

EU EXIT INSTRUMENT: THE TECHNICAL STANDARDS (EUROPEAN MARKET INFRASTRUCTURE) (EU EXIT) (No. 5) INSTRUMENT 2020

Powers exercised

- A. The Prudential Regulation Authority (“PRA”) being the appropriate regulator within the meaning of the Financial Regulators’ Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 (“the Regulations”), having carried out consultations pursuant to regulation 5 of the Regulations and with the approval of the Treasury, makes the instrument in exercise of the powers conferred by regulation 3 of the Regulations.

History

- B. The PRA made the Technical Standards (European Market Infrastructure) (EU Exit) (No. 3) Instrument 2019 on 9 April 2019. This made modifications to the EU EMIR.

Pre-conditions to making

- C. The PRA and the FCA are the appropriate regulators for the EU EMIR.
- D. The PRA proposes to exercise the power in regulation 3 of the Regulations to modify the EU EMIR.
- E. The FCA has been consulted on the modifications contained in the Annex to this instrument in accordance with regulation 5 of the Regulations and has consented to the modifications contained in the Annex to this instrument in accordance with regulation 3(2) of the Regulations.
- F. A draft of this instrument has been approved by the Treasury, the Minister considering that it makes appropriate provision to prevent, remedy or mitigate any failure of retained EU law to operate effectively, or any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the European Union.

Interpretation

- G. In this instrument –
- (a) “the 2018 Act” means the European Union (Withdrawal) Act 2018;
 - (b) “the 2020 Act” means the European Union (Withdrawal Agreement) Act 2020;
 - (c) “EU EMIR” means the EU Regulation specified in Part 4 of the Schedule to the Regulations under the heading “European Markets Infrastructure Regulation”, as it forms part of domestic law by virtue of section 3 of the 2018 Act;
 - (d) “IP completion day” has the meaning given in section 39 of the 2020 Act; and
 - (e) “the FCA” means the Financial Conduct Authority.

Modifications

- H. The PRA makes the modifications in the Annex below to the Technical Standards (European Market Infrastructure) (EU Exit) (No. 3) Instrument 2019.

Commencement

- I. This instrument comes into force immediately before IP completion day.

Citation

- J. This instrument may be cited as Technical Standards (European Market Infrastructure) (EU Exit) (No. 5) Instrument 2020.

By order of the Prudential Regulation Committee

[] 2019

Annex

[**Note:** for consultation purposes, modifications to the Technical Standards (European Market Infrastructure) (EU Exit) (No. 3) Instrument 2019 in this Annex are highlighted for the convenience of readers. This highlighting will not appear in any final instrument and will not form part of the legislative text.]

1 MODIFICATIONS TO THE ANNEX TO THE TECHNICAL STANDARDS (EUROPEAN MARKET INFRASTRUCTURE) (EU EXIT) (NO. 3) INSTRUMENT 2019

- 1.1 The following provisions are added to the Annex to the Technical Standards (European Market Infrastructure) (EU Exit) (No. 3) Instrument 2019 (which modifies Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, as it forms part of domestic law by virtue of section 3 of the 2018 Act):

Article 31a

Treatment of physically settled foreign exchange forwards and physically settled foreign exchange swaps

By way of derogation from Article 2(2), counterparties may provide in their risk management procedures that variation margins are not required to be posted or collected for physically settled foreign exchange forward contracts and physically settled foreign exchange swap contracts where: one of the counterparties is not an institution as defined in point (3) of Article 4(1) of Regulation (EU) No 575/2013 or would not qualify as such an institution if it were established in the ~~Union~~United Kingdom.

- 1.2 Relevant provisions of the Annex to the Technical Standards (European Market Infrastructure) (EU Exit) (No. 3) Instrument 2019 (which modifies Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, as it forms part of domestic law by virtue of section 3 of the 2018 Act) are substituted as follows:

Article 35A

Application of Articles 4(1), 6, 7, 8, point (e) of Article 19(1), Articles 22, 23, 28, 29, 30, 39 and Annexes I, II and III.

