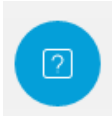
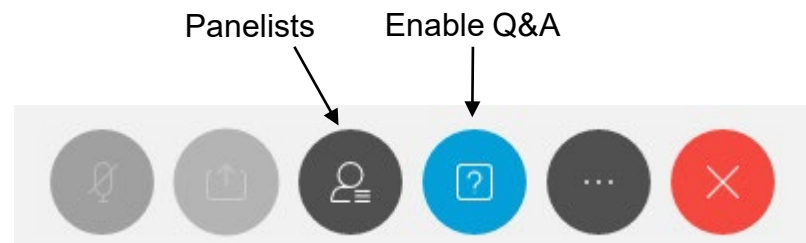
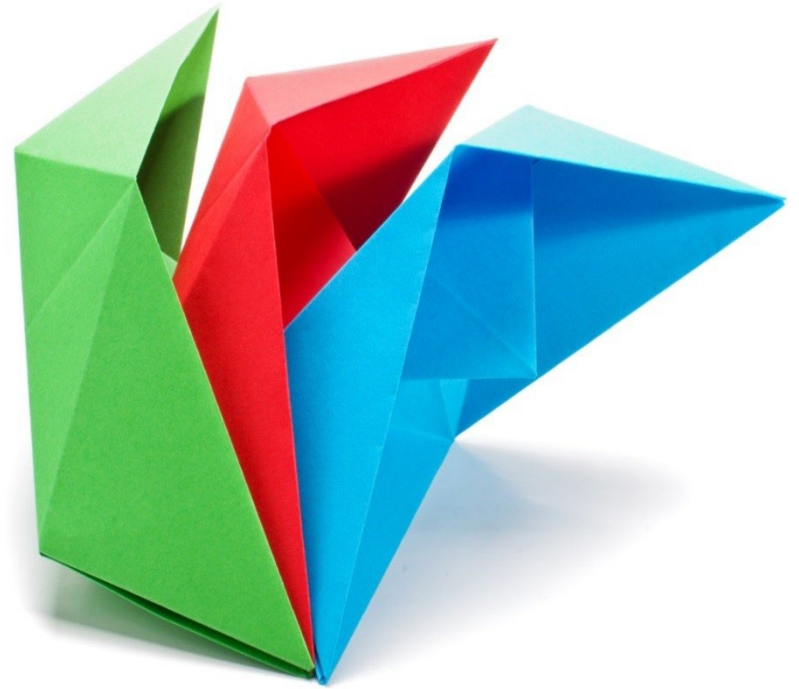


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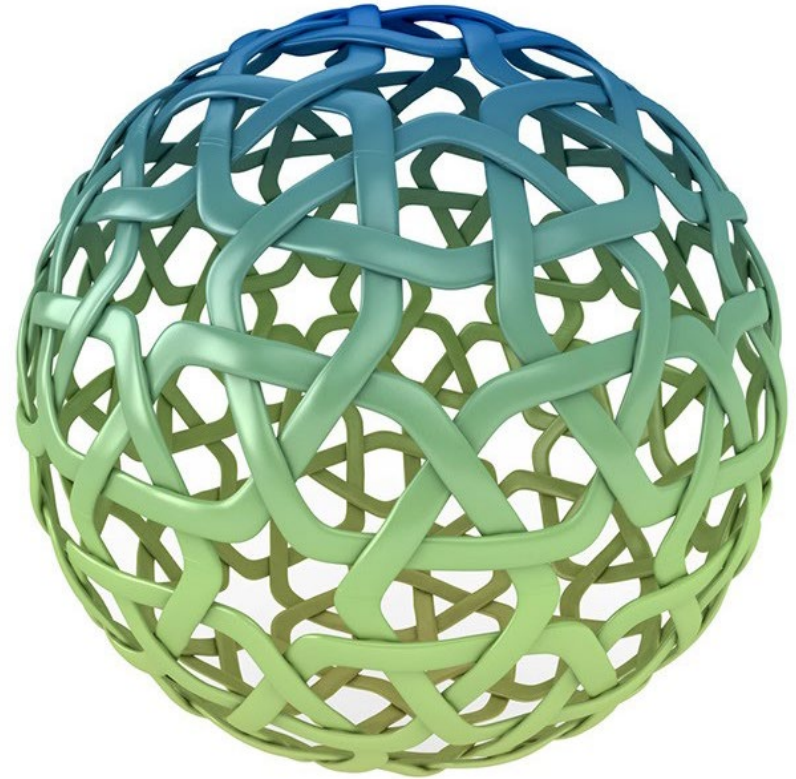


