

## SCHEDULES

### SCHEDULE 10

Section 27

#### AMENDMENTS OF THE MARKETS IN FINANCIAL INSTRUMENTS REGULATION

##### *Introduction*

- 1 The Markets in Financial Instruments Regulation is amended as follows.

##### *Scope*

- 2 In Article 1 (subject matter and scope), after paragraph 4 insert—
- “4A. Chapter 1 of Title 7 of this Regulation also applies to third-country firms providing investment services or performing investment activities in the United Kingdom.”

##### *Definitions*

- 3 In Article 2(1) (definitions), after point (61) insert—
- “(61A) “*Directive 2013/36/EU*” means [Directive 2013/36/EU](#) of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms;”.

##### *Provision of services by third-country firms following equivalence determination*

- 4 In the heading of Title 8, for “DECISION” substitute “DETERMINATION”.
- 5 (1) Article 46 (general provision about provision of services etc by third-country firms following an equivalence decision) is amended as follows.
- (2) In paragraph 1, for “Article 47” substitute “Article 48”.
- (3) In paragraph 2—
- (a) for point (a) substitute—
- “(a) the Treasury has made a determination under Article 47(1) in respect of the third country;
- (aa) the firm, and the services or activities, fall within the scope of the determination;”, and
- (b) after point (c) insert—
- “(d) the firm has established the necessary arrangements and procedures to provide the information required by rules made under paragraph 6B of this Article;
- (e) the firm has established the necessary arrangements and procedures to comply with requirements imposed under Article 48A.”

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- (4) Omit paragraph 2A.
- (5) In paragraph 4—
  - (a) in the first subparagraph, for the words from “adoption” to the end substitute “making of a determination by the Treasury under Article 47(1) that the legal and supervisory arrangements of the third country in which the third-country firm is authorised satisfy the requirements described in Article 47(1).”,
  - (b) after the first subparagraph insert—
    - “An application for registration must—
    - (a) be made in such form and manner as the FCA may direct, and
    - (b) contain, or be accompanied by, such information as the FCA may direct.”, and
    - (c) in the following subparagraph, after “all” insert “further”.
- (6) In paragraph 5, in the second subparagraph, for “in writing and in a prominent way” substitute “in writing, in a prominent way and in such form as the FCA may direct”.
- (7) After paragraph 5 insert—
  - “5A. For the purposes of paragraph 5, where a third-country firm or a person acting on behalf of a third-country firm solicits a person, the provision of an investment service or activity by the third-country firm to the person is not initiated at the person’s own exclusive initiative.”
- (8) After paragraph 6 insert—
  - “6A. Third-country firms providing services or performing activities in accordance with this Article must—
    - (a) keep the data relating to all orders and transactions in the United Kingdom in financial instruments which they have carried out, whether on own account or on behalf of a client, for a period of five years, and
    - (b) make that data available to the FCA on request.
  - 6B. The FCA may make rules requiring third-country firms providing services or performing activities in accordance with this Article to provide information specified in the rules to the FCA at intervals specified in the rules.”
- (9) Omit paragraph 7.

#### *Equivalence determination*

- 6 (1) Article 47 (equivalence determination) is amended as follows.
- (2) For paragraph 1 substitute—
  - “1. The Treasury may by regulations determine that the legal and supervisory arrangements of a third country ensure all of the following—
    - (a) that firms authorised in that third country to provide investment services or perform investment activities comply with legally binding prudential, organisational and business conduct requirements which have equivalent effect to the relevant UK requirements,

- (b) that such firms are subject to effective supervision and enforcement ensuring compliance with the applicable legally binding prudential, organisational and business conduct requirements, and
  - (c) that the legal framework of that third country provides for an effective equivalent system for the recognition of investment firms authorised under third country legal regimes.
- 1A. For the purposes of paragraph 1(a), the relevant UK requirements are the following, as they apply on the day on which the Treasury makes the regulations—
  - (a) the requirements set out in this Regulation;
  - (b) the requirements set out in [Regulation \(EU\) No. 575/2013](#) of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms;
  - (c) the requirements set out in CRR rules (as defined in section 144A of FSMA);
  - (d) the requirements set out in Part 9C rules (as defined in section 143F of FSMA);
  - (e) the requirements set out in [Directive 2013/36/EU](#) UK law and [Directive 2014/65/EU](#) UK law.
- 1B. The prudential, organisational and business conduct framework of a third country may be considered to have equivalent effect where that framework fulfils all of the following conditions—
  - (a) firms providing investment services or performing investment activities in that third country are subject to authorisation and to effective supervision and enforcement on an on-going basis;
  - (b) such firms are subject to sufficient capital requirements and, in particular, where they provide services or carry out the activities referred to in paragraph 3 or 6 of Part 3 of Schedule 2 to the Regulated Activities Order they are subject to comparable capital requirements to those that would apply if they were established in the United Kingdom;
  - (c) such firms are subject to appropriate requirements applicable to shareholders and members of their management body;
  - (d) such firms are subject to adequate business conduct and organisational requirements;
  - (e) market transparency and integrity is ensured by preventing market abuse in the form of insider dealing and market manipulation.
- 1C. When making regulations under paragraph 1, the Treasury must take into account whether the third country is a high-risk third country within the meaning of regulation 33 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ([S.I. 2017/692](#)).”
- (3) In paragraph 2—
  - (a) omit point (c), and
  - (b) at the end insert—
    - “(d) the procedures concerning the coordination of investigations and on-site inspections that the FCA considers necessary for the purposes of carrying out its