1. Article 4(1)(c) shall, for the specified period, be read as if the reference to “the central government of the United Kingdom or the Bank of England” included a reference to “Member States’ central governments or central banks”.
2. Article 4(1)(d) shall, for the specified period, be read as if the reference to “United Kingdom regional governments or local authorities” included a reference to “Member States’ regional governments or local authorities” and as if the reference to “the United Kingdom” included a reference to “that Member State”.
3. Article 4(1)(e) shall, for the specified period, be read as if the reference to “United Kingdom public sector entities” included a reference to “Member States’ public sector entities” and as if the reference to “the United Kingdom” included a reference to “that Member State”.
4. Article 4(1)(f) shall, for the specified period, be read as if the reference to “United Kingdom regional governments or local authorities” included a reference to “Member States’ regional governments or local authorities”.
5. Article 4(1)(g) shall, for the specified period, be read as if the reference to “United Kingdom public sector entities” included a reference to “Member States’ public sector entities”.
6. For the purposes of Article 6(1)(b) a posting counterparty either:-
 - (a) established in the EEA; or
 - (b) established in a third country other than a country in the EEA where the posting counterparty is subject to consolidated supervision which, prior to IP completion day, has been assessed by an EEA competent authority other than the Prudential Regulation Authority or the Financial Conduct Authority as equivalent to that governed by Union law in accordance with Article 127 of Directive 2013/36/EU, is, for the specified period, deemed to be established in the United Kingdom.
7. Article 6(1)(c) shall, for a period of one year beginning on IP completion day, be read as if the reference to “a credit quality assessment issued by a recognised External Credit Assessment Institution (ECAI) as defined in Article 4(98) of Regulation (EU) 575/2013” included a reference to “a credit quality assessment that was issued or endorsed and not withdrawn immediately before IP completion day by a recognised External Credit Assessment Institution (ECAI) as defined in Article 4(98) of Regulation (EU) 575/2013 (as it had effect immediately before IP completion day)” and, unless the context otherwise requires, related references in this Regulation to Regulation (EU) 575/2013, “ECAI”,

- “credit quality assessments”, “credit assessment” and “credit quality steps” shall be read accordingly.
8. Article 8(3) shall, for the specified period, be read as if, in addition to (a) to (c), it included institutions identified as G-SIIs or O-SIIs by EU competent authorities in accordance with Article 131 of Directive 2013/36/EU.
 9. A credit institution authorised in accordance with Directive 2013/36/EU is, for the specified period, deemed to fall within Article 19(1)(e)(i).
 10. For the specified period, the derogation provided for in Article 23 may also be applied by counterparties to EEA CCPs that are authorised as credit institutions in accordance with Directive 2013/36/EU.
 11. For the specified period-
 - (a) references to UK UCITS in this Regulation shall be read as if they included references to EEA UCITS (and in relation to EEA UCITS, the reference to Article 132(3) of Regulation (EU) No 575/2013 in Article 5(1)(c) of this Regulation shall be read as a reference to Article 132(3) of Regulation (EU) No 575/2013 as it had effect immediately before IP completion day); and
 - (b) references to AIFs managed by AIFMs authorised or registered in accordance with the Alternative Investment Fund Managers Regulations 2013 in Articles 28(3), 29(3) and 39(2) shall be read as if they included references to alternative investment funds managed by alternative investment fund managers authorised or registered in accordance with Directive 2011/61/EU.
 12. In Article 30, the reference to Article 129 of Regulation (EU) 575/2013 shall, for the specified period, be read as a reference to that Article as it had effect immediately before IP completion day.
 13. The specified period is the period that begins on IP completion day and ends on 31 March 2022.
 14. In this Article – “EEA UCITS” has the meaning it has in section 237(3) of the Financial Services and Markets Act 2000.

Article 36

Application of 9(2), Article 11, Articles 13 to 18, points (c), (d) and (f) of Article 19(1), Article 19(3) and Article 20

1. Article 9(2), Article 11, Articles 13 to 18, points (c), (d) and (f) of Article 19(1), Article 19(3) and Article 20 shall apply as follows:
 - (a) from 1 month after ~~the date of entry into force of this Regulation~~ 4 January 2017, where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of non-centrally cleared derivatives that is above EUR 3 000 billion;
 - (b) from 1 September 2017, where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of non-centrally cleared derivatives that is above EUR 2 250 billion;

(c) from 1 September 2018, where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of non-centrally cleared derivatives that is above EUR 1 500 billion;

(d) from 1 September 2019, where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of non-centrally cleared derivatives that is above EUR 750 billion;

~~(e) from 1 September 2021, where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of non-centrally cleared derivatives that is above EUR 50 billion;~~

[Note: Articles 9(2), Article 11, Articles 13 to 18, points (c), (d) and (f) of Article 19(1), Article 19(3) and Article 20 do not form part of domestic law on and after IP completion day by virtue of section 3 of the European Union (Withdrawal) Act 2018 where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of non-centrally cleared derivatives that is above EUR 50 billion and below EUR 750 billion.]

~~(f) from 1 September 2022, where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of non-centrally cleared derivatives that is above EUR 8 billion.~~

[Note: Articles 9(2), Article 11, Articles 13 to 18, points (c), (d) and (f) of Article 19(1), Article 19(3) and Article 20 do not form part of domestic law on and after IP completion day by virtue of section 3 of the European Union (Withdrawal) Act 2018 where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of non-centrally cleared derivatives that is above EUR 8 billion and below EUR 50 billion.]

