



BANK OF ENGLAND

October 2018

The Bank of England's approach to amending financial services legislation under the European Union (Withdrawal) Act 2018

Bank of England Consultation Paper | PRA Consultation Paper CP25/18

The Bank of England's approach to amending financial services legislation under the European Union (Withdrawal) Act 2018

October 2018

By responding to this consultation, you provide personal data to the Bank of England. This may include your name, contact details (including, if provided, details of the organisation you work for), and opinions or details offered in the response itself.

The response will be assessed to inform our work as a regulator and central bank, both in the public interest and in the exercise of our official authority. We may use your details to contact you to clarify any aspects of your response.

The consultation paper will explain if responses will be shared with other organisations (for example, the Financial Conduct Authority). If this is the case, the other organisation will also review the responses and may also contact you to clarify aspects of your response. We will retain all responses for the period that is relevant to supporting ongoing regulatory policy developments and reviews. However, all personal data will be redacted from the responses within five years of receipt. To find out more about how we deal with your personal data, your rights or to get in touch please visit bankofengland.co.uk/legal/privacy.

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure to other parties in accordance with access to information regimes including under the Freedom of Information Act 2000 or data protection legislation, or as otherwise required by law or in discharge of the Bank's functions.

Please indicate if you regard all, or some of, the information you provide as confidential. If the Bank of England receives a request for disclosure of this information, we will take your indication(s) into account, but cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system on emails will not, of itself, be regarded as binding on the Bank of England.

Responses are requested by Wednesday 2 January 2019.

Please address any comments or enquiries to:

Nationalising the Acquis
EU Withdrawal Unit
Bank of England
Threadneedle Street
London
EC2R 8AH

Email: CP25_18@bankofengland.co.uk for responses to Bank of England Consultation Paper 'The Bank of England's approach to amending financial services legislation under the European Union (Withdrawal) Act 2018'

Contents

| | | |
|----------|---|-----------|
| 1 | Introduction | 1 |
| 2 | Background | 4 |
| 3 | General approach to making changes | 7 |
| 4 | General approach for the use of the temporary transitional power | 9 |
| 5 | EU Guidelines and Recommendations | 12 |
| | Appendix | 14 |

1 Introduction

1.1 This Bank of England (Bank)¹ consultation paper (CP) sets out the general approach the Bank proposes to adopt to ensure a functioning legal framework when the UK leaves the European Union (EU).

1.2 This consultation is relevant to all firms authorised and regulated by the Prudential Regulation Authority (PRA), as well as financial market infrastructure providers (FMIs) that are currently supervised by the Bank. Some of the proposals are also relevant to firms authorised and regulated by the Financial Conduct Authority (FCA), and to the Financial Services Compensation Scheme (FSCS). The consultation is also relevant to firms that might seek to apply to the PRA or FCA for authorisation, and to FMIs that might apply to the Bank for recognition.

1.3 The UK's withdrawal from the EU requires changes to be made to UK legislation to ensure that it remains functional. The European Union (Withdrawal) Act 2018 (the 'Act') converts directly applicable EU law (eg EU Regulations) into UK law and preserves domestic law that relates to EU membership (including domestic law that was introduced to implement EU Directives). This body of law is referred to as 'retained EU law'. The Act also confers powers on Government ministers to make changes to the law so that it continues to operate effectively after the UK's withdrawal from the EU – this is often referred to as 'onshoring', or 'Nationalising the Acquis'² (NtA).³ Government is responsible for making amendments to retained EU law that relates to financial services, and will lay statutory instruments (SIs) to propose those changes. HM Treasury proposes to delegate powers under the Act to the Bank and PRA to make amendments to their existing rules as well as onshored Binding Technical Standards (BTS) relevant to their remits (the 'delegated power'). Changes to rules and BTS using the delegated power will be made by legal instruments called EU Exit Instruments. As part of this, the Bank and PRA have published a package of consultations⁴ which set out proposals to make changes to relevant onshored BTS, rules for FMIs, and the PRA Rulebook.

1.4 The proposed changes are to ensure that there is a functioning legal framework for UK financial regulation when the UK leaves the EU. They do not reflect any change in Bank or PRA policy, except to reflect the UK's withdrawal from the EU. The Bank proposes to follow the general approach to onshoring adopted by Government under the Act. In particular, Government has indicated that its general approach is that, in the scenario that the UK leaves

¹ References to the Bank in this CP include the Prudential Regulation Authority (PRA), as appropriate.

² Acquis refers to the 'acquis communautaire'.

³ HM Treasury has set out its approach to onshoring EU financial services regulation in 'HM Treasury's approach to financial services legislation under the European Union (Withdrawal) Act', June 2018:

<https://www.gov.uk/government/publications/financial-services-legislation-under-the-eu-withdrawal-act>.

⁴ The Bank issued a news release (<http://www.bankofengland.co.uk/news/2018/october/boes-approach-to-amending-financial-services-legislation-under-the-eu-withdrawal-act-2018>) and four consultation papers on Thursday 25 October 2018:

- this CP on the overall approach, setting out the Bank's general approach to fixing deficiencies in rules and onshored BTS, and providing guidance on how EU Guidelines and Recommendations should be interpreted (<http://www.bankofengland.co.uk/paper/2018/the-boes-approach-to-amending-financial-services-legislation-under-the-eu-withdrawal-act-2018>);
- a PRA CP on changes to PRA rules and changes to onshored BTS within the PRA's remit (<http://www.bankofengland.co.uk/prudential-regulation/publication/2018/uk-withdrawal-from-the-eu-changes-to-pra-rulebook-and-onshored-bts>);
- a Bank CP on changes to Financial Market Infrastructure (FMI) rules and onshored BTS within the remit of the Bank as FMI supervisor (<http://www.bankofengland.co.uk/paper/2018/uk-withdrawal-from-the-eu-changes-to-fmi-rules-and-onshored-binding-technical-standards>); and
- a Bank CP on changes to onshored BTS within the remit of the Bank as resolution authority (<http://www.bankofengland.co.uk/paper/2018/uk-withdrawal-from-the-eu-boes-approach-to-resolution-sop-and-onshored-binding-technical-standards>).

the EU without a deal, the UK would default to treating the EU and its Member States in the same way as other 'third countries'. Exceptions would be made to that default approach where appropriate – including where this is justified in order to ensure financial stability, or to minimise disruption and avoid material unintended consequences for the continuity of service provision to UK customers, investors and the market.

