

2018 No. 1184

EXITING THE EUROPEAN UNION
FINANCIAL SERVICES

The Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018

Made - - - - *13th November 2018*

Coming into force in accordance with regulation 1(2) and (3)

The Treasury, in exercise of the powers conferred by sections 8(1) and 8(2)(a), (b), (d) and (g) of, and paragraph 1 of Schedule 4 and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018^(a), makes the following Regulations.

In accordance with paragraph 1(1) and (2) of Schedule 7 to the European Union (Withdrawal) Act 2018, a draft of this instrument has been laid before, and approved by a resolution of, each House of Parliament.

PART 1

Introduction

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018.

(2) Parts 2 to 5 of these Regulations come into force on exit day.

(3) This Part and Part 6 of these Regulations come into force the day after the day on which they are made.

(4) In these Regulations—

“the 2000 Act” means the Financial Services and Markets Act 2000^(b);

“central counterparty” has the meaning given in section 313(1) (interpretation of Part 18)^(c) of the 2000 Act.

“the EMIR Regulation” means Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

(a) 2018 c.16.

(b) 2000 c.8.

(c) The definition of central counterparty was inserted by S.I. 2013/504.

PART 2

Amendment of primary legislation

Amendment of the 2000 Act

2. The 2000 Act is amended as follows.
- 3.—(1) Section 285 (exemption for recognised bodies) is amended as follows.
 - (2) In subsection (1)—
 - (a) omit paragraph (c)(a); and
 - (b) for paragraph (d)(b) substitute—

“(d) ‘third country central counterparty’ means a person established in a country other than the United Kingdom who has been recognised by the Bank of England as a central counterparty pursuant to Article 25 of the EMIR Regulation;”.
 - (3) Omit subsection (3B)(c).
 - (4) In subsection (3C)(d), for “ESMA” substitute “the Bank of England”.
4. In section 292(6) (overseas clearing houses)(e), omit “authorised as an EEA central counterparty or”.
5. In Schedule 17A (further provision in relation to the exercise of Part 18 functions by Bank of England)(f)—
 - (a) in paragraph 22, after “recognised clearing house” insert “, third country central counterparty”;
 - (b) in paragraph 32, after “recognised clearing houses,” insert “third country central counterparties,”;
 - (c) in paragraph 33, in sub-paragraph (a), after “recognised clearing houses,” insert “third country central counterparties,”; and
 - (d) in paragraph 36, in sub-paragraph (1), omit “EEA central counterparties,”.

PART 3

Amendment of the EMIR Regulation

Introduction to amendment of the EMIR Regulation

6. The EMIR Regulation is amended in accordance with this Part.

Definitions

7. In Article 2, after point (29) insert—
 - “(30) ‘third country’ means a country other than the United Kingdom;
 - (31) ‘working day’ means any day other than—
 - (a) Saturday or Sunday,

(a) Paragraph (c) was substituted by S.I. 2013/504 and amended by S.I. 2017/1064.
(b) Paragraph (d) was substituted by S.I. 2013/504.
(c) Subsection (3B) was inserted by S.I. 2013/504.
(d) Subsection (3C) was inserted by S.I. 2013/504.
(e) Section 292(6) was inserted by S.I. 2013/504.
(f) Schedule 17A was inserted by the paragraph 1 of Schedule 7 to the Financial Services Act 2012 (c. 21). Paragraphs 22, 32 and 33 were amended by S.I. 2017/1064. Paragraph 36 was amended by the S.I. 2013/504 and S.I. 2017/1064.

- (b) Christmas Day or Good Friday, or
- (c) a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom;
- (32) ‘FCA’ means the Financial Conduct Authority;
- (33) ‘PRA’ means the Prudential Regulation Authority.”.

Recognition of a third country CCP

8.—(1) Article 25 is amended as follows.

(2) In paragraph 1—

- (a) for “Union” substitute “United Kingdom”; and
- (b) for “ESMA” substitute “the Bank of England”.

(3) In paragraph 2—

- (a) before point (a), for the words from the beginning to “paragraph 3,” substitute “The Bank of England”;
- (b) in point (a), for “the Commission has adopted an implementing act” substitute “the Treasury has made regulations”; and
- (c) in point (d), for the words from “considered” to the end, substitute “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(a)”.