Fog in Channel: Continent Cut Off

Bob Penn, Kirsty Taylor, Emma Dwyer

25 June 2020

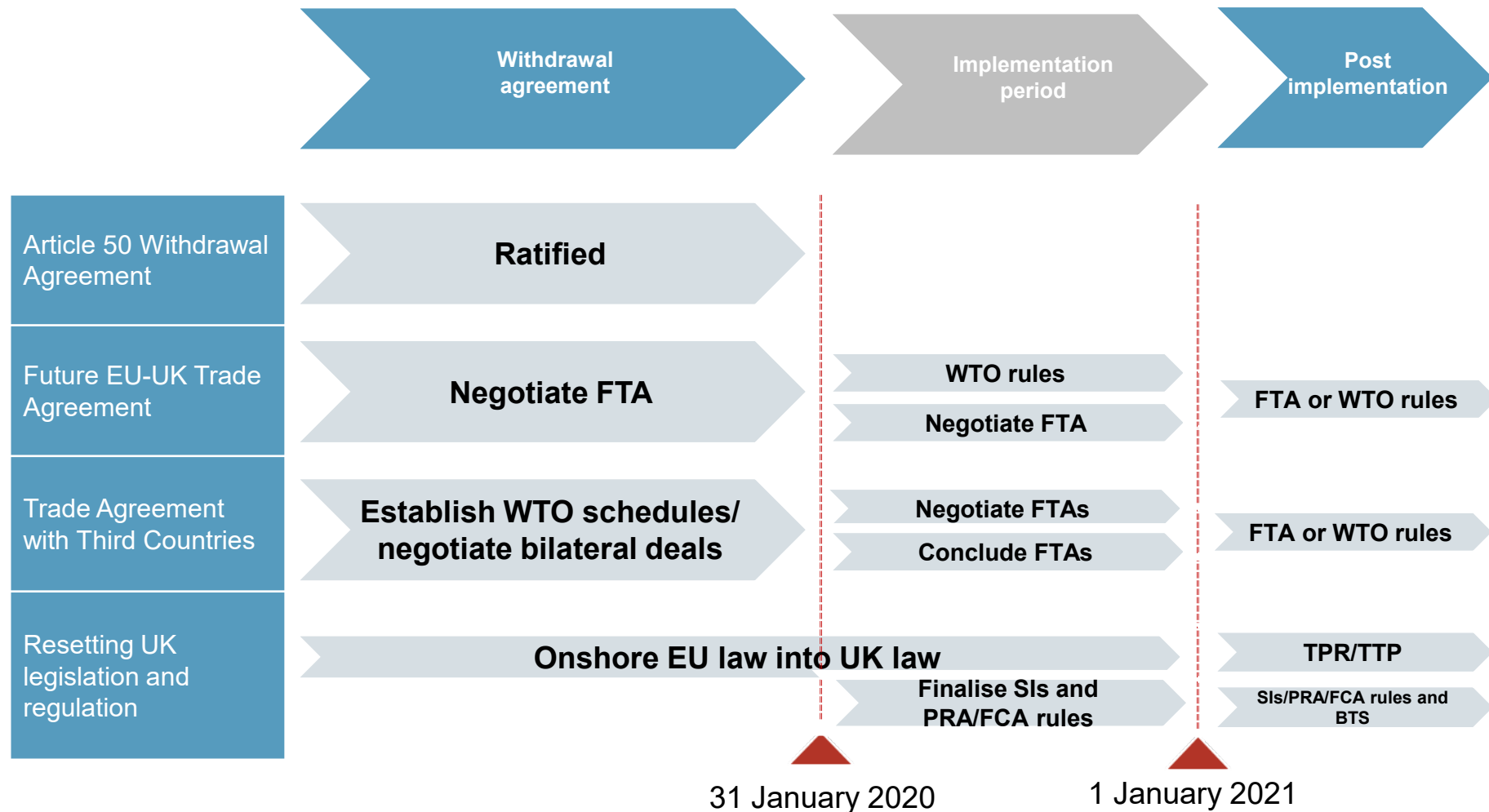
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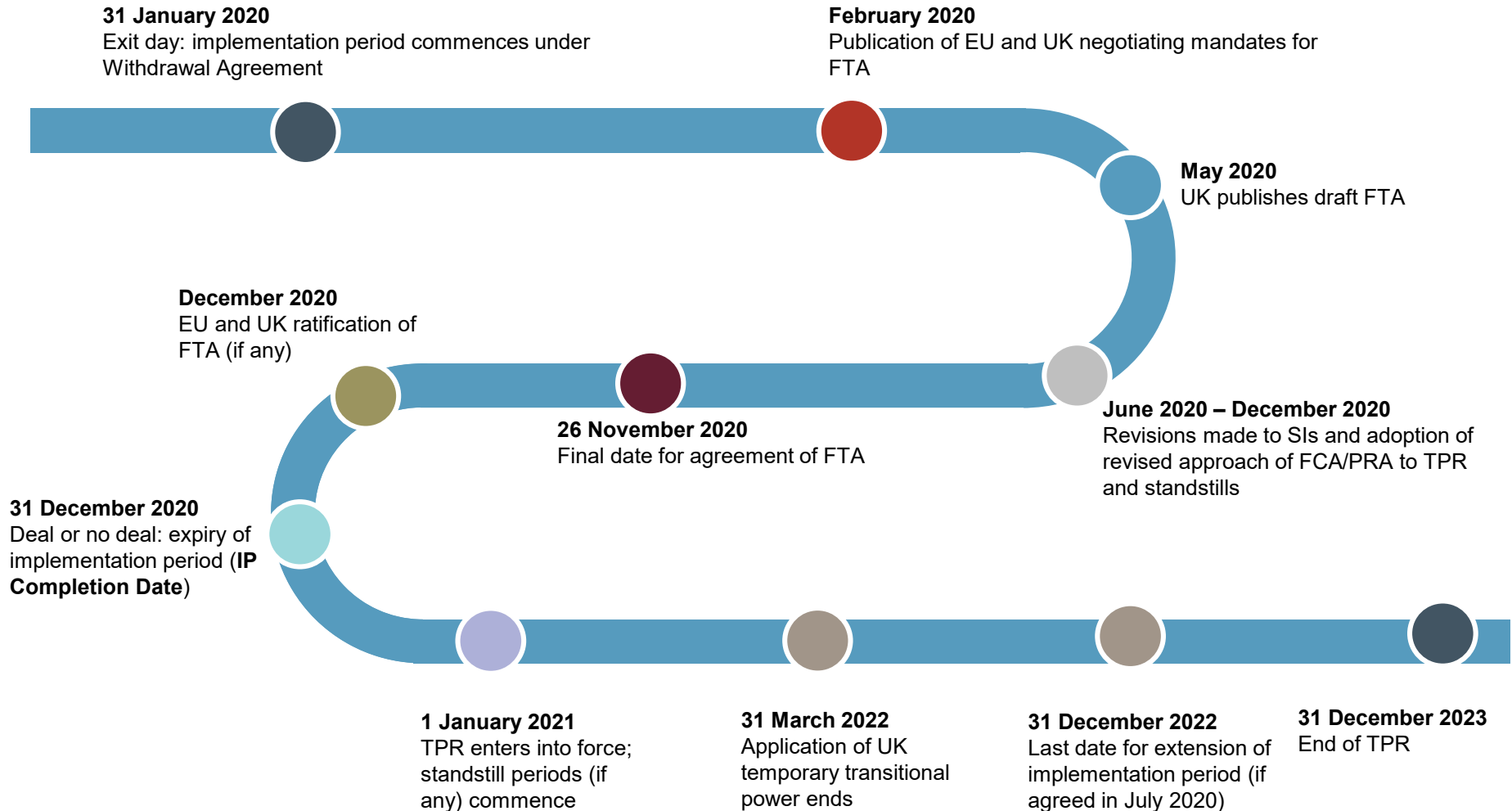
1. Where are we going?

- Withdrawal Agreement
- Future Trade Agreement

The road to Brexit: where are we now?



And where are we going? Key milestones



Are we going to get an FTA?

“There will not be alignment, we will not be a rule-taker.”

Sajid Javid, then-Chancellor of the Exchequer, 18 January 2020

“Any Brexit extension would be unwise.”

Michael Gove, Cabinet Office Minister, 4 June 2020

Align for access
or diverge to
compete?

- EU position: no access without commitments around state aid, employment and environmental standards; dynamic alignment of standards.
- UK position: no rule-taking.
- Likely outcome: no new access rights.

Equivalence

- Equivalence assessments due to be made by each side by June/July 2020:
- EU finds UK equivalent where politically expedient (eg CCPs, CSDs)?
 - UK finds EU equivalent or takes ‘tit-for-tat’ approach?

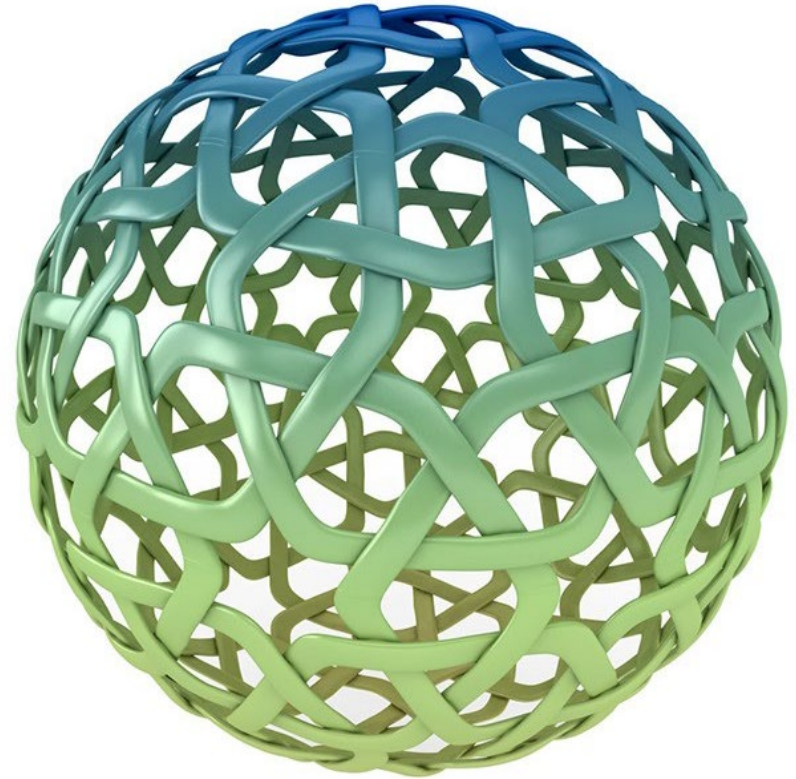
Transitional
relief

No sign of EU transitional relief (though EMIR concessions are likely to be re-enacted). EU Member States may re-enact domestic transitional relief (although this would be limited). By contrast, UK will provide extensive transitional relief.