1.5 The changes would only take effect on 11:00pm Friday 29 March 2019 ('exit day')⁵ in the event that there is no Implementation Period⁶ agreed between the UK and the EU as part of an agreement on the withdrawal of the UK from the EU.

1.6 If there is an Implementation Period, the Bank expects that the changes would take effect from the end of that period. However, further modifications to the proposals in this consultation package may be required to reflect any changes to the rules and BTS during the period and any agreement that is reached between the UK and EU on their future relationship.

1.7 HM Treasury has announced its intention to provide the financial services regulators with a temporary transitional power that could be used to grant transitional relief in respect of changes to firms' and FMIs' regulatory obligations that are being made under the Act (including through EU Exit Instruments).⁷ This CP sets out the Bank's proposed approach to using this power.

Structure of Bank and PRA consultation papers

1.8 Chapters 2 and 3 of this CP set out how the Bank proposes to use the delegated power to amend deficiencies within onshored BTS and regulators' rules. Chapter 4 of this CP sets out the Bank's proposed approach to the use of the temporary transitional power to grant transitional relief in respect of onshoring changes, including those changes described in the accompanying consultation papers (CPs). Chapter 5 of this CP sets out the Bank's proposed approach to interpreting the existing body of EU Guidelines and Recommendations in light of the UK's withdrawal from the EU.

1.9 This CP provides the background to, and should be read in conjunction with, the other three CPs and supporting documentation in the consultation package. These are:

- (i) PRA CP26/18 'UK withdrawal from the EU: Changes to PRA Rulebook and onshored Binding Technical Standards' on changes to PRA rules and onshored BTS that are relevant to the PRA's regulatory remit. This PRA CP26/18 is accompanied by:
 - Draft supervisory statements (SSs) on:
 - the PRA's approach to non-binding PRA materials;
 - the PRA's approach to interpreting reporting and disclosure requirements; and
 - updates to SS18/15 'Depositor and dormant account protection'.
 - Draft EU Exit Instruments which contain the specific changes that the PRA proposes to make to the PRA Rulebook and relevant onshored BTS.

⁵ As defined in the Act.

⁶ A draft Withdrawal Agreement was agreed March 2018. The draft Withdrawal Agreement provides for an implementation period ending on Thursday 31 December 2020 (the 'Implementation Period'):
<https://www.gov.uk/government/publications/draft-withdrawal-agreement-19-march-2018>.

⁷ 'Proposal for a temporary transitional power to be exercised by UK regulators', October 2018:
<https://www.gov.uk/government/publications/proposal-for-a-temporary-transitional-power-to-be-exercised-by-uk-regulators>.

- (ii) Bank (as supervisor of FMIs) CP 'UK withdrawal from the EU: Changes to FMI rules and onshored Binding Technical Standards' on changes that are relevant to FMIs. This CP is accompanied by:
 - a draft supervisory statement on the interpretation of non-binding Bank materials; and
 - a draft EU Exit Instrument which contains the specific changes that the Bank as FMI supervisor proposes to make to relevant onshored BTS and FMI rules.
- (iii) Bank (as resolution authority) CP 'UK withdrawal from the EU: The Bank of England's approach to resolution Statements of Policy and onshored Binding Technical Standards' on changes that are relevant to resolution. This CP is accompanied by a draft EU Exit Instrument which contains the specific changes that the Bank as resolution authority proposes to make to relevant onshored BTS.

1.10 In drafting amendments to onshored BTS and rules, the Bank and PRA have followed the approach taken by Government to onshoring changes under the Act. Most individual changes proposed in this consultation package reflect onshoring changes being made by Government as set out in its published SIs. Such changes, which are consequential to Government's changes, are generally not described in the CPs, but draft EU Exit Instruments showing all of the Bank's and PRA's proposed changes are appended to the relevant CP.

1.11 The CPs describe and explain those proposed changes:

- (i) that represent a departure from the default approach being taken by Government of treating the EU and its Member States as a 'third country';
- (ii) where there are different possible approaches which could be taken to making the relevant amendment; or
- (iii) in some cases, where the Bank and/or PRA considers that an explanation would be appropriate to make clear the rationale for a particular change.

1.12 In general, the Bank and PRA do not, at this stage, propose to amend their existing set of SSs, statements of policy (SoPs), and reporting requirements for firms or FMIs. Instead, as part of this consultation package, the Bank and PRA are consulting on draft SSs and draft SoPs which explain how these materials should be interpreted in light of the UK's withdrawal from the EU. In addition, the PRA is proposing specific changes to SS18/15 'Depositor and dormant account protection' which are appended to CP26/18.

1.13 Firms and FMIs should have regard to the changes being made by Government to amend relevant UK legislation under the Act when reading this CP. Firms and FMIs should also have regard to changes being made by the FCA under the Act, as appropriate.

Responses and next steps

1.14 This consultation closes on Wednesday 2 January 2019. The Bank invites feedback on the proposals set out in this consultation. Please address any comments or enquiries to CP25_18@bankofengland.co.uk.

1.15 Responses to this CP will be shared with the FCA.

2 Background

2.1 The Act received Royal Assent on Tuesday 26 June 2018. The Act will repeal the European Communities Act 1972 (which currently provides for the direct applicability of EU law in the UK), convert directly applicable EU law as it stands on exit day into domestic law, and save any existing domestic legislation that relates to EU membership (including domestic law that was introduced to implement EU Directives).

2.2 The Act also creates temporary powers for Government to make subordinate legislation in the form of SIs to enable changes to be made to laws that would otherwise no longer operate appropriately once the UK has left the EU. For example provisions that: have no practical application after the UK has left the EU; provide for reciprocal arrangements or rights between the UK and other EU Member States that are no longer in place or are no longer appropriate; or include EU references that are no longer appropriate. The Act refers to such provisions as 'deficiencies'. HM Treasury is exercising these powers to make appropriate amendments to onshored EU legislation and relevant UK legislation that relates to financial services.