(4) Omit paragraph 3.

(5) In paragraph 4—

- (a) in the first sub-paragraph, for “ESMA” substitute “the Bank of England”;
- (b) in the second sub-paragraph, for “ESMA”, in each place it occurs, substitute “the Bank of England”; and
- (c) after the third sub-paragraph insert the following sub-paragraphs—

“Recognition under this Article must be granted only for services or activities linked to clearing and the decision granting recognition must specify the services or activities which the CCP is recognised to provide or perform, including the classes of financial instruments covered by the recognition.

The applicant CCP must, without undue delay, notify the Bank of England of any material changes affecting the condition for recognition in point (b) of paragraph 2.”;

(d) omit the fourth sub-paragraph;

(e) in the fifth sub-paragraph—

- (i) for the words from the beginning to “ESMA” substitute “Before the end of the relevant period, the Bank of England”; and
- (ii) at the end insert—

“The relevant period is:

- (a) where the applicant CCP has submitted an application before the end of the period of 6 months beginning with exit day, the period of one year beginning with the first day on which:
 - (i) the applicant CCP has submitted a complete application; and
 - (ii) the conditions in paragraph 2(a) and (c) are met; or
- (b) in any other case, the period of 180 working days beginning with the first day on which:

(a) S.I. 2017/692.

- (i) the applicant CCP has submitted a complete application; and
 - (ii) the conditions in paragraph 2(a) and (c) are met.”; and
- (f) in the sixth sub-paragraph, for “ESMA” substitute “The Bank of England”.
- (6) After paragraph 4 insert—
 - “4A. A CCP must, without undue delay, notify the Bank of England of any material changes affecting the condition for recognition in point (b) of paragraph 2.”.
- (7) In paragraph 5—
 - (a) omit the first and second sentences;
 - (b) in the third sentence—
 - (i) for “ESMA” substitute “The Bank of England”; and
 - (ii) for “that CCP” substitute “a CCP established in a third country”; and
 - (c) at the end, insert a new sub-paragraph as follows—
 - “The Bank of England may:
 - (a) limit the withdrawal to a particular service, activity or class of financial instruments; and
 - (b) direct that the withdrawal is to have effect subject to such transitional arrangements as the Bank of England considers necessary or expedient.”.
- (8) In paragraph 6—
 - (a) for the words from the beginning to “determining” substitute “The Treasury may by regulations specify”; and
 - (b) for “third-country legal regimes” substitute “legal regimes of other countries”.
- (9) After paragraph 6 insert—
 - “6A. The Bank of England may provide advice to the Treasury in connection with any regulations made or to be made by the Treasury under paragraph 6.”.
- (10) In paragraph 7—
 - (a) for “ESMA”, in each place it occurs, substitute “the Bank of England”;
 - (b) before point (a), for “shall establish” substitute “must take such steps as it considers appropriate to establish”; and
 - (c) in point (c), for “Union” substitute “United Kingdom”.
- (11) In paragraph 8—
 - (a) in the first sub-paragraph—
 - (i) for the words “ESMA shall develop draft regulatory technical standards” substitute “the Bank of England may make technical standards”;
 - (ii) for “ESMA”, in the second place it occurs, substitute “the Bank of England”;
 - (b) omit the second and third sub-paragraphs.
- (12) After paragraph 8 insert—
 - “**9.** This Article is subject to Part 6 of the Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018, which contains transitional provisions having effect for the purposes of this Article.
 - 10.** In this Article, “competent authority” means a regulatory authority which is responsible for the authorisation and supervision of central counterparties in its territory.”.

PART 4

Revocation of Level 2 Legislation

Revocation of implementing acts made under Article 25.6 of the EMIR Regulation

9. Any implementing acts which have been adopted by the European Commission under Article 25.6 of the EMIR Regulation and are in force immediately before exit day are revoked.

PART 5

Disapplication of continuation of existing acts, etc.

Disapplication of ESMA recognition decisions

10. Paragraph 37(1) of Schedule 8 to the European Union (Withdrawal) Act 2018 does not apply to a decision by the European Securities and Markets Authority to recognise a central counterparty under Article 25 of the EMIR Regulation where that decision is in force immediately before exit day.