~~2. By way of derogation from paragraph 1, where the conditions of paragraph 3 of this Article are met, Article 9(2), Article 11, Articles 13 to 18, points (c), (d) and (f) of Article 19(1), Article 19(3) and Article 20 shall apply as follows:~~

~~(a) from 21 December 2020 where no equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 11(3) of that Regulation in respect of the relevant third country;~~

~~(b) the later of the following dates where an equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 11(3) of that Regulation in respect of the relevant third country:~~

~~(i) 4 months after the date of entry into force of the decision adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 11(3) of that Regulation in respect of the relevant third country;~~

~~(ii) the applicable date determined pursuant to paragraph 1.~~

~~3. The derogation referred to in paragraph 2 shall only apply where counterparties to a non-centrally cleared OTC derivative contract meet all of the following conditions:~~

~~(a) one counterparty is established in a third country and the other counterparty is established in the Union;~~

- (b) ~~the counterparty established in a third country is either a financial counterparty or a non-financial counterparty;~~
- (c) ~~the counterparty established in the Union is one of the following:~~
 - (i) ~~a financial counterparty, a non-financial counterparty, a financial holding company, a financial institution or an ancillary services undertaking subject to appropriate prudential requirements and the third-country counterparty referred to in point (a) is a financial counterparty;~~
 - (ii) ~~either a financial counterparty or a non-financial counterparty and the third-country counterparty referred to in point (a) is a non-financial counterparty;~~
- (d) ~~both counterparties are included in the same consolidation on a full basis in accordance to Article 3(3) of Regulation (EU) No 648/2012;~~
- (e) ~~both counterparties are subject to appropriate centralised risk evaluation, measurement and control procedures;~~
- (f) ~~the requirements of Chapter III are met.~~

Article 37

Application of Articles 9(1), 10 and 12

1. Articles 9(1), 10 and 12, shall apply as follows:
 - (a) ~~from 1 month after the date of entry into force of this Regulation~~4 January 2017 for counterparties both of which have, or belong to groups each of which has, an aggregate average notional amount of non-centrally cleared OTC derivatives above EUR 3 000 billion;
 - (b) ~~from the date that is the latest of 1 March 2017 or 1 month following the date of its entry into force of this Regulation~~ for other counterparties.
2. By way of derogation from paragraph 1 in respect of contracts for foreign exchange forwards referred to in point (a) of Article 27, Articles 9(1), 10 and 12 shall apply on ~~one of the following dates, whichever is earlier:~~
 - (a) ~~31 December 2018, where the Regulation referred to in point (b) does not yet apply;~~
 - (b) ~~the date of entry into application of the Commission Delegated Regulation (EU) 2017/565~~3 January 2018 specifying some technical elements related to the definition of financial instruments with regard to physically settled foreign exchange forwards or the date determined pursuant to paragraph 1, whichever is later.
3. By way of derogation from paragraph 1, where the conditions of paragraph 4 of this Article are met, Articles 9(1), 10 and 12 shall apply as follows:
 - (a) ~~from 21 December 2020 where no equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 11(3) of that Regulation in respect of the relevant third country;~~

- (b) ~~the later of the following dates where an equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 11(3) of that Regulation in respect of the relevant third country:~~
- ~~(i) four months after the date of entry into force of the decision adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 11(3) of that Regulation in respect of the relevant third country;~~
 - ~~(ii) the applicable date determined pursuant to paragraph 1.~~
4. ~~The derogation referred to in paragraph 3 shall only apply where counterparties to a non-centrally cleared OTC derivative contract meet all of the following conditions:~~
- ~~(a) one counterparty is established in a third country and the other counterparty is established in the Union;~~
 - ~~(b) the counterparty established in a third country is either a financial counterparty or a non-financial counterparty;~~
 - ~~(c) the counterparty established in the Union is one of the following:~~
 - ~~(i) a financial counterparty, a non-financial counterparty, a financial holding company, a financial institution or an ancillary services undertaking subject to appropriate prudential requirements and the third country counterparty referred to in point (a) is a financial counterparty;~~
 - ~~(ii) either a financial counterparty or a non-financial counterparty and the third country counterparty referred to in point (a) is a non-financial counterparty;~~
 - ~~(d) both counterparties are included in the same consolidation on a full basis in accordance to Article 3(3) of Regulation (EU) No 648/2012;~~
 - ~~(e) both counterparties are subject to appropriate centralised risk evaluation, measurement and control procedures;~~
 - ~~(f) the requirements of Chapter III are met.~~

Article 38

Dates of application for specific contracts

1. By way of derogation from Articles 36(1) and 37, in respect of all non-centrally cleared OTC derivatives which are single-stock equity options or index options, the Articles referred to in Articles 36(1) and 37 shall not apply from 4 January 2021.

[Note: Articles 36(1) and 37 do not form part of domestic law on and after IP completion day by virtue of section 3 of the European Union (Withdrawal) Act 2018 in respect of all non-centrally OTC derivatives which are single-stock equity options or index options.]

2. ~~By way of derogation from Articles 36(1) and 37, where a counterparty established in the Union enters into a non-cleared OTC derivative contract with another counterparty which belongs to the same group, the Articles referred to in Articles 36(1) and 37 shall~~

~~apply from the dates specified in accordance with those Articles, or 4 July 2017, whichever is the later.~~

Draft for consultation