2.3 The 'Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018' draft SI (the 'Regulations') delegates a power to the Bank, PRA, FCA, and Payment Systems Regulator (PSR) to amend deficiencies within BTS that will be onshored by the Act. The delegated power may also be used by the regulators to amend deficiencies within their respective existing rules.

2.4 This will enable the Bank and the PRA to amend provisions in relevant BTS, rules for FMIs, and the PRA Rulebook that would otherwise not operate appropriately as a result of the UK's withdrawal from the EU.

2.5 The Bank's and PRA's uses of the delegated power will be subject to similar constraints that apply to HM Treasury's power to amend deficiencies under the Act. This includes, for example, the definition of a 'deficiency' and various restrictions on the use of the powers. For example, it will not be possible to impose or increase taxation or fees using these powers, as set out in Section 8 of the Act.

2.6 All changes made by the regulators using the delegated power will be subject to approval by HM Treasury before the relevant EU Exit Instruments are made by the regulator. This approval will only be provided if HM Treasury considers that the relevant regulator has made appropriate provision to fix deficiencies arising from the UK's withdrawal from the EU.

2.7 Consistent with the approach taken by Government, and the scope of the delegated power, the Bank and PRA will not be making amendments that are unrelated to the UK's withdrawal from the EU as part of this process. Therefore, the proposed changes do not reflect any change in Bank or PRA policy, except to reflect the UK's withdrawal from the EU.

2.8 The Bank and PRA have worked closely with the FCA on the proposed amendments in this consultation package. In particular, for certain onshored BTS which are relevant to the remits of more than one regulator, the power to make amendments has been delegated jointly to the Bank, PRA and FCA. Where this is the case, either regulator may make the amendments with the consent of the other regulator. In addition, it is possible to 'divide' these onshored BTS into two parts so that separate provision can be made for different types of firms that fall within the remits of the different regulators.

2.9 In many cases, the Bank and PRA are choosing to exercise the option to divide onshored BTS, as this allows for the operational independence of the regulators. It is also consistent with the current model under the Financial Services and Markets Act 2000 (FSMA), where the PRA and FCA separately make rules that apply to their respective populations of firms. However, in some cases, onshored BTS are proposed to be left undivided. Further information on where the Bank, PRA and FCA are proposing to divide onshored BTS is set out in each relevant CP.

2.10 Using the delegated power means that FSMA obligations to consult publicly and conduct a cost benefit analysis (CBA) do not apply. However, the Bank and PRA have chosen to consult stakeholders, and will continue to do so as far as possible, to help inform the changes to onshored BTS, FMI rules and the PRA Rulebook.

Implementation Period

2.11 The UK and the EU agreed in principle at the March 2018 EU Council that there should be an Implementation Period lasting until Thursday 31 December 2020, as part of the UK's Withdrawal Agreement with the EU. If the Implementation Period takes effect, the UK would continue to be treated as part of the EU's single market in financial services, meaning that firms and FMIs will be able to operate on the same basis as they do now. Under the terms of the draft Withdrawal Agreement, EU law would also continue to apply in the UK during the Implementation Period, from Friday 29 March 2019 until Thursday 31 December 2020. UK firms and FMIs should therefore plan on the assumption that requirements arising from new EU legislation that come into effect during the Implementation Period will apply to UK firms and FMIs.

2.12 Government set out its approach to legislating for the Withdrawal Agreement in a White Paper on Tuesday 24 July 2018.⁸ In particular, this explained that EU rules and Regulations will continue to apply in the UK during the Implementation Period. Government has proposed to introduce the European Union (Withdrawal Agreement) Bill to amend the Act so that the conversion of EU law into 'retained EU law' takes place at the end of the Implementation Period, instead of on exit day.

2.13 Government has noted its strong expectation that the Implementation Period will be in place, and that the European Union (Withdrawal Agreement) Bill will likely defer, revoke or amend SIs made under the Act, as necessary to reflect the terms of the UK's relationship with the EU that would apply from Friday 1 January 2021. However, Government has said that it will continue to lay SIs under the Act with the aim of ensuring that there is a functioning framework for financial services legislation after exit day regardless of the outcome of negotiations with the EU, including if there is no Implementation Period.

2.14 The Bank also recognises the need to ensure that there is a fully functioning regulatory framework in place for financial services, whatever the outcome of negotiations between the UK and the EU. For that reason, the Bank and PRA are consulting now on changes to relevant onshored BTS and rules so that they could, if necessary, take effect on exit day. If the draft Withdrawal Agreement is ratified, the Bank expects that the changes proposed by the CPs would not take effect until the end of the Implementation Period and may, in that case, be subject to further amendment depending on the outcome of further negotiations between the EU and UK.

⁸ 'Legislating for the Withdrawal Agreement between the United Kingdom and the European Union': <https://www.gov.uk/government/publications/legislating-for-the-withdrawal-agreement-between-the-united-kingdom-and-the-european-union>.

Temporary transitional power

2.15 The Bank set out on Wednesday 27 June 2018⁹ that it does not expect firms providing services within the UK's regulatory remit to start preparing to implement onshoring changes. At the same time, HM Treasury set out that it intended to legislate to provide the financial services regulators with a temporary transitional power that could, in the event that there is no Implementation Period, be used to provide transitional relief in respect of onshoring changes.¹⁰ On Monday 8 October 2018, HM Treasury published further details on the powers it intends to provide to the regulators. HM Treasury's intention is that the power could be used to grant transitional relief in respect of any changes to firms' and FMIs' regulatory obligations that are being made under the Act (including through EU Exit Instruments).¹¹ Chapter 4 of this CP sets out how the Bank and PRA would propose to exercise this power, if it is conferred in the form set out by HM Treasury in its proposal.

⁹ 'Bank of England's approach to financial services legislation under the European Union (Withdrawal) Act': www.bankofengland.co.uk/news/2018/june/boes-approach-to-financial-services-legislation-under-the-eu-withdrawal-act.

¹⁰ 'HM Treasury's approach to financial services legislation under the European Union (Withdrawal) Act', June 2018: <https://www.gov.uk/government/publications/financial-services-legislation-under-the-eu-withdrawal-act>.

¹¹ 'Proposal for a temporary transitional power to be exercised by UK regulators': <https://www.gov.uk/government/publications/proposal-for-a-temporary-transitional-power-to-be-exercised-by-uk-regulators>.