Going our own way: announcements of 23 June

The UK Treasury issued a ministerial statement, and the FCA issued various papers, on 23 June. What do these tell us?

- **Alignment until – but not after – IP completion date:** the Government will implement the Regulatory Reform Package (CRDV, CRR2, BRRD2) to the minimum extent required by the law. Thereafter the UK will design its own framework – accepting that much of it will be consistent with international consensus, it will not necessarily match the EU requirements in all respects. Examples of announced non-implementation include
 - MREL (and MREL subordination)
 - requirements for large investment firms' reauthorisation as credit institutions
 - the CSDR settlement discipline regime
 - the SFTR reporting regime for NFCs.
- **Technical compliance with EU law at the end of the implementation period:** the ministerial statement includes explicit reference to non-implementation of EU law which will be required to be in force as at 28 December (Article 45 BRRD2 on MREL) – albeit that it does not apply until later. So it appears that the UK may be non-compliant with its EU law obligations at exit.
- **Implications for discussions on equivalence: dynamic alignment:** whether or not technical non-compliance is a point in equivalence decisioning, the statement makes it clear that the UK will not be rule-taker, and will diverge from EU law where it sees fit. A number of EU member states have sought dynamic alignment as the price for access/equivalence: any alignment will be fuzzy, rather than precise, at best.
- **So what's up for grabs?** HMT are consulting on the BRRD2 package in very general terms – it appears that there may be appetite to get rid of some of the more egregious elements of the regime that come in on 28 December (Article 55; stays; moratoria). FCA are consulting on the IFPR – so there is room for manoeuvre on the detail of the investment firm prudential regime.
- **Introduction of Basel 3.1 and IFPR through rules:** legislative reform to reposition (some of?) the acquis as regulations within the powers of the regulators and to implement the remainder of the package; minor changes to the Benchmarks Regulation (to permit third country benchmark provision until 2025); to MAR (on insider lists and PDMRs); to PRIIPs and EMIR REFIT.



2. What's still on the table?

- Could we see access rights or similar under the FTA?
- Equivalence – what's the use?
- Remaining transitional relief – UK; EU

From ‘no deal’ to ‘not much of a deal’

As a reminder, and based on our view of likely outcomes:

- **Even if an FTA is agreed there will be little or no meaningful provision for financial services:** on the basis of the current state of play, there will be no agreement conferring automatic market access for UK participants facing the EU or *vice versa* after IP Completion Date. This means that passporting rights will fall away, requiring contingency plans to be (finally) put into effect. This is likely to crystallise the same cliff edge risks as no-deal.
- **And still we wait:** the parties’ fall-back position is to make equivalence assessments. This perpetuates uncertainty for market participants as we will not know the outcome of equivalence assessments until late summer at the earliest, and the assessments may be used as bargaining chips as we approach year end if an FTA is still not agreed.
- **Political risk looms large:** the EU will not grant equivalence except where it has identified that it is in its own interests to do so. The Political Declaration effectively reserves each party’s autonomy to take equivalence decisions for political purposes.
- **Even if granted, equivalence will not be not a substitute for market access:** the bulk of firms’ planning has been around licensing to retain market access. Equivalence does not confer market access, except in the case of MiFID II for investment services. There seems to be no reasonable prospect of the EU granting UK firms third country rights to market access under MiFID II.
- **The UK will offer the same transitional relief as under ‘no-deal’:** the UK approach is to extend the same transitional relief as was offered for no-deal.
- **Will EU Member States ride to the rescue again?** EU relief measures were not the same in each Member State (with some jurisdictions taking no steps at all). They ranged from a bespoke regime for UK firms providing services to an extension of third country licensing regimes. It remains unclear whether such relief will be provided after IP Completion Date.

How the EU and UK propose to deal with the cliff edge ...

Right	Coverage	Third country rights?	Any transitional license/exemption?	
			UK – for inbound EU providers	EU – for outbound UK providers
A. Services – passports				
CRD passport	Banking services	No	Yes – 3 years*	Non
MiFID passport	Investment services	In principle	Yes – 3 years*	Nein
AIFMD/UCITS passport	Fund/asset management	Limited	Yes – 3 years*	Ne
PSD/E-money passports	Payment services/e-money	No	Yes – 3 years*	Nej
Solvency II and IDD passports	Insurance	No	Yes – 3 years*	Ei
B. Products – mutual recognition				
Prospectus Directive	Securities offers	In principle	Yes – 12 months* for existing passported prospectuses	Nie
UCITS Directive	Retail fund offers	No	Yes – 3 years* for existing passported funds	Nao
AIFMD	Other fund offers	Limited	Yes – 3 years*	Nem
C. Market Infrastructure – passports, access rights				
MiFID passport (regulated markets)	Rights of access	No	No	Nee
CCPs (EMIR)	Clearing passport	Yes	Yes – 3 years*	EMIR 2.2 – timing?
CSDs (CSDR)	Depository services passport	Yes	Yes – 6 months* (subject to recognition of EU member state)	Expected to be resolved
Trade repositories (EMIR)	Trade repository passport	Yes	Limited – 3 years* for affiliates of existing repositories only	Non
Data services (MiFID II)	Data services passport	No	Yes – 1 year*	Nein
CRAs	Data services passport	Yes	Yes – 3 years*	Ne
Benchmarks	Benchmark passport	Yes	Yes – 2 years*	Nej
SFD	Recognition of settlement finality designation	No	Yes – 3 years* (application within 6 months)	Ei
Share trading obligation	Rights to access	Yes	Power exists (12 months*) – will it be exercised?	Nie
Derivatives trading obligation	Rights to access	Yes	Power exists (12 months*) – will it be exercised?	Nao

Is equivalence the answer?

Equivalence is the mechanism by which the EU recognises that the regulatory or supervisory regime of a third country is equivalent to the corresponding EU regime. Equivalence supports a variety of exemptions, substituted compliance provisions and third country access rights in EU law.

Key areas in which equivalence is in principle available to facilitate cross-Channel dealings are:

- *Services passports: investment services* (but not banking, payment services, insurance services);
- *Product recognition*: third country prospectuses for securities offerings; limited regime in respect of third country alternative investment funds; and
- *Market infrastructure access rights: access by/to third country CCPs*; access to third country trade repositories; use of third country credit ratings and use of third country benchmarks.

Equivalence is also used in a number of other contexts:

- *Trading obligations*: equivalent third country trading venues may be used to discharge the **share trading obligation** and **derivatives trading obligation**;
- *Prudential*: a number of aspects of the EU capital requirements framework treat third country actors less favourably for capital and/or liquidity purposes, but provide for equality of treatment where an equivalence determination is made; and
- *Fund management*: power to delegate fund management to third country managers.

Absent a comprehensive FTA covering financial services, the UK and EU have committed to assessing equivalence in June 2020 – following which it is likely (but not certain) that each side will take the necessary procedural steps to confer equivalence on the other. HM Treasury will make its assessments (in conjunction with the relevant UK regulators) on the basis of the onshored framework.

However, as has been well rehearsed, equivalence is **unharmonised, discretionary** (and now, it seems, politicised), **highly technical** and an **unstable basis for facilitating comprehensive market access**.

