to trade repositories and is widely recognised as an important regulatory measure to improve the resilience of CCPs and address deficiencies in global derivatives markets.

Since the implementation of these post-crisis reforms, the importance of CCPs within the financial system has increased, such that they can sometimes have a significant impact on countries outside their home jurisdiction. The EU therefore introduced "EMIR 2.2" to amend EMIR and introduce an updated third country supervision framework.

The SI amends EMIR and related UK legislation to ensure that the UK continues to have an effective regulatory framework for third country CCPs.

Deficiencies this SI remedies

Consistent with the government's objective of providing continuity to businesses and consumers as far as possible, the policy approach set out in the EMIR 2.2 legislation will not change after the UK has left the EU. However, to ensure that the EMIR regime continues to operate effectively once the UK is outside of the EU, certain deficiency fixes to the legislation will be necessary. These are explained below.

Transfer of functions

This SI ensures that requirements imposed by EMIR 2.2 continue to apply in the UK, and transfers new responsibilities from EU authorities to the appropriate UK authorities.

In the UK, responsibility for recognising third country CCPs has already been transferred from the European Securities and Markets Authority (ESMA) to the Bank of England. As EMIR 2.2 introduces new elements to the third country CCP recognition process, this instrument transfers the new responsibilities in this process from ESMA to the Bank of England.

Tiering

EMIR 2.2 empowers ESMA to tier third country CCPs according to their systemic importance to the EU as part of the recognition process. Tier 1 CCPs will continue to be supervised by their home regulator alone. Systemic CCPs will be recognised as Tier 2, expected to comply with certain requirements in EMIR, and subject to supervision by ESMA.

This instrument transfers responsibility for tiering to the Bank of England, who will be able to tier third country CCPs according to their systemic importance to the UK. This will be part of their existing responsibility for recognising third country CCPs.

Ongoing Supervision

This instrument transfers ESMA's new supervisory responsibility over Tier 2 CCPs to the Bank of England by extending the existing supervisory framework and tools which the Bank uses to supervise UK CCPs to also apply to third-country CCPs in certain cases.

In addition, this instrument ensures the Bank of England has the discretion necessary to sign appropriate and workable Memorandums of Understanding with third country competent authorities of recognised CCPs, to ensure the Bank of England is able to fulfil its supervisory obligations.

Location Policy

Under EMIR 2.2, ESMA can recommend to the Commission that a third-country CCP which is 'substantially systemically important' cannot offer some or all of its services to EU clearing members unless those services are offered from inside the EU (referred to as the "location policy").

This instrument transfers the power to use the location policy from the Commission to HM Treasury, following a recommendation from the Bank, and subject to appropriate procedural safeguards and transitional provisions.

Delegated Acts

EMIR 2.2 empowers the Commission to adopt several delegated acts to further specify how the framework will apply in practice, including more detail on tiering criteria and deference to the rules of home authorities (“comparable compliance”).

This instrument transfers the two delegated acts mentioned above to the Bank of England to be made via binding technical standards. This is consistent with the Bank’s existing responsibilities for safeguarding financial stability in general, and managing systemic risk in CCPs in particular.

Recognition powers during the Transition Period

In an earlier SI laid under the EUWA, HMT established a ‘Temporary Recognition Regime’ (TRR) to enable third country CCPs to continue their activities in the UK after exit day for a period of three years while their recognition applications are assessed.¹ In addition, this SI empowered HM Treasury to make equivalence decisions, and the Bank of England to make recognition decisions, ahead of Exit day. This instrument updates these recognition powers to allow the Bank to assess those third country CCPs that have already applied for recognition in line with the new EMIR 2.2 provisions before the end of the Transition Period.

Relevant Rulebook and Binding Technical Standard changes

The instrument transfers powers to the Bank of England to make binding technical standards. This is in line with the approach that the government has set out in the Financial Regulators’ Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 (S.I. 2018/1115), in which legislative responsibility for Level 2 technical legislation in financial services will be transferred to the financial regulators.

The Bank will update their rulebook and relevant BTS to reflect any changes introduced through this SI. This will ensure they will operate at the end of the transition period.

Stakeholders

This SI will impact CCPs which are established in third countries, in particular those that are likely to be recognised as a tier 2 CCP by the Bank of England, as they will face additional supervisory oversight from the Bank. This instrument does not make any changes to the regulatory or supervisory framework for firms based in the UK.

Next steps

HM Treasury plans to lay this instrument before Parliament in the Spring.

¹ An interim list of the third country CCPs which have entered this regime is available here: <https://www.bankofengland.co.uk/-/media/boe/files/financial-stability/financial-market-infrastructure-supervision/interim-list-of-third-country-ccp>

Further information

Read [HM Treasury's approach to financial services legislation under the European Union \(Withdrawal\) Act 2018](#).

Enquiries

If you have queries regarding this instrument, email FMPolicyBranch@hmtreasury.gov.uk.