3 General approach to making changes

3.1 HM Treasury set out its approach to onshoring financial services legislation on Wednesday 27 June 2018.¹² In line with that statement, HM Treasury has started publishing in draft, and laying, SIs under the Act that make the appropriate changes to onshored legislation to ensure that there is a functioning regulatory framework when the UK leaves the EU. These changes have been prepared on the assumption that there are no new, specific arrangements in place between the UK and the EU after the UK's withdrawal from the EU. Therefore, as a general principle, Government's amendments to retained EU law have been prepared on the basis that the UK would treat the EU and its Member States¹³ as it currently treats other countries ('third countries'). This would reflect the treatment of the UK in EU law in such a scenario, as the UK would automatically become a 'third country' under EU law.

3.2 As a result of this general approach, there are a number of common changes that are being made to onshored legislation by Government. In order to help firms and FMIs understand the context in which the Bank is proposing changes to onshored BTS and rules, a non-exhaustive description of some of the key changes to relevant financial services legislation is set out below. However, note that the Bank's proposed use of the temporary transitional power would affect the time that some of these changes take effect in practice (see Chapter 4 of this CP).

- (a) European Economic Area (EEA) firms that were able to provide services into the UK through passporting arrangements will need to seek authorisation to continue to be able to do so after exit day. Similarly, EEA FMIs will need to seek recognition to be able to continue to provide services in the UK after exit day. HM Treasury has brought forward legislation that will allow EEA firms, FMIs and funds to continue their activities in the UK for a period of three years after exit day¹⁴ before such firms and FMIs require full authorisation or recognition. In light of this, EEA firms and FMIs may plan on the assumption that full PRA authorisation or Bank recognition will only be needed by the end of the Implementation Period. Please refer to 'The EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018' draft SI for more information.¹⁵ As part of this consultation package, the PRA is consulting on the operation of the 'temporary permissions regime' (TPR). Please refer to Chapter 7 of CP26/18.
- (b) Roles and responsibilities that are currently being carried out by EU authorities are being reallocated to the most appropriate UK authority, to the extent that they remain relevant when the UK has left the EU. For example, the responsibility for central counterparty (CCP) recognition will be transferred to the Bank, and the European Insurance and Occupational Pensions Authority (EIOPA) function of declaring an 'exceptional adverse situation' will be transferred to the PRA. Some EU roles that will be redundant after the UK's withdrawal from the EU, for example those that exist only to support pan-EU structures, will be deleted.

¹² 'HM Treasury's approach to financial services legislation under the European Union (Withdrawal) Act': <https://www.gov.uk/government/publications/financial-services-legislation-under-the-eu-withdrawal-act>.

¹³ References in this consultation package to the EU and/or its Member States include, as appropriate, the European Economic Area (EEA) States of Norway, Iceland and Liechtenstein.

¹⁴ This period is extendable in certain circumstances.

¹⁵ July 2018: <https://www.gov.uk/government/publications/temporary-permissions-regime-for-firms>.

- (c) Detailed obligations that arise as part of EU membership for UK regulators to share information and co-operate with EU authorities will be deleted. This includes obligations to participate in EU supervisory colleges and to take joint decisions with other EU regulators. However, while these detailed obligations are being removed, the UK has actively worked since the financial crisis to build strong bilateral and multilateral co-operation mechanisms. The UK regulators will continue to be able to rely on existing FSMA provisions that support supervisory co-operation with third countries and will, for example, continue to host and participate in global supervisory colleges and crisis management groups.
- (d) In general, preferential treatment of the EU and its Member States will cease and they will be treated in the same way that third countries are currently. For example, the treatment of EU firms and assets for the purposes of capital and liquidity requirements will, in most cases, be aligned with the treatment of third country firms and assets. In addition, the ranking in the insolvency hierarchy of deposits made through EU branches of UK banks will be aligned with the ranking of deposits held by third country branches of such banks.
- (e) Where capital or liquidity consolidation was only required at the EU level previously, this will be required at the UK level after exit day. For insurance groups, firm-specific consolidation waivers would remain available.
- (f) References to directly applicable EU legislation will in general be updated to refer to the onshored version of that legislation. References to EU Directives will in general be updated to refer to the UK implementation of the Directive.

3.3 There are some specific instances where Government has said it would consider a departure from its general approach of treating the EU and its Member States as a third country to be appropriate.¹⁶ For example, the Government has stated that it would consider exceptions from that general approach in order to: i) minimise disruption and avoid material unintended consequences for the continuity of service provision to UK customers and investors; ii) protect the existing rights of UK consumers; and iii) ensure financial stability.

3.4 The Bank and PRA CPs highlight those instances where the Bank or PRA propose, in line with the above and in light of the Bank's and PRA's statutory objectives, to depart from the general approach of treating the EU and its Member States as a third country. The CPs do not highlight and explain each individual instance where the Bank or PRA propose to adhere to the Government's general approach. All of the changes that the Bank and PRA propose to make are set out in draft EU Exit Instruments, appended to the relevant CPs, and comments are welcome on all of the proposed changes.

3.5 The changes proposed in the CPs are based on draft SIs (or relevant explanatory policy materials) that have been published by HM Treasury or laid before Parliament as at the time of publication. For example, the CPs do not include certain changes to BTS and the PRA Rulebook that will be needed to reflect future Government SIs that are expected to cover areas such as accounting, audit, state aid, the Securitisation Regulation, and the treatment of Gibraltar. The CPs also only contain proposed changes to BTS and the PRA Rulebook that were applicable as at Sunday 1 July 2018. Further amendments will be required to onshored BTS and the PRA Rulebook in due course, as further relevant SIs are published.

¹⁶ 'HM Treasury's approach to financial services legislation under the European Union (Withdrawal) Act', June 2018: <https://www.gov.uk/government/publications/financial-services-legislation-under-the-eu-withdrawal-act>.

4 General approach for the use of the temporary transitional power

Background

4.1 On Wednesday 27 June 2018,¹⁷ in light of the Implementation Period in the draft Withdrawal Agreement, the Bank set out that '[W]e do not expect firms providing services within the UK's regulatory remit to have to prepare now to implement [onshoring] changes'. This reflects the expectation that there will be an Implementation Period.