PART 6

Transitional provisions

Interpretation

11. In this Part—

“applicant” means a person who has submitted an application under regulation 12(1);

“clearing” has the meaning given in section 313(1) of the 2000 Act; and “clearing services”, in relation to a central counterparty, is to be read accordingly;

“competent authority” means a regulatory authority which is responsible for the authorisation and supervision of central counterparties in its territory; and

“third country” means a country other than the United Kingdom.

Application for deemed recognition pursuant to Article 25 of the EMIR Regulation

12.—(1) A central counterparty established in a third country may apply to be recognised by the Bank of England where it intends to provide clearing services as a central counterparty in the United Kingdom on and after exit day.

(2) The application must—

(a) be submitted before exit day;

(b) be made in such manner as the Bank of England may direct;

(c) specify the services or activities linked to clearing which the applicant intends to provide and the classes of financial instrument in respect of which the applicant wishes to be recognised; and

(d) be accompanied by such other information as the Bank of England may direct.

(3) The Bank of England must confirm promptly receipt of the application to the person making it.

(4) The applicant may withdraw the application by giving notice to the Bank of England at any time before the application is determined.

(5) Where the application has not been determined by the Bank of England before exit day, the application is to be treated on exit day as if it had been made on that day under Article 25.4 of the EMIR Regulation.

Deemed recognition pursuant to Article 25 of the EMIR Regulation

13.—(1) The Bank of England may before exit day determine that the applicant is to be taken, on and after exit day, to be recognised pursuant to Article 25 of the EMIR Regulation if each of the following conditions are met.

(2) The first condition is that the Treasury has made regulations in respect of the country in which the applicant is established in accordance with regulation 14.

(3) The second condition is that the applicant is—

- (a) authorised in the country in which it is established, and
- (b) subject to effective supervision and enforcement ensuring full compliance with the prudential requirements applicable in that country.

(4) The third condition is that the Bank of England has established co-operation arrangements with the competent authority responsible for supervising the applicant in accordance with regulation 16.

(5) The fourth condition is that the applicant is not established or authorised in a country that is considered, by the Commission in accordance with Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing^(a), as having strategic deficiencies in its national anti-money laundering and counter financing of terrorism regime that poses significant threats to the financial system of the European Union.

(6) A determination under paragraph (1) must only be made in respect of the services or activities linked to clearing and must specify the services or activities which the applicant is to be taken to be recognised to provide or perform including the classes of financial instruments in respect of which the applicant is to be taken to be recognised.

(7) Where the Bank of England makes a determination under paragraph (1), the applicant in respect of which the determination is made is to be taken to be recognised pursuant to Article 25 of the EMIR Regulation in accordance with that decision.

Power to make regulations in respect of third countries' regulatory frameworks before exit day

14.—(1) The Treasury may before exit day by regulations specify that—

- (a) the legal and supervisory arrangements of a third country ensure that central counterparties authorised in that country comply with legally binding requirements which are equivalent to the requirements laid down in Title IV of the EMIR Regulation, as it has effect in EU law as amended from time to time;
- (b) central counterparties authorised in that country are subject to effective supervision and enforcement on an ongoing basis; and
- (c) the legal framework of that country provides for an effective equivalent system for the recognition of central counterparties authorised under the legal regimes of other countries.

(2) On and after exit day, regulations under paragraph (1) have effect as if made under Article 25.6 of the EMIR Regulation.

(a) OJ No. L 141, 5.6.2015, p. 73.

Bank's power to advise Treasury on regulatory equivalence of central counterparties

15.—(1) The Bank of England may before exit day provide advice to the Treasury in connection with any regulations made or to be made by the Treasury under regulation 14.

(2) On and after exit day, advice provided under this regulation is to be treated as having been provided in accordance with Article 25.6A of the EMIR Regulation.

Cooperation arrangements between the Bank of England and the competent authorities of third countries before exit day

16.—(1) Where the Treasury has made regulations under regulation 14, the Bank of England must take such steps as it considers appropriate to establish co-operation arrangements with the relevant competent authority of the third country in respect of which the regulations have been made.