Progress on the Temporary Transitional Powers regime

The TTP is the statutory mechanism by which the PRA, FCA and Bank of England are given power to provide temporary transitional relief to firms arising from Brexit in respect of 'relevant obligations'. **All three regulators have confirmed that they will exercise the TTP to provide transitional relief for firms from IP completion date until 31 March 2022.**

The FCA's website still refers to the February 2019 supervisory expectations indicating seven areas for firms to act on. So can firms forget about making changes for year end, other than those items ? Sadly not:

- The TTP does not empower the regulators to override changes in law – eg to the change in certain residential mortgage contracts to become consumer credit, or to changes in the regulatory perimeter
- The TTP applies only to 'relevant obligations': FCA takes the view that that does not cover definitional changes – meaning onshored EMIR changes still apply
- The TTP does not override equivalence decisions
- The FCA approach to implementation has been not to provide a blanket exclusion, but rather a series of Annexes 'switching off' relevant obligations – leaving others switched on

FCA has indicated informally that it is considering providing updated directions – possibly including some further general direction – in September.

TTP– where Transitional Directions do not apply

PRA Transitional Direction does not apply to:

- Part 15A FSMA/FSCS
- information published by EIOPA which after exit is published by PRA
- obligations to which a specific transitional or savings provision applies
- stay in Resolution part of the Rulebook
- securitisation repository provisions
- STS securitisations provisions
- in relation to persons for whom HMT has the power to make an exemption direction
- obligations applying as a result of an equivalence determination/direction
- in relation to MiFIR when HMT has power to make an equivalence determination
- obligations in the CRA Regulation
- obligations in DR 2017/589/DR 2017/1945 or DR 2017/1946 persons to whom reg 47 of the EEA Passport Rights SI applies (Firms in CRO)
- definition of OTC derivatives (Art 2 EMIR)
- provisions related to TPR Firms (except certain remuneration obligations/certain reporting obligations)
- Contractual Recognition Rules (except phase two liabilities (existing EEA law governed agreements unless materially amended post Brexit))
- CRA Regulation (special transitional applies)
- reference to accounting standards

FCA Transitional Direction does not apply to:

- amendments to the RAO/Financial Promotion Order/Exemption Order
- information to be provided to an EU institution/apply technical standards
- additional requirements imposed by the FCA in the context of Brexit
- FCA powers/functions/duties
- provisions relating to Gibraltar
- provisions applying as a result of an equivalence direction (i.e. transitional will end when equivalence decision in effect)
- rules relating to TPR firms

FCA Prudential Transitional Direction does not apply to:

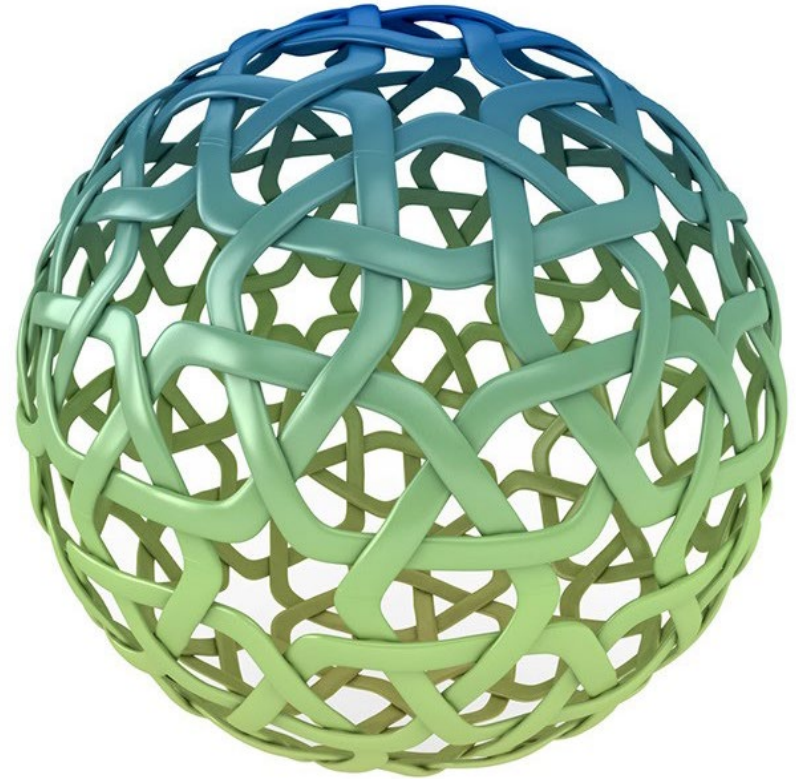
- obligations to when a specific transitional or savings provision exists
- contractual recognition of bail in (except phase two liabilities/pre-existing EEA law governed agreements unless materially amended post Brexit)
- persons for whom HMT has power to make an exemption direction (see Equivalence SI)
- circumstances where the obligation is the subject of an exemption or equivalence decision
- obligations applying to TPR firms
- EU/MS institution functions
- requirements imposed by FCA
- Gibraltar

* Where transitional relief doesn't apply, the FCA has said that it expects firms to have undertaken "reasonable steps" to comply with the new/amended obligations by exit day

BoE Transitional Direction does not apply to:

- Part 15A of FSMA/FSCS
- obligations for which specific transitional/savings provisions exist
- persons for whom HMT has power to make an exemption direction
- obligations applying as a result of equivalence direction/determination
- MiFIR/any related implementing measures
- definition of OTC derivative (Art 2 EMIR)
- Art 25 EMIR
- Art 25 CSDR
- FMI SI
- BoE powers
- Gibraltar

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Annex

- Further detail on equivalence measures

Summary table showing where key equivalence provisions (1)

Provision	Coverage	Equivalence/adequacy decision already taken by European Commission in respect of third countries
Market access – investment services		
Article 47(1) - MiFIR	Third country firm access	No
Market infrastructure access		
Article 38(3) - MiFIR	Third-country trading venue and CCP access	No
Article 25(4) - MIFID	Third-country markets	Yes
Article 25(6) - EMIR	Third-country CCPs	Yes
Article 2a - EMIR	Regulated markets	Yes
Article 75(1) - EMIR	Trade repositories	Yes
Article 19(1) - SFTR	Trade repositories	No
Article 25(9) - CSDR	Third-country CSDs	No
Article 5(6) – CRA Regulation	Third-country credit ratings	Yes
Article 30(2) - BMR	Administrators authorised/registered in a third-country	No
Article 30(3) - BMR	Specific administrators or benchmarks	Yes
Markets - Trading obligations		
Article 28(4) - MiFIR	Third-country venues may be used to discharge DTO	Yes
Article 25(4)[a] - MiFID	Third-country venues may be used to discharge STO	Yes
Markets		
Article 33(2) - MiFIR	Derivatives transaction rules	No
Article 1(9) - MiFIR	Central banks	Yes
Article 20& 21 – MiFIR & ESMA Guidance	Post-trade transparency	
Article 13(2) - EMIR	Transaction requirements	Yes
Article 76a(2) - EMIR	Trade repositories – data access	No

Summary table showing where key equivalence provisions (2)