4.2 HM Treasury also set out that it intended to legislate to provide the financial services regulators with a temporary power to introduce transitional relief that could be used to phase in onshoring changes in the event that there is no Implementation Period.¹⁸

4.3 HM Treasury confirmed on Monday 8 October 2018 that it intends that the power would be available to be used by regulators in respect of any onshoring changes that alter firms' and FMI's regulatory obligations.¹⁹ The power could therefore be applied to any such changes proposed in this consultation package, as well as any such changes to onshored EU legislation or EU-derived domestic legislation that Government makes using its powers under the Act.

4.4 Any use of the power would be subject to certain limitations. For example, the power could not be used for any purpose other than facilitating firms and FMIs in adjusting to the UK's post-exit regulatory regime. As such, it could not be used to waive or modify a firm's pre-exit obligations where they are unaltered by legislation made under the Act. In addition, the power could not be used if this would adversely affect the advancement of the regulators' statutory objectives. Any transitional relief granted under the power could not last for longer than two years from exit day. Also, the power would only be available in relation to changes that alter firms' and FMIs' regulatory obligations and therefore cannot be used to delay the application of onshoring changes which are concerned with the regulators' own functions and powers. This includes, for example, changes to regulatory processes for granting permissions.

4.5 The Bank and PRA could not use the power to mitigate any impacts of the UK's withdrawal from the EU which require action by the EU. For example, the power could not be used to allow UK firms to continue to provide services to EU clients or to change the treatment of UK firms or assets under EU law.

Bank and PRA proposals for using the temporary transitional power

4.6 This section sets out how the Bank and PRA propose to use the temporary transitional power. Firms that will be within the TPR should read this section in conjunction with Chapter 7

¹⁷ 'Bank of England's approach to financial services legislation under the European Union (Withdrawal) Act': <https://www.bankofengland.co.uk/news/2018/june/boes-approach-to-financial-services-legislation-under-the-eu-withdrawal-act>

¹⁸ 'HM Treasury's approach to financial services legislation under the European Union (Withdrawal) Act', June 2018: <https://www.gov.uk/government/publications/financial-services-legislation-under-the-eu-withdrawal-act>.

¹⁹ 'Proposal for a temporary transitional power to be exercised by UK regulators': <https://www.gov.uk/government/publications/proposal-for-a-temporary-transitional-power-to-be-exercised-by-uk-regulators>.

of CP26/18, which sets out the PRA's proposals in respect of the temporary transitional power in relation to such firms' regulatory obligations.

4.7 The Bank and PRA expect to use the temporary transitional power in such a manner that would ensure that firms and FMIs providing services within the Bank's and PRA's regulatory remits do not generally have to prepare now to implement onshoring changes by exit day.

4.8 HM Treasury has provided for various transitional arrangements in the drafting of their Sis under the Act. However, the Bank and PRA recognise that it could be challenging for firms and FMIs to comply from exit day with certain onshoring changes, where no specific transitional arrangement has otherwise been provided.

4.9 Therefore, the Bank and PRA are considering exercising the transitional powers in a broad way to delay the application of onshoring changes that would otherwise result in firms or FMIs needing to take action before exit day to comply with them, with certain limited exceptions. The Bank and PRA are considering further the duration of the transitional relief, with a view to ensuring that firms and FMIs can implement these changes in an orderly way.

4.10 The proposed broad use of the transitional powers would mean, for example, that after exit day and for the duration of the transitional relief:

- firms and FMIs would continue to treat EU27 exposures and assets preferentially, under the applicable capital frameworks, and under the CRR liquidity and large exposure regimes;
- firms and FMIs would continue to report and disclose regulatory data on the same basis as before exit day;
- UK groups that are part of EEA headquartered banking groups would not need to comply with consolidated liquidity requirements at the UK level;
- if HM Treasury relieves the PRA of its obligation to exercise group supervision at the level of any new UK sub-group that arises as a result of the UK's withdrawal from the EU, then EEA headquartered insurance groups would not need to calculate or report consolidated capital requirements on the basis of any such new UK sub-group; and
- credit unions could continue to place deposits with EEA credit institutions.

4.11 The above list is not exhaustive. However, the PRA has, at this stage and subject to responses to this CP, identified three examples of where it would not expect to use the power to delay onshoring changes to firms' obligations. This would mean that firms would need to be ready to comply with those onshoring changes by exit day, in the event that there is no Implementation Period. For these specific issues, the PRA considers that granting transitional relief could undermine its statutory objectives. The issues are:

- (i) *Contractual recognition of bail in rules*: The PRA does not propose to grant transitional relief in respect of liabilities that are intended to count towards a firm's minimum requirement for own funds and eligible liabilities (MREL) as this could undermine resolvability. In order to act proportionately, however, the PRA does propose to use the temporary transitional power in relation to phase two liabilities²⁰ as these have a lower

²⁰ Phase two liability means an unsecured liability that is not a debt instrument.

potential impact on resolvability. Accordingly, firms will be required to include contractual recognition of bail-in terms in all new liabilities,²¹ other than phase two liabilities, from exit day. This would delay firms having to include a contractual recognition of bail-in term in new non-UK EEA law governed phase two liabilities²² that are subject to the PRA's contractual recognition of bail-in rules.

- (ii) *Contractual stays*: The PRA does not propose to use the temporary transitional power in respect of new or materially amended non-UK EEA law governed financial arrangements in scope of the Stay in Resolution Part of the PRA Rulebook. This reflects the importance of these instruments in executing a resolution.
- (iii) *FSCS protection*: The PRA's proposed changes to the Depositor Protection and Policyholder Protection Parts of the PRA Rulebook and the proposed changes described in Chapter 8 of CP26/18 would take effect on exit day and the PRA is not proposing to grant transitional relief.²³ To deliver effective FSCS protection, deposit-takers must be able to deliver a Single Customer View (SCV) to enable pay-out by the FSCS in the case of failure; depositors must be aware of the changes in protection; and FSCS levies must be calculated on the basis of the changed scope. Otherwise, the aims of the FSCS regime and benefits to the stability of the financial system could be undermined.