(2) The arrangements must specify at least—

- (a) the mechanism for the exchange of information between the Bank and the competent authority, including access to all information requested by the Bank regarding central counterparties authorised in the third country;
- (b) the mechanism for prompt notification to the Bank where the competent authority deems a central counterparty it is supervising to be in breach of the conditions of its authorisation or of other law to which it is subject;
- (c) the mechanism for prompt notification to the Bank by the competent authority where a central counterparty it is supervising has been granted the right to provide clearing services to clearing members or clients established in the United Kingdom; and
- (d) the procedures concerning the coordination of supervisory activities including, where appropriate, on-site inspections.

(3) On and after exit day, co-operation arrangements established in accordance with this regulation are to be taken as having been established in accordance with Article 25.7 of the EMIR Regulation.

Eligibility for temporary deemed recognition

17.—(1) This regulation applies to a central counterparty established in a third country ('A') if—

- (a) immediately before exit day the central counterparty is—
 - (i) authorised in accordance with Article 17 of the EMIR Regulation as it then has effect;
 - (ii) recognised in accordance with Article 25 of the EMIR Regulation as it then has effect; or
 - (iii) a central counterparty to which Article 89.4 of the EMIR Regulation as it then has effect applies;
- (b) the central counterparty has notified the Bank of England in accordance with paragraph (2) that it intends to provide clearing services as a central counterparty in the United Kingdom on and after exit day; and
- (c) where the central counterparty has submitted an application under regulation 12, that application has not been determined by the Bank of England.

(2) For the purposes of paragraph (1)(b), the notification must—

- (a) be made before exit day,
- (b) be made in such manner as the Bank of England may direct, and
- (c) contain, or be accompanied by, such information as the Bank of England may direct.

(3) The Bank of England must confirm promptly receipt of the notification to the person making it.

(4) During the temporary recognition period determined under regulation 18, A is to be taken to be recognised by the Bank of England pursuant to Article 25 of the EMIR Regulation in respect of the services, activities and classes of financial instrument mentioned in paragraph (5).

(5) The services, activities and classes of financial instrument in respect of which A is to be taken to be recognised are those which meet the following conditions—

- (a) the first condition is that the service, activity and class of financial instrument is one which immediately before exit day A is—
 - (i) authorised to provide or perform under Article 17 of the EMIR Regulation as it then has effect;
 - (ii) recognised to provide or perform under Article 25 of the EMIR Regulation as it then has effect; or
 - (iii) in the case of a central counterparty to which Article 89.4 of the EMIR Regulation as it then has effect applies, authorised or recognised to provide or perform in a member State in accordance with that Article; and
- (b) the second condition is that where A has submitted an application under regulation 12, the service, activity or class of financial instrument is specified in A's application.

(6) The Bank of England must publish on its website a list of central counterparties that are taken to be recognised by the Bank of England pursuant to Article 25 of the EMIR Regulation by virtue of this regulation.

(7) Article 25.5 of the EMIR Regulation does not apply to a central counterparty which is taken to be recognised by the Bank of England pursuant to Article 25 of the EMIR Regulation by virtue of this regulation.

Temporary deemed recognition period

18.—(1) The temporary recognition period is the period of three years beginning with exit day.

(2) If the Treasury is satisfied that it is necessary and proportionate to avoid disruption to the financial stability of the United Kingdom, it may by regulations amend paragraph (1) to extend the temporary recognition period by a period not exceeding 12 months at a time.

Cessation of temporary deemed recognition

19.—(1) A central counterparty is, on or after exit day, to cease to be taken to be recognised pursuant to Article 25 of the EMIR Regulation in accordance with regulation 17 where any of the following conditions are met.

- (2) The first condition is that the central counterparty ceases to be—
 - (a) authorised in accordance with Article 17 of the EMIR Regulation;
 - (b) recognised in accordance with Article 25 of the EMIR Regulation; or
 - (c) a central counterparty to which Article 89.4 of the EMIR Regulation applies, unless that central counterparty has been subsequently recognised in accordance with Article 25 of the EMIR Regulation.

(3) In paragraph (2), references to the “EMIR Regulation” are to be read as references to that regulation as it has effect in EU law as amended from time to time.