Provision	Coverage	Equivalence/adequacy decision already taken by European Commission in respect of third countries
Markets		
Article 1(6) - EMIR	Central banks and public bodies	No
Article 2(2) - SFTR	Central banks and public bodies	No
Article 21 - SFTR	Transaction reporting	No
Article 6(5) - MAR	Central banks and public bodies	Yes
Article 17(2) - SSR	Market makers	No
Article 16 - SSR	Principal venue	No
Prudential		
Article 127(1) - CRD	Consolidated supervision	Decision for NCAs to take
Article 107(4) - CRR	Exposures to third-country investment firms, credit institutions, clearing houses and exchanges	Yes
Article 114(7) - CRR	Exposures to third country central governments or central banks	Yes
Article 115(4) - CRR	Exposures to third-country regional governments or local authorities	Yes
Article 116(5) - CRR	Exposures to third-country public sector entities	Yes
Article 142(2) - CRR	Permission to use IRB approach: third-country equivalent supervisory and regulatory arrangements: credit institutions & investment firms	Yes
Article 55 - IFD	Consolidated supervision	No

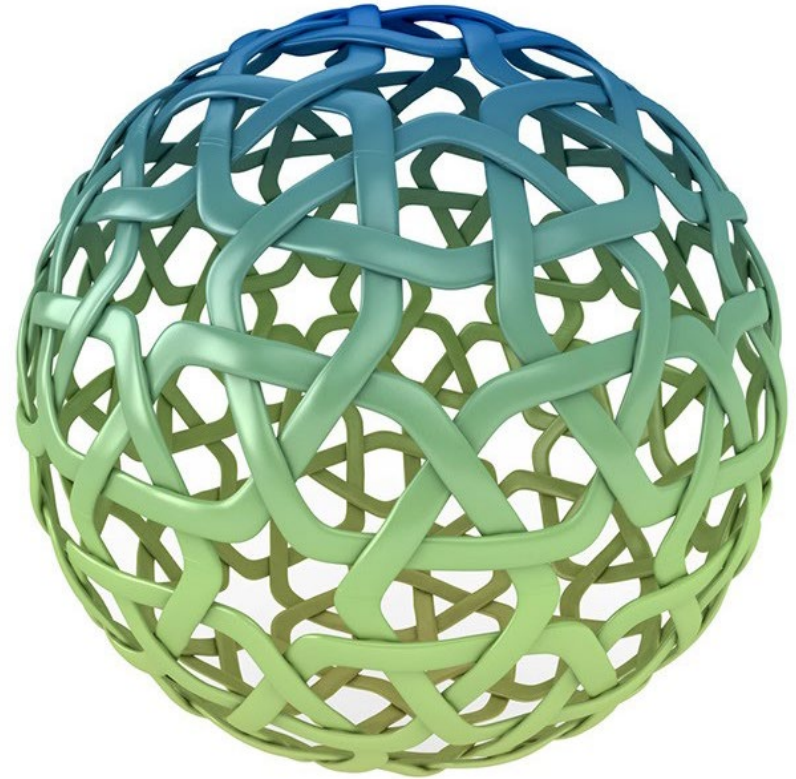
Summary table showing where key equivalence provisions (3)

Provision	Coverage	Equivalence/adequacy decision already taken by European Commission in respect of third countries
Product recognition		
Article 29(3) - Prospectus regulation	Third-country prospectuses for securities offerings	No
Articles 35,36 - AIFMD	Third-country AIFs	
Funds and asset management		
Article 37, 39-41 - AIFMD	Third-country AIFM	No
Article 21(6) - AIFMD	Third-country depository	No
Article 20- AIFMD & Article 13 - UCITS	Delegation	Numerous co-operation agreements
Article 9(6) – AIFMD & Article 7(1)(a) - UCTIS	Own funds requirement where third-country credit institution/investment firm provides guarantee	Not applicable
Article 50(1)(f) - UCITS	Kinds of investments – deposits in third-country credit institution	Not applicable
Insurance		
Article 172 - Solvency II	Third-country insurers	Yes
Article 260 - Solvency II	Third-country group supervision	Yes
Article 227 - Solvency II	Group solvency	Yes
Accounting, offers of securities		
Article 2 of Regulation (EC) 1569/2007 - Third-Country GAAP	Accounting standards (Third-country GAAP with IFRS)	Yes
Article 47 - Accounting Directive	Country-by-country reporting	Yes
Articles 45(6), 46(2) and 47(3) - Statutory Audit Directive	Registration, Equivalence and Adequacy	Yes for registration & equivalence
Article 23(6) – Transparency Directive	Equivalent conditions of independence as management companies/investment firms	No
Article 46(e) – Securitisation Regulation	Review to consider whether an equivalence regime could be introduced for third-country originators, sponsors and SSPEs	No

Summary table showing where key equivalence provisions (4)

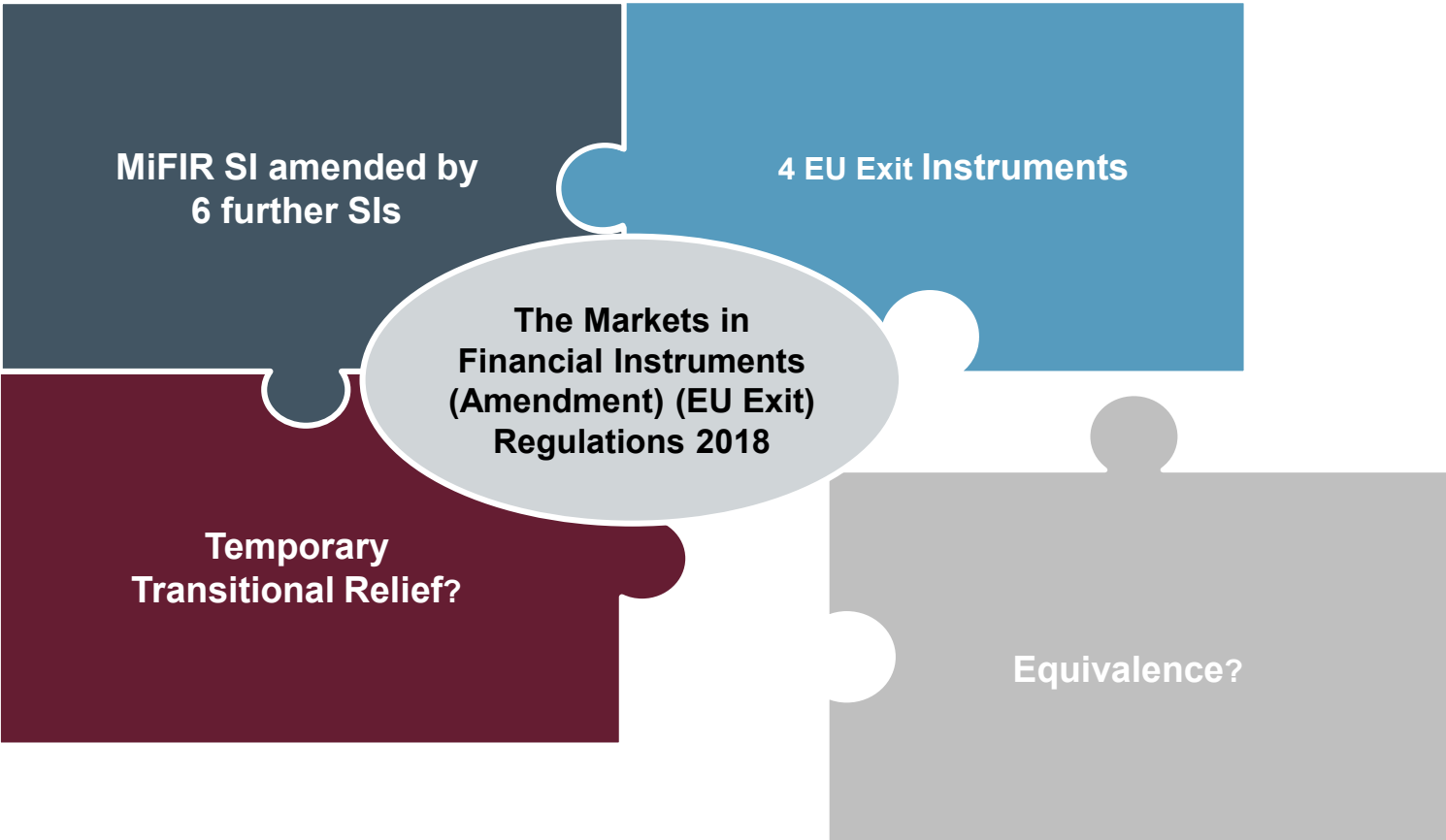
Provision	Coverage	Equivalence/adequacy decision already taken by European Commission in respect of third countries
Payments		
SEPA Participation	EPC List of SEPA Scheme countries	Not applicable
Article 8(3) - EMD	Branches of third-country entities	No