4.12 Note that the Bank and PRA do not propose to delay the application of textual onshoring changes where no specific action from firms or FMIs would be needed in order to continue to meet their regulatory obligations from exit day. This includes, for instance, changes in relation to cross references in legislation.

4.13 The proposed use of the temporary transitional power does not affect the Bank's and PRA's approach to the supervision of individual firms and FMIs. Regardless of how the power is used, the Bank and PRA would continue to consider supervisory action in relation to individual firms or FMIs, as appropriate, in line with their statutory objectives. This includes, for example, requiring additional reporting.

4.14 The Bank and PRA will continue to consider their approach to the potential use of the temporary transitional power, in light of responses received to this CP, further Government onshoring SIs and the progress of Government's negotiations on the Withdrawal Agreement. This includes considering the duration of the transitional relief to be provided and whether further exceptions to the general approach outlined above are needed to take account of the Bank's and PRA's objectives.

4.15 The Bank welcomes comments from readers, especially firms and FMIs, on the proposed approach outlined above – in particular, which onshoring changes that affect their regulatory obligations they would consider to be particularly challenging to implement in time for exit day, and how much time they would need to implement those changes in an orderly way.

²¹ Or existing liabilities that are materially amended.

²² Or existing phase two liabilities that are materially amended.

²³ The PRA is also proposing changes to the Dormant Account Scheme, Management Expenses in Respect of Relevant Schemes, and Management Expenses Levy Limit and Base Costs Parts of the PRA Rulebook that would also take effect on exit day. The PRA is not proposing to grant transitional relief in respect of these changes.

5 EU Guidelines and Recommendations

5.1 The European Supervisory Authorities (ESAs) have powers to issue Guidelines and Recommendations. European regulators, firms, and FMIs are currently under an obligation to 'make every effort to comply' with them. National authorities have the option of not complying, but must inform the relevant ESA of this, stating their reasons. There is currently no exhaustive list of Guidelines and Recommendations maintained by the ESAs but they are generally available on the relevant authority's website.

5.2 Guidelines and Recommendations are not saved by the Act and HM Treasury has stated that it intends to delete the obligation to make every effort to comply with them.²⁴ However, Guidelines and Recommendations will continue to be relevant to firms' and FMIs' compliance with relevant regulatory requirements. For example, Guidelines issued by the European Banking Authority (EBA) in relation to the Capital Requirements Regulation (575/2013) (CRR) will continue to be relevant to the interpretation of the onshored version of the CRR,²⁵ and therefore firms' compliance with it.

5.3 The Bank continues to expect firms and FMIs to continue to make every effort to comply with any Guidelines and Recommendations that they are currently expected to comply with, to the extent that they remain relevant after the UK's withdrawal from the EU. The Bank and the PRA also expect to continue to comply with those Guidelines and Recommendations directed at them, except where the Bank and/or PRA has previously explained to the relevant EU authority an intention not to comply. This proposed approach is set out in the draft Statement of Policy (SoP) in the Appendix to this CP. The Bank and PRA may revisit their approach to existing Guidelines or Recommendations after exit day.

5.4 The Bank and the PRA do not propose to reproduce and make amendments to the content of individual Guidelines and Recommendations ahead of exit day. However, firms and FMIs should interpret them in light of onshoring changes that are being made to financial services legislation under the Act.

5.5 To provide greater clarity for UK firms and FMIs, the Bank and PRA have included in Appendices 1 to 3 of the accompanying draft SoP a list of Guidelines that are currently complied with in the UK. The Bank and PRA expect firms and FMIs to continue to comply with these Guidelines after exit day to the extent that they are addressed directly to firms and FMIs and remain relevant. This is not an exhaustive list of Guidelines that will continue to be relevant to firms and FMIs. For example, Guidelines that were made by the predecessor committees²⁶ to the ESAs are not included in this list but may continue, where relevant, to apply unless they have been revoked or superseded by Guidelines on the list or by other legislation.

²⁴ 'Regulations relating to the European Supervisory Authorities and the European Systemic Risk Board', October 2018: <https://www.gov.uk/government/publications/regulations-relating-to-the-european-supervisory-authorities-and-the-european-systemic-risk-board/regulations-relating-to-the-european-supervisory-authorities-and-the-european-systemic-risk-board>.

²⁵ 'Capital Requirements (Amendment) (EU Exit) Regulations 2018' draft SI: <https://www.gov.uk/government/publications/draft-capital-requirements-amendment-eu-exit-regulations-2018>.

²⁶ The Committees of European Banking Supervisors (CEBS), European Insurance and Occupational Pensions Supervisors (CEIOPS), and European Securities Regulators (CESR).

5.6 The Bank and PRA would not expect firms and FMIs to comply with Guidelines where the Bank and/or the PRA has previously informed the relevant EU authority that it does not intend to comply with that Guideline. Individual Guidelines which the Bank and the PRA have explained that the UK does not intend to comply with are set out in Appendix 4 of the accompanying draft SoP.

5.7 Changes to existing Guidelines, or new Guidelines and Recommendations made by EU authorities, will not automatically apply in the UK after exit day if there is no Implementation Period. However, the Bank and PRA may choose to apply similar standards in future, and will indicate where this is the case.

Appendix: Draft Statement of Policy 'Interpretation of EU Guidelines and Recommendations: Bank of England and PRA approach after the UK's withdrawal from the EU'

Contents

1 Introduction

2 Bank and PRA expectations for firms and FMIs

3 Key onshoring changes relevant to the interpretation of non-binding EU materials

Appendices

1 Introduction

1.1 This joint Bank of England (Bank) and Prudential Regulation Authority (PRA) Statement of Policy (SoP) sets out the Bank's and PRA's approach to EU Guidelines and Recommendations in light of the UK's withdrawal from the European Union (EU).

1.2 This SoP is relevant to all PRA-regulated firms, and all Bank-regulated financial market infrastructure providers (FMIs) operating, or intending to operate, in the UK.

1.3 HM Treasury has set out its intention to use powers under the European Union (Withdrawal) Act 2018 (the 'Act') to ensure that the UK would continue to have a functioning financial services regulatory regime regardless of the outcome of negotiations with the EU. Its approach is to ensure that EU-derived laws and rules that are currently in place in the UK will continue to apply at the point of exit to the extent that they remain operable in a UK regime. Changes will only be made to those laws or rules that would otherwise not operate appropriately. This will provide continuity and certainty for firms and FMIs as the UK leaves the EU.