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functions under this Regulation, which must include a requirement for the FCA to give prior notice to the competent authority of the third country;

- (e) the procedures concerning the coordination of other supervisory activities;
- (f) the procedures concerning a request for data by the FCA under Article 46(6A)(b);
- (g) the mechanism for the FCA to obtain from a third-country firm providing services or performing activities in accordance with Article 46 further information in respect of the firm's operations by making a request to the competent authority of the third country concerned."

(4) At the end insert—

"5. The FCA must—

- (a) monitor the regulatory and supervisory developments, the enforcement practices and other relevant market developments in third countries for which determinations made by the Treasury in accordance with paragraph 1 are in force in order to verify that the conditions on the basis of which those determinations were made are still fulfilled, and
- (b) provide a report of its findings to the Treasury on request.

6. In this Article, "[Directive 2013/36/EU](#) UK law" and "[Directive 2014/65/EU](#) UK law" mean the law of the United Kingdom which was relied on by the United Kingdom before IP completion day to implement [Directive 2013/36/EU](#) or [Directive 2014/65/EU](#) (as appropriate), as amended from time to time."

### *Requirements*

7 After Article 48 insert—

#### *"Article 48A*

#### ***Requirements***

1. The Treasury may by regulations impose requirements on third-country firms providing investment services, or performing investment activities, in accordance with Article 46 or on a description of such firms specified in the regulations.
2. In making regulations under this Article, the Treasury must have regard to the requirements imposed on UK firms by or under this Regulation.
3. Regulations under this Article may describe requirements by reference to—
  - (a) rules made or to be made by the FCA, or
  - (b) other enactments.
4. The power under paragraph 3 includes power to make provision by reference to rules or other enactments as amended from time to time.
5. The FCA may make, amend or revoke a rule if it considers it necessary or appropriate to do so for the purposes of a requirement imposed (or varied or

withdrawn) by regulations under this Article which is described by reference to a rule made or to be made by the FCA.

6. If, for the purposes of a requirement imposed (or varied or withdrawn) by regulations under this Article which is described by reference to a rule made or to be made by the FCA, the Treasury consider that it is necessary or appropriate for the FCA to make, amend or revoke a rule, they may direct the FCA to do so.
7. If the Treasury give a direction under paragraph 6, the FCA must comply with the direction within such time as the Treasury may specify in the direction.
8. The references in paragraphs 5 and 6 to the amendment or revocation of rules are to the amendment or revocation of rules made by the FCA.
9. In this Article—
  - “enactment” includes—
    - (a) retained direct EU legislation,
    - (b) an enactment comprised in subordinate legislation,
    - (c) an enactment comprised in, or in an instrument made under, a Measure or Act of Senedd Cymru,
    - (d) an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament, and
    - (e) an enactment comprised in, or in an instrument made under, Northern Ireland legislation;
  - “subordinate legislation” has the same meaning as in the Interpretation Act 1978 (see section 21 of that Act);
  - “UK firm” means—
    - (a) a credit institution providing investment services or performing investment activities, or
    - (b) an investment firm,

whose registered office or (if it has no registered office) head office is located in the United Kingdom.”

#### *Temporary prohibitions and restrictions and withdrawal of registration*

- 8 (1) Article 49 (withdrawal of registration) is amended as follows.
- (2) For the heading substitute—

#### ***“Temporary prohibitions and restrictions and withdrawal of registration”.***

- (3) Before paragraph 1 insert—

- “A1. The FCA may temporarily prohibit a third-country firm from providing investment services, or performing investment activities, in the United Kingdom, or place temporary restrictions on a third-country firm’s provision of such services or performance of such activities in the United Kingdom, where the third-country firm—
  - (a) has failed to comply with a prohibition or restriction imposed on it by the FCA under Article 42,

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- (b) has failed to comply with a request for data made by the FCA under Article 46(6A)(b) in accordance with the cooperation arrangements established under Article 47(2),
- (c) has failed to provide information in accordance with rules made under Article 46(6B),
- (d) has failed to provide information requested by the FCA in accordance with the cooperation arrangements established under Article 47(2),
- (e) has failed to cooperate with an investigation or on-site inspection carried out in accordance with the cooperation arrangements established under Article 47(2), or
- (f) has failed to comply with a requirement imposed by regulations under Article 48A.