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Brexit & MiFIR

UK MiFIR



Legislation amended by the SI

EU Legislation	UK Legislation
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)	Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 (SI 2017/701) (the MiFI regulations)
Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (the MiFID Org Regulation)	The Data Reporting Services Regulations 2017 (SI 2017/699) (the DRS regulations)
Commission Delegated Regulation (EU) 2017/567 of 18 May 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions (the MiFIR Delegated Regulation)	Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the RAO)

Becoming third countries



The MiFID SI generally provides that EU states are treated as third countries.

However, there are certain **exceptions** “to help provide for a smooth transition for market participants by maintaining existing outcomes as far as possible”

Exceptions

1. EEA emission allowances will continue to be a financial instrument.
2. Energy forwards that must be physically settled and are traded on OTFs in the EU will continue to be excluded from the definition of financial instruments.
3. The Ancillary Activities Exemption (**AAE**) will continue to be based on UK and EU market data.
4. UK firms will be able to treat EU UCITS as automatically non-complex instruments.

Transparency – consequences of SI

Base case – only UK data and transactions now important

Existing waivers now no longer appropriate – new calculations required

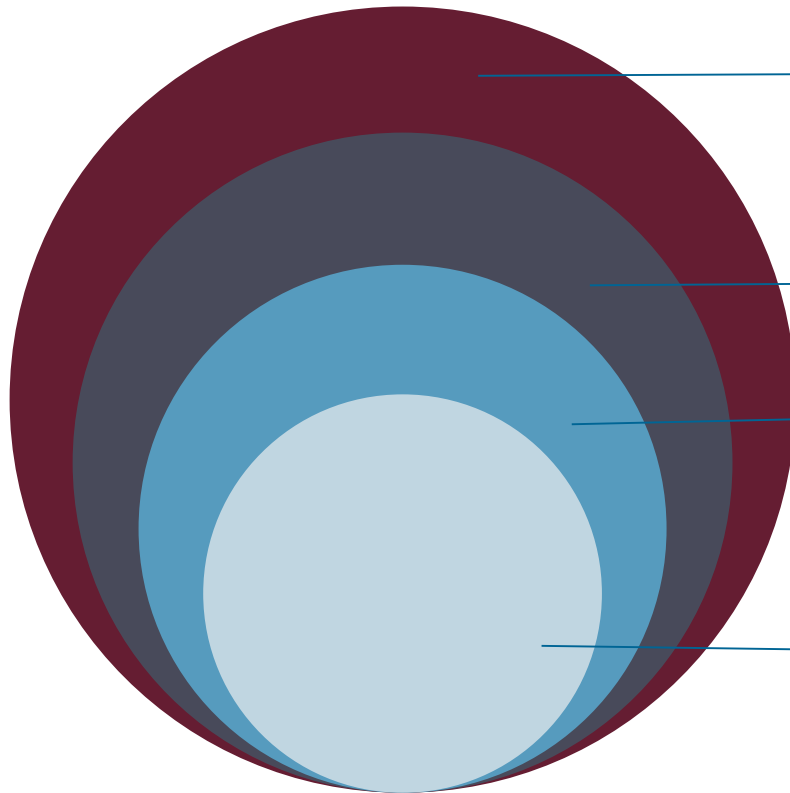
SI builds in broad scope for FCA temporary powers (for up to 4 years) to amend operation of transparency regime

FCA can suspend transparency requirements in respect of certain instruments

FCA can amend transparency calibrations and direct the application of the double volume cap mechanism

FCA can determine the ‘relevant area’ for transparency calculations to also include EU 27 jurisdictions

Transparency – consequences of SI (2)



- ✓ identify channels of communication used to meet pre-trade transparency publication requirements

- ✓ connect to UK FIRDS/FITRS

- ✓ assess status
- ✓ monitor suspensions, changes to waivers, thresholds
- ✓ update SI policies

- ✓ TPR Firms must distinguish between UK TOTV instruments eligible for substituted compliance, where relevant

Transaction reporting



- UK firms will be required to report transactions in instruments which are traded on UK or EU venues
- UK venue operators will be required to report reference data for instruments that are trading on UK venues

Equivalence markets issues: clearing, derivatives trading obligation and share trading obligation

Equivalence will throw up a number of markets issues. Three are particularly prominent given the threat that they pose to existing cross-Channel activity.

Obligation	Current EU rule	Impact of onshoring and third country status (of the UK under EU law, and <i>vice versa</i>)	Implications for markets
Clearing	EMIR prohibits CCPs from providing clearing services unless authorised in the EU or equivalent.	Following Brexit, the UK will have its own version of EMIR. At present the EU regime does not recognise the UK CCPs as equivalent.	Absent recognition of the UK CCPs, EU market participants will be unable to be members of the UK CCPs.
Derivatives Trading Obligation (DTO)	The DTO requires financial counterparties (FCs) or non-financial counterparties meeting the clearing threshold (NFC+s) to trade in classes of derivatives that are subject to the DTO (currently certain interest rate derivatives and index CDS) on (1) an EEA trading venue or (2) a recognised non-EU trading venue.	Following Brexit, the UK will have its own DTO. At present neither regime recognises the venues of the other.	Absent recognition, EU27 FCs and NFC+s will be unable to deal with UK FCs and NFC+s in in-scope derivatives unless they trade on an EU, US or Singaporean venue.
Share Trading Obligation (STO)	The STO requires EU banks and investment firms to trade in shares issued by EU companies which are listed in the EU on (1) an EU systematic internaliser; (2) an EU trading venue; or (3) a recognised non-EU trading venue.	Following Brexit, the UK will have its own STO. At present neither regime recognises the venues of the other.	Absent recognition, this will split liquidity in dual traded shares subject to both the EU and UK STO. This will also have the effect of limiting liquidity more generally.