1.4 The European Supervisory Authorities (ESAs) have powers to issue Guidelines and Recommendations. European regulators, PRA-regulated firms, and FMIs are currently under an obligation to 'make every effort to comply' with them. National authorities have the option of not complying, but must inform the relevant ESA of this, stating their reasons. There is currently no exhaustive list of Guidelines and Recommendations maintained by the ESAs but they are generally available on the relevant authority's website.

1.5 The Bank and/or PRA may issue further statements in relation to this topic, including in relation to any EU materials issued after the publication of this statement.

2 Bank and PRA expectations for firms and FMIs

2.1 Guidelines and Recommendations are not saved by the Act and HM Treasury has stated that it intends to delete the obligation to make every effort to comply with them.¹ However, the Bank and PRA expect firms and FMIs to continue to make every effort to comply with EU Guidelines and Recommendations to the extent that they remain relevant when the UK leaves the EU. Firms and FMIs that become authorised or recognised to continue to provide services in the UK on or after exit day (including firms and FMIs that previously provided rights services in the UK via EU rights, such as passporting) will become subject to these expectations.

2.2 Appendices 1 to 3 contain lists of Guidelines that are currently complied with in the UK. The Bank and PRA expect firms and FMIs to continue to comply with these after exit day to the extent that they are addressed directly to firms and FMIs and remain relevant. Where aspects of Guidelines and Recommendations are addressed to competent authorities, the Bank and PRA expect firms and FMIs to continue to comply with any associated rules or expectations produced by the Bank or PRA that implement those Guidelines. The lists in Appendices 1 to 3 are not exhaustive. For example, Guidelines that were made by the predecessor committees² to the ESAs are not included on this list but firms and FMIs should continue, where relevant, to

¹ 'Regulations relating to the European Supervisory Authorities and the European Systemic Risk Board', October 2018: <https://www.gov.uk/government/publications/regulations-relating-to-the-european-supervisory-authorities-and-the-european-systemic-risk-board/regulations-relating-to-the-european-supervisory-authorities-and-the-european-systemic-risk-board>.

² The Committees of European Banking Supervisors (CEBS), European Insurance and Occupational Pensions Supervisors (CEIOPS), and European Securities Regulators (CESR).

comply with them, unless they have been revoked or superseded by later Guidelines or by other legislation.

2.3 The UK authorities have previously communicated that they have not complied with the Guidelines set out in Appendix 4. The Bank and the PRA do not expect firms and FMIs to comply with these Guidelines.

2.4 The Bank and the PRA do not propose to reproduce and make amendments to the content of individual Guidelines and Recommendations issued by the EU ahead of exit. However, if they remain relevant, firms and FMIs should interpret them in light of the UK's withdrawal from the EU and onshoring changes that are being made to ensure that the UK regulatory framework operates appropriately. Firms and FMIs should also interpret the Guidelines and Recommendations in light of the use of any relevant transitional relief.

2.5 Changes to existing EU Guidelines and Recommendations, and new Guidelines and Recommendations made by EU authorities, will not automatically apply when the UK leaves the EU. The Bank and PRA will consider their approach to such developments and may issue further statements in relation to them.

3 Key onshoring changes relevant to the interpretation of non-binding EU materials

3.1 Below is a non-exhaustive list of onshoring changes that are proposed to be made by Government under the Act, which are relevant to firms' and FMIs' interpretation of non-binding EU materials. However, any transitional relief granted by the Bank or PRA may affect the time that some of these changes take effect.

- EEA firms, FMIs and funds that were able to provide services into the UK through the use of passporting will need to seek authorisation or recognition to continue to be able to do so after exit. Therefore, any reference to passporting or processes associated with passporting is redundant. However, HM Treasury has also brought forward legislation that will allow EEA firms, FMIs, and funds to continue their activities in the UK for a limited period after withdrawal. References to third country firms and FMIs should be interpreted to include firms and FMIs that have temporary permission or recognition, as appropriate.
- Roles and responsibilities carried out by EU authorities are being reallocated to the most appropriate UK authority, to the extent that they remain relevant when the UK has left the EU. For example, HM Treasury has transferred the responsibility for central counterparty (CCP) recognition to the Bank of England, and is proposing to transfer the European Insurance and Occupational Pensions Authority (EIOPA) function of declaring an 'exceptional adverse situation' to the PRA. Some EU roles that exist to support the EU single market will be deleted. Firms and FMIs should interpret references to EU functions with reference to the new UK authority taking on that function. References to functions that are being deleted in Government onshoring legislation can be ignored.
- Detailed obligations for UK regulators to share information and co-operate with EU regulators will no longer be maintained. UK regulators will, however, be able to rely on general statutory provisions that support supervisory co-operation with third country authorities. Firms and FMIs should therefore interpret detailed obligations on the Bank and PRA to share information and co-operate with EU regulators as redundant but note that the Bank and PRA will continue to co-operate with international authorities and regulators, including EU authorities, in pursuit of their statutory objectives.

- The treatment of EEA firms and assets for the purposes of capital and liquidity requirements will, in most cases, be aligned with the treatment of third country firms and assets. Therefore, firms should interpret any Guidelines or Recommendations providing for preferential treatment of EEA assets in light of that approach.
- Where capital or liquidity consolidation was only required at the EEA level previously, this will be required at the UK level after exit day. For insurance groups, firm-specific consolidation waivers remain available. Therefore, firms should interpret any reference to the EEA consolidated group as if it was to the UK consolidated group.