A2. The FCA may impose more than one temporary prohibition or restriction under paragraph A1 in respect of the same failure.”

(4) In paragraph 1—

- (a) in the opening words, for “shall” substitute “may”,
- (b) for points (a) and (b) substitute—
  - “(a) the FCA has well-founded reasons based on documented evidence to believe that—
    - (i) in the provision of investment services and the performance of investment activities in the United Kingdom, the third-country firm is acting in a manner which is clearly prejudicial to the interests of investors or the orderly functioning of markets,
    - (ii) in the provision of such services and activities in the United Kingdom, the third-country firm has seriously infringed a provision applicable to it in the third country and on the basis of which the Treasury made regulations under Article 47(1),
    - (iii) in the provision of such services and activities in the United Kingdom, the third-country firm has seriously infringed a requirement imposed under Article 48A, or
    - (iv) the third-country firm is not maintaining the necessary arrangements and procedures to provide the information required by rules made under Article 46(6B) or to comply with requirements under Article 48A, and”, and
- (c) omit point (d) (and the “and” before it).

(5) After paragraph 1 insert—

- “1A. In deciding the appropriate action to take under this Article, the FCA must, among other things, take into account the nature and seriousness of the risk posed to the interests of investors and the orderly functioning of markets in the United Kingdom, having regard to—
- (a) the duration and frequency of the risk arising,
  - (b) whether the risk has revealed serious or systemic weaknesses in the third-country firm’s procedures,

- (c) whether financial crime has been occasioned or facilitated by, or is otherwise attributable to, the risk, and
  - (d) whether the risk has arisen intentionally or negligently.
- 1B. The FCA must inform the competent authority of the third country in due course of its intention to take action in accordance with paragraph A1 or 1.”

(6) At the end insert—

- “4. In this Article, “documented evidence” includes, but is not limited to, information provided in accordance with rules made under Article 46(6B).”

*Temporary prohibitions and restrictions and withdrawal of registration: procedure*

9 After Article 49 insert—

*“Article 49A*

***Temporary prohibitions and restrictions: procedure***

1. A temporary prohibition or restriction under Article 49(A1) takes effect—
  - (a) immediately, if the notice given under paragraph 3 states that that is the case,
  - (b) on such date as may be specified in the notice, or
  - (c) if no date is specified in the notice, when the matter to which it relates is no longer open to review.
2. A temporary prohibition or restriction under Article 49(A1) may be expressed to take effect immediately, or on a specified date, only if the FCA, having regard to the ground on which it is taking that action, reasonably considers that it is necessary for it to take effect immediately or (as appropriate) on that date.
3. The FCA must give written notice to a third-country firm if—
  - (a) it proposes to take action in relation to the firm under Article 49(A1), or
  - (b) it takes action in relation to the firm under Article 49(A1) with immediate effect.
4. The notice must—
  - (a) give details of the temporary prohibition or restriction,
  - (b) inform the firm when the prohibition or restriction takes effect,
  - (c) state the FCA’s reasons for taking the action and for its determination of when the prohibition or restriction takes effect,
  - (d) inform the firm that it may make representations to the FCA within such period as may be specified in the notice (whether or not the firm has referred the matter to the Upper Tribunal), and
  - (e) inform the firm of its right to refer the matter to the Upper Tribunal.
5. The FCA may extend the period allowed under the notice for making representations.
6. The FCA must give the third-country firm written notice if, having considered any representations made by the firm, the FCA decides—
  - (a) to impose the proposed prohibition or restriction, or

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- (b) if the prohibition or restriction has been imposed, not to rescind it.
- 7. The FCA must give the third-country firm written notice if, having considered any representations made by the firm, the FCA decides—
  - (a) not to impose the proposed prohibition or restriction,
  - (b) to impose a different prohibition or restriction, or
  - (c) to rescind a prohibition or restriction that has been imposed.
- 8. A notice under paragraph 6 must inform the third-country firm of its right to refer the matter to the Upper Tribunal.
- 9. A notice under paragraph 7(b) must comply with paragraph 4.
- 10. If a notice informs a third-country firm of its right to refer a matter to the Upper Tribunal, it must give an indication of the procedure on such a reference.
- 11. A third-country firm that is aggrieved by action taken by the FCA under Article 49(A1) may refer the matter to the Upper Tribunal.
- 12. Part 9 of FSMA (hearings and appeals) applies in relation to references to the Upper Tribunal made under this Article as it applies in relation to references made to that Tribunal under that Act.
- 13. For the purposes of paragraph 1(c), section 391(8) of FSMA (matters open to review) applies as if the notice under paragraph 3 were a supervisory notice (as defined in section 395 of that Act).