Data Reporting Services Providers - TPR

Passported EEA Data Reporting Services Providers (**DRSPs**) have their own version of TPR

Regime will last for **1 year only**

18 November deadline for notifications

Must on-board FCA market data processor system, undertake necessary systems testing and pay associated fee

Additional compliance burden while in TPR and additional fees to FCA



Brexit and EMIR

- UK approach

What is UK EMIR? Key legislation – Level 1



Level 1: Five main SIs to onshore EU EMIR and existing associated UK regulations:

- **“EMIR SI” (final):** Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment) (EU Exit) Regulations 2019 - **Focus:** Counterparty classification and obligations
 - **“CCP SI” (final):** Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018 – **Focus:** Recognition of third country CCPs
 - **“TR SI” (final):** Trade Repositories (Amendment and Transitional Provision) (EU Exit) Regulations 2018 – **Focus:** Registration of trade repositories
 - **“EMIR Refit 2.1 SI” (final):** Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment) (EU Exit) (No. 2) Regulations 2019 – **Focus:** Changes to existing SIs required as a result of EMIR Refit 2.1
 - **“EMIR 2.2 SI” (draft):** The Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2020 – **Focus:** Recognition of third country CCPs
- **Note:** Relevance of other SIs (i) miscellaneous SIs make changes to the above SIs and EMIR; and (ii) **“Equivalence SI” (final)** provides for various exemption directions and equivalence determinations in an EMIR context

What is UK EMIR? Level 2 and transitional relief



Level 2: Under EUWA, HMT can delegate powers to UK regulators to amend Level 2 technical standards (**BTS**)

- See: The Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018
- Changes made by “EU Exit Instruments”
- “Near final” rules and BTS published 28 February 2019 (see BoE/PRA Policy Statement PS5/19 and FCA Policy Statement PS19/5)
- Subsequent “final” rules published in March and April 2019
- Additional consultation published by PRA/BoE in July 2019
- Awaiting further amendments in EMIR context to reflect implementation period

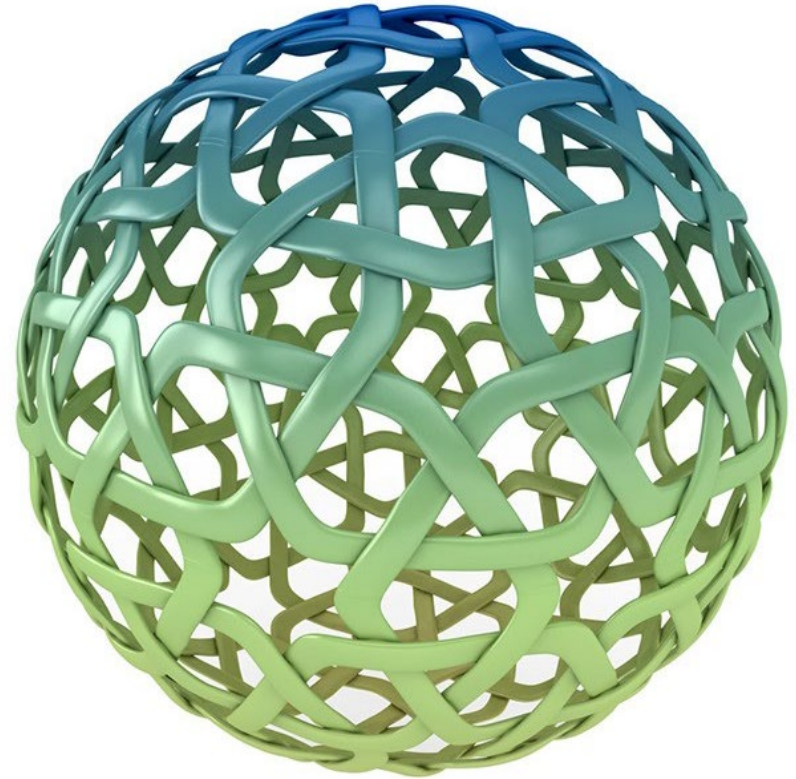
UK transitional relief subject to certain exceptions:

- FCA “final” directions in March 2019
- Joint PRA/BoE consultation in July 2019 updated ‘near final’ directions
- On 30 April 2020, FCA and PRA/BoE confirmed the extension of temporary transitional relief so it will be available for 15 months after the end of the implementation period (31 March 2022)
- Limited use in EMIR context

Inflight legislation?

UK EMIR: Breakdown of obligations

UK EMIR obligation type	Relevant UK regulator	Relevant UK legislation	Inflight provisions?	Transitional relief available?
Reporting	BoE and FCA (FCA lead) – see FCA PS 19/5	EMIR SI / EMIR Refit 2.1 SI FCA final BTS instruments published in March and April 2019	Yes – RTS relating to new EMIR Refit 2.1 reporting provisions may not be onshored	No
Clearing	BoE and FCA – see FCA PS 19/5 and BoE/PRA PS 5/19	EMIR SI / EMIR Refit 2.1 SI FCA final BTS instrument published in March 2019; BoE final BTS instrument published in March 2019	Yes – Status of EMIR Refit 2.1 provisions relating to FRANDT (applicable June 2021) unclear; Any changes made relating to current consultation on exemption for post-trade risk reduction services will likely not be onshored	No but note (i) any changes that apply as a result of a change to the covered bond exemption for clearing will apply from 31 March 2022; and (ii) transitional arrangements for non-UK CCPs
Risk mitigation (excluding margin)	BoE and FCA (FCA lead)- see FCA PS 19/5	EMIR SI / EMIR Refit 2.1 SI FCA final BTS instrument published in March 2019	N/A	No
Margin	PRA and FCA (PRA lead) – see BoE/PRA PS 5/19 and CP 18/19	EMIR SI / EMIR Refit 2.1 SI PRA final BTS instrument published in April 2019 and draft instrument published in July 2019	Yes- Status of Phase 5 (and 6) IM unclear; Status of EMIR Refit 2.1 changes relating to IM models (to be made by RTS) unclear; Equity options?	Unclear if June 2020 date in UK margin RTS (and date relating to credit quality assessments issued by an ECAI in Article 6(1)(c) of the margin RTS) intended to be revised further; No relief for changes as a result of definition of OTC derivatives
Intragroup exemptions for margin and clearing	FCA	EMIR SI	N/A	Existing exemptions grandfathered
CCPs	BoE – see BoE/PRA PS 5/19	EMIR SI (authorisation) / CCP SI and EMIR 2.2 SI (recognition of third country CCPs) BoE final BTS instrument published in March 2019	Yes – Status of EMIR 2.2 RTS relating to tiering and comparable compliance unclear	Yes - Transitional arrangements for non-UK CCPs
Trade Repositories (TRs)	FCA - see FCA PS 19/5	EMIR SI (recognition of third country TRs) / TR SI (registration of UK TRs) FCA final BTS instruments published in March and April 2019	N/A	No transitional arrangements for non-UK TRs but possibility for UK affiliates of EU TRs currently registered under EMIR to apply for deemed registration in the UK



Brexit and EMIR

- EU27 approach

EU27 preparations

EMIR obligation type	Relevant EU legislation	Transitional relief available?
Reporting	EMIR and related technical standards	No
Clearing	EMIR and related technical standards	No – Note that RTS to avoid triggering clearing requirements on novation of bilateral contracts have fallen away
Risk mitigation (excluding margin)	EMIR and related technical standards	No
Margin	EMIR and related technical standards	No – Note that RTS to avoid triggering margin requirements on novation of bilateral contracts have fallen away
Intragroup exemptions	EMIR and related technical standards	No
CCPs	EMIR and related technical standards	No – Note that temporary and conditional equivalence decision for UK CCPs has fallen away
TRs	EMIR and related technical standards	No



Brexit and EMIR

- Refresh on Outstanding Issues

Outstanding Issues: Definition of OTC Derivatives



UK issues:

- EU regulated markets are no longer “regulated markets”
- EU regulated markets are not “equivalent third country markets” as have not been declared equivalent under Art 2a UK EMIR
- Derivatives traded on EU regulated markets will be regarded as “OTC derivatives” under UK EMIR rather than “derivatives” as previously
- Certain C6 energy derivatives may also be brought within the definition
- No broad UK transitional relief is available

Consequences under UK EMIR include:

- (a) consideration of the obligations that apply to those contracts; and
- (b) impact on contracts which count towards the clearing threshold and, consequently, whether some entities are categorised as NFC+/NFC- or FC/SFC