Appendices

-
- 1 Non-exhaustive list of EIOPA Guidelines that are complied with in the UK**

 - 2 Non-exhaustive list of EBA Guidelines and Recommendations that are complied with in the UK**

 - 3 Non-exhaustive list of ESMA Guidelines that are complied with in the UK, excluding those that apply only to FCA-regulated firms**

 - 4 Individual Guidelines where explanation has been provided that the UK does not intend to comply**

Appendix 1: Non-exhaustive list of EIOPA Guidelines that are complied with in the UK

Solvency II

- Guidelines on the supervision of branches of third-country insurance undertakings
- Guidelines on Financial Stability Reporting
- Guidelines on the Extension of the Recovery Period
- Guidelines on the exchange of information within colleges
- Guidelines on the implementation of the long-term guarantee measures
- Guidelines for determining the market shares for reporting
- Guidelines on reporting and public disclosure
- Guidelines on the recognition and valuation of assets and liabilities other than technical provisions
- Guidelines on System of Governance
- Guidelines on Own Risk Solvency Assessment
- Guidelines on ancillary own funds
- Guidelines on application of outwards reinsurance
- Guidelines on the application of life underwriting risk module
- Guidelines on basis risk
- Guidelines on classification of own funds
- Guidelines on contract boundaries
- Guidelines on group solvency
- Guidelines on health catastrophe risk sub-module
- Guidelines on look-through approach
- Guidelines on operational functioning of colleges
- Guidelines on ring-fenced funds
- Guidelines on supervisory review process
- Guidelines on the loss-absorbing capacity of technical provisions and deferred taxes

- Guidelines on the methodology for equivalence assessments by national supervisory authorities under Solvency II
- Guidelines on the treatment of market and counterparty risk exposures in the standard formula
- Guidelines on the use of internal models
- Guidelines on the treatment of related undertakings, including participations
- Guidelines on undertaking-specific parameters
- Guidelines on valuation of technical provisions

Appendix 2: Non-exhaustive list of EBA Guidelines and Recommendations that are complied with in the UK

Bank Recovery and Resolution Directive (BRRD)

- Guidelines on the rate of conversion of debt to equity in bail-in
- Guidelines on the treatment of shareholders in bail-in
- Guidelines on treatment of liabilities in bail-in
- Guidelines on how information should be provided under the BRRD
- Guidelines on Business Reorganisation Plans
- Guidelines specifying the various conditions for the provision of group financial support
- Guidelines on simplified obligations
- Guidelines on the sale of business tool
- Guidelines on the asset separation tool
- Guidelines on necessary services
- Guidelines on failing or likely to fail
- Guidelines on early intervention triggers
- Guidelines on recovery plans indicators
- Guidelines on measures to reduce or remove impediments to resolvability
- Guidelines on the types of tests, reviews or exercises that may lead to support measures
- Guidelines on the range of scenarios to be used in recovery plans

Capital Requirements Directive IV (CRD IV)

- Guidelines on internal governance (revised)
- Recommendation on the equivalence of confidentiality regimes
- Guidelines on criteria to assess other systemically important institutions (O-SIIs)
- Guidelines on the data collection exercise regarding high earners
- Guidelines on the remuneration benchmarking exercise

- Guidelines on the applicable notional discount rate for variable remuneration
- Recommendations on the coverage of entities in a group recovery plan
- Joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body

Capital Requirements Regulation (CRR)

- Guidelines on disclosure requirements under Part Eight of Regulation (EU)
- Guidelines on the LCR disclosure
- Guidelines on the application of the definition of default
- Guidelines on corrections to modified duration for debt instruments
- Guidelines on implicit support for securitisation transactions
- Guidelines on limits on exposures to shadow banking
- Guidelines on materiality, proprietary and confidentiality and on disclosure frequency
- Guidelines on significant risk transfer (SRT) for securitisation transactions
- Guidelines on disclosure of encumbered and unencumbered assets

Financial Conglomerates Directive (FICOD)

- Joint Guidelines on the convergence of supervisory practices relating to the consistency of supervisory coordination arrangements for financial conglomerates

EBA Regulation Article 16

- Guidelines on supervision of significant branches
- Recommendations on outsourcing to cloud service providers
- Guidelines on ICT Risk Assessment under the SREP
- Guidelines on credit risk management practices and accounting for expected credit losses
- Guidelines on ICAAP and ILAAP information
- Guidelines on communication between competent authorities and auditors
- Guidelines on harmonised definitions and templates for funding plans of credit institutions
- Recommendation on the use of Legal Entity Identifier (LEI)

IFRS 9

- Guidelines on disclosure requirements of IFRS 9 transitional arrangements

Deposit Guarantee Scheme Directive (DGSD)

- Guidelines on stress tests of deposit guarantee schemes
- Guidelines on cooperation agreements between deposit guarantee schemes
- Guidelines on methods for calculating contributions to Deposit Guarantee Schemes (DGSs)
- Guidelines on payment commitments

Appendix 3: Non-exhaustive list of ESMA Guidelines that are complied with in the UK, excluding those that apply only to FCA-regulated firms

Central Securities Depositories Regulation (CSDR)

- Guidelines on participant default rules and procedures under CSDR
- Guidelines on the Process for the Calculation of the Indicators to Determine the Substantial Importance of a CSD for a Host Member State
- Guidelines on the Process for the Calculation of the Indicators to Determine the Most Relevant Currencies in which Settlement Takes Place
- Guidelines on Internalised Settlement Reporting under Article 9 of CSDR
- Guidelines on Cooperation between Authorities under articles 17 and 23 of CSDR
- Guidelines on Access by a CSD to the Transaction Feeds of a CCP or of a Trading Venue under CSDR

European Market Infrastructure Regulation (EMIR)

- Guidelines and Recommendations regarding written agreements between members of CCP colleges
- Guidelines and Recommendations regarding the implementation of the CPSS-IOSCO Principles for Financial Market Infrastructures in respect of Central Counterparties
- Guidelines and Recommendations for establishing consistent, efficient and effective assessments of interoperability arrangements
- Guidelines on CCP conflicts of interest management
- Guidelines on Anti-procyclicality Margin Measures for Central Counterparties

Markets in Financial Instruments Directive II (MiFID II)

- Joint ESMA and EBA guidelines on the assessment of suitability of members of the management body and key function holders
- Guidelines on certain aspects of the MiFID II suitability requirements

Appendix 4: Individual Guidelines where explanation has been provided that the UK does not intend to comply

Capital Requirements Directive IV (CRDIV)

- Guidelines on sound remuneration policies
- Guidelines for the identification of global systemically important institutions (G-SIIs)

Prudential Assessment of Financial Sector Acquisitions Directive¹

- Joint Guidelines for the prudential assessment of acquisitions of qualifying holdings

¹ 2007/44/EC.