#### *Article 49B*

##### ***Withdrawal of registration: procedure***

- 1. If the FCA proposes to withdraw the registration of a third-country firm in the register established in accordance with Article 48, it must give the firm a warning notice.
- 2. If the FCA decides to withdraw the registration of a third-country firm in that register, it must give the firm a decision notice.
- 3. If the FCA gives a third-country firm a decision notice under paragraph 2, the firm may refer the matter to the Upper Tribunal.
- 4. Part 9 of FSMA (hearings and appeals) applies in relation to references to the Upper Tribunal made under this Article as it applies in relation to references made to that Tribunal under that Act.
- 5. Section 387 of FSMA (warning notices) applies in relation to a warning notice given under this Article as it applies to a warning notice given by the FCA under that Act.
- 6. Section 388 of FSMA (decision notices) applies in relation to a decision notice given under this Article as it applies to a decision notice given by the FCA under that Act, but as if—
  - (a) in subsection (1)(e)(i), for “this Act” there were substituted “Article 49B of the markets in financial instruments regulation”, and
  - (b) subsection (2) were omitted.
- 7. Section 389 of FSMA (notices of discontinuance) applies in relation to a warning notice or decision notice given under this Article as it applies in



relation to a warning notice or decision notice given by the FCA under that Act, but as if subsection (2) were omitted.

8. Section 390 of FSMA (final notices) applies in relation to a decision notice given under this Article as it applies in relation to a decision notice given by the FCA under that Act.
9. Sections 393 and 394 of FSMA (third party rights and access to FCA material) apply in relation to a warning notice or decision notice given under this Article as they apply in relation to a warning notice or decision notice given by the FCA under a provision listed in section 392 of that Act.

### *Article 49C*

#### **Notices under Articles 49A and 49B**

1. The Treasury may by regulations make provision about the procedure to be followed, or rules to be applied, in connection with the giving of notices by the FCA under Article 49A or 49B.
2. The regulations may, among other things, make provision—
  - (a) requiring, or allowing, a notice to be sent electronically;
  - (b) requiring, or allowing, a notice to be given in another manner;
  - (c) as to the address to which a notice must or may be sent;
  - (d) requiring a person to provide an address to which a notice must or may be sent;
  - (e) for treating a notice as having been given, or as having been received, on a date or at a time determined in accordance with the regulations;
  - (f) as to what must, or may, be done if the person to whom a notice is required to be given is not an individual;
  - (g) as to what must, or may, be done if the intended recipient of a notice is outside the United Kingdom.
3. Section 7 of the Interpretation Act 1978 (service of notice by post) has effect in relation to notices under Article 49A or 49B subject to any provision made by regulations under this Article.”

### *FCA directions and rules*

- 10 In the heading of Title 9, after “DIRECTIONS” insert “, RULES”.
- 11 In the heading of Article 50B (FCA Directions), at the end insert “identifying relevant area of the UK”.
- 12 After that Article insert—

### *“Article 50C*

#### **Other FCA directions**

1. A direction by the FCA under Article 46(4) may make different provision in relation to different applications or categories of application.
2. A direction by the FCA under Article 46(5) may make different provision for different cases or categories of case.

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3. A direction by the FCA under Article 46 may be varied or revoked by a further direction under that provision.
4. A direction by the FCA under Article 46 must—
  - (a) be in writing, and
  - (b) be published by the FCA in a manner suitable to bring it to the attention of persons likely to be affected by it.

#### *Article 50D*

##### ***FCA rules***

1. The provisions of Part 9A of FSMA (rules and guidance) listed in paragraph 2 apply in relation to rules made by the FCA under Article 46(6B) or 48A as they apply in relation to rules made by the FCA under that Part of that Act, subject to the modification in paragraph 3.
  2. The provisions are—
    - (a) section 137T (general supplementary powers);
    - (b) Chapter 2 (modification, waiver, contravention and procedural provisions), with the exception of section 138D (actions for damages);
    - (c) section 141A (power to make consequential amendments of references to rules etc).
  3. Section 137T applies as if the reference to authorised persons were a reference to third-country firms providing services or performing activities in accordance with Article 46.”
- 13 The requirements of section 138I of the Financial Services and Markets Act 2000, in so far as they apply in connection with rules made under Article 46(6B) or 48A of the Markets in Financial Instruments Regulation, may be satisfied by things done before paragraph 12 of this Schedule comes into force (as well as by things done after that time).

#### *Transitional provisions*

- 14 Omit Article 54 (transitional provisions).