EU perspective:

- Same issues and consequences under EMIR
- No EU transitional relief

Actions:

- Assess impact and monitor equivalence decisions

Outstanding Issues: Reporting

UK issues:

- No UK transitional relief for the reporting obligation
- No transitional recognition for non-UK TRs (other than UK affiliates of EU TRs registered under EMIR)
- Absent EU TR recognition, UK counterparties cannot comply with reporting obligation by reporting to an EU TR and may need to make new arrangements

Consequences under UK EMIR include:

- (a) impact on reporting regime;
- (b) impact on delegated reporting;
- (c) impact on mandatory reporting;
- (d) impact on legacy contracts if TR changes; and
- (e) impact on confidentiality waiver

EU perspective:

- Same issues and consequences under EMIR
- No EU transitional relief

Actions:

- Assess impact and monitor recognition and equivalence decisions
- Consider documentation impact
- Monitor use of suspension of the reporting obligation (UK EMIR only)
- Assess continued alignment of UK and EU reporting regimes



Outstanding Issues: Clearing

UK issues:

- No UK transitional relief is available (except for covered bond exemption) but note impact given relief for non-UK CCPs
- Transitional recognition for non-UK CCPs (for at least 3 years)



EU perspective:

- No EU transitional relief available
- Previous EU temporary recognition for UK CCPs in a “no deal” context has fallen away
- RTS to avoid triggering clearing requirements on novation of bilateral contracts has fallen away
- Equivalence for UK regulatory framework for CCPs? EMIR 2.2?
- Pension Scheme Clearing Exemption – not available for trades between UK pension scheme arrangements and EU counterparties

Actions:

- Assess impact and monitor recognition and equivalence decisions
- Consider documentation impact
- Assess continued alignment of UK and EU clearing regimes

Outstanding Issues: Uncleared Margin

UK issues:

- Transitional relief – awaiting confirmation whether it will be extended
- Note EUR thresholds/amounts continue to be denominated in EUR (no change to GBP)

Consequences under UK EMIR include:

- Impact on applicable margin regime(s)
- Differences (including Eligible Collateral, Initial Margin Cash Accounts, CCPs authorised as credit institutions, credit quality assessment, UCITs/AIFs thresholds)
- Availability of exemptions (covered bond, non-netting, equity)

EU perspective:

- Same issues and consequences under EMIR
- No EU transitional relief
- RTS to avoid triggering margin requirements on novation of bilateral contracts has fallen away

Actions:

- Assess impact and monitor equivalence decisions
- Consider documentation impact
- Assess continued alignment of UK and EU uncleared margin regimes



Outstanding Issues: Intragroup exemptions

Consequences under UK EMIR include:

- Existing clearing and margin exemptions grandfathered
- UK EMIR anticipates process for new applications for cross-border intragroup exemptions
- Exemption for cross-border (grandfathered or new) time limited for 3 years post exit day subject to equivalence decision or regulator intervention
- Existing equivalence decisions on margin (eg CFTC, Japan) onshored

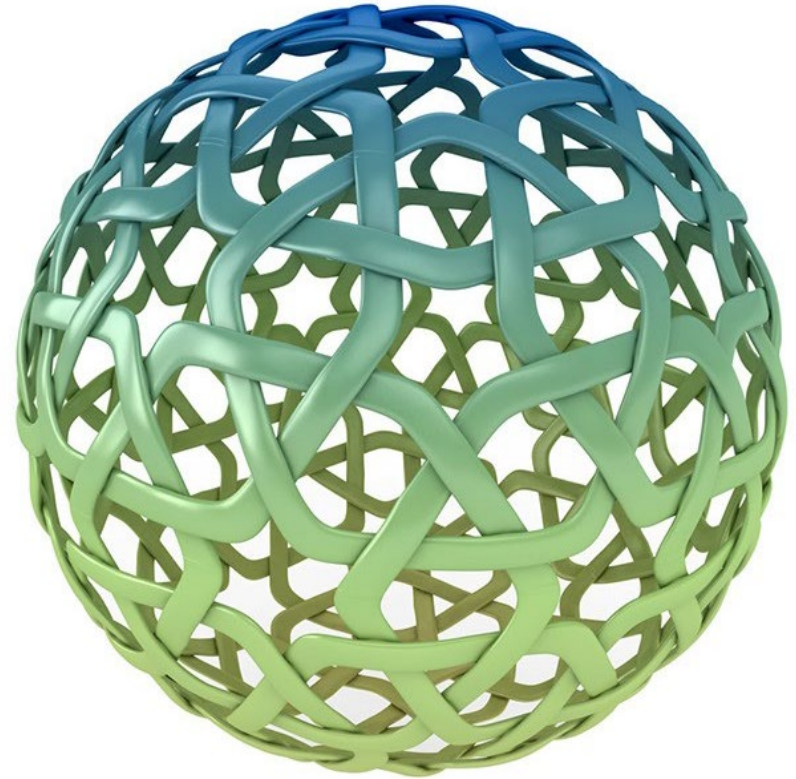
EU perspective:

- No transitional relief/grandfathering of existing UK vs EU exemptions as a result of Brexit
- If counterparty status changes as a result of Brexit, new applications are required – Process uncertain
- Existing time frame for cross-border intragroup transactions continues
- Existing equivalence decisions on margin continue

Actions:

- Monitor equivalence decisions
- UK EMIR – when does 3 year period start to run
- Legacy trades?





Brexit and EMIR

- Counterparty scope and practical impact

Practical impact: Regime application – UK bank perspective

Counterparty A	Counterparty B	Pre-Brexit regime application to UK bank	Post-Brexit regime application to UK bank
UK bank	UK bank	EMIR	UK EMIR
UK bank, EU branch	UK bank, EU branch	EMIR	UK EMIR and EMIR*
UK bank	EU bank	EMIR	UK EMIR [and EMIR**]
UK bank	Third country (non-EU) bank	EMIR [and any relevant third country regime**]	UK EMIR [and any relevant third country regime**]

* Direct, substantial and foreseeable effect

** Indirect application to UK bank

Practical impact: Regime application – EU bank perspective

Counterparty A	Counterparty B	Pre-Brexit regime application to EU bank	Post-Brexit regime application to EU bank
EU bank	EU bank	EMIR	EMIR
EU bank, UK branch	EU bank, UK branch	EMIR	EMIR and UK EMIR*
EU bank	UK bank	EMIR	EMIR [and UK EMIR**]
EU bank	Third country (non-UK) bank	EMIR [and any relevant third country regime**]	EMIR [and any relevant third country regime**]

* Direct, substantial and foreseeable effect

** Indirect application to EU bank

Issues: Brexit and counterparty classification



Your categorisation

- Reclassify entities under UK EMIR and EMIR

Counterparty classification

- Consider whether existing representations or communications as to counterparty categorisation can be relied upon under UK EMIR and EMIR – Are new confirmations as to UK EMIR and EMIR categorisation required from existing counterparties? Client outreach?

Action points

- Update policies, procedures and documentation to provide for counterparty classification under UK EMIR and EMIR
- Ensure procedures in place to ensure any appropriate calculations and notifications under UK EMIR are made relating to the clearing threshold and EMIR policies are also amended as relevant
- Assess impact on UK EMIR and EMIR clearing, reporting and risk mitigation obligations

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Resources

Resources

Allen & Overy Brexit toolkit

Allen & Overy Brexit Law – Financial Services

Brexit SI tracker

Regulators' publications

TPR

BTS / Rule set changes

Equivalence table

A&O Brexit Briefings



Questions?

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