(4) The second condition is that the Bank of England directs that the central counterparty is to cease to be taken to be recognised pursuant to Article 25 of the EMIR Regulation in accordance with regulation 17.

(5) The third condition is that, in the case of a central counterparty who has submitted an application under regulation 12 or Article 25.4 of the EMIR Regulation—

- (a) the central counterparty withdraws their application; or
- (b) the application is determined by the Bank of England.

(6) The fourth condition is that, in the case of a central counterparty which has not submitted an application under regulation 12, the period of 6 months beginning with exit day expires without the central counterparty having submitted an application under Article 25.4 of the EMIR Regulation during that period.

(7) A direction may only be given under paragraph (4) where—

- (a) the Bank of England considers that there would otherwise be an adverse effect on financial stability in the United Kingdom;
- (b) the central counterparty has not made use of the recognition within the period of twelve months beginning with exit day, has expressly renounced the recognition or has provided no services or performed no activity for the preceding six months; or
- (c) in the case of a central counterparty who has submitted an application under regulation 12 or Article 25.4 of the EMIR Regulation, the central counterparty has made false statements in relation to the application or has sought to obtain recognition by any other irregular means.

Regulations under this Part

20.—(1) Any power to make regulations conferred on the Treasury by this Part is exercisable by statutory instrument.

(2) Such regulations may—

- (a) contain incidental, supplemental, consequential and transitional provision; and
- (b) may make different provision for different purposes.

(3) A statutory instrument containing regulations made under this Part is subject to annulment in pursuance of a resolution of either House of Parliament.

Application of the 2000 Act to the Bank of England in relation to its functions under this Part

21.—(1) The provisions of the 2000 Act mentioned in regulations 22 to 25 are to apply in relation to the Bank of England in accordance with those regulations.

(2) Any reference in the 2000 Act to the Financial Conduct Authority or Prudential Regulation Authority which is contained in, or relates to, any of those provisions (however expressed) is to be read as a reference to the Bank of England.

22. Sections 348 to 350 and 353 (disclosure of information)(a) of the 2000 Act apply in relation to information received by the Bank of England for the purposes of, or in discharge of, any of its functions under this Part.

23. Section 398 (misleading FCA or PRA: residual cases)(b) of the 2000 Act applies to information given to the Bank of England in purported compliance with a requirement that is imposed by or under this Part.

24.—(1) Section 401 (proceedings for offences)(c) of the 2000 Act applies to the Bank of England as if for the purpose of subsections (2)(a) and (3)(a) of that section the Bank of England were the appropriate regulator in respect of an offence under section 398(1) where the

(a) Section 348 was amended by paragraph 26 of Schedule 2 to the Financial Services Act 2010 (c.28), paragraph 18 of Schedule 12 to the Financial Services Act 2012 (c.21), paragraph 5 of Schedule 8 to the Financial Services (Banking Reform) Act 2013 (c.33), paragraph 45(2) of Schedule 2 to the Bank of England and Financial Services Act 2016 (c.14) and S.I. 2016/1239. Section 349 was amended by section 964(4) of Companies Act 2006 (c.46), S.I. 2006/1183, S.I. 2007/1093, S.I. 2011/1043, and paragraph 19 of Schedule 12 to the Financial Services Act 2012. Section 350 was amended by paragraph 20 of Schedule 12 to the Financial Services Act 2012. Section 353 was amended by section 61 of the Consumer Credit Act 2006 (c.14), paragraph 23 of Schedule 12 of Financial Services Act 2012, and S.I. 2013/1881.

(b) Section 398 was amended by the paragraph 36 of Schedule 9 to the Financial Services Act 2012, S.I. 2013/1773, S.I. 2015/1882, S.I. 2016/680, S.I. 2017/701 and S.I. 2018/135.

(c) Section 401 was amended by paragraph 38 of Schedule 9 of the Financial Services Act 2012, S.I. 2013/1881 and S.I. 2016/1239.

information was given to the Bank of England in purported compliance with a requirement that is imposed by or under this Part.

(2) Section 401(3B) of the 2000 Act has effect subject to the provision made by this regulation (so that the FCA is not the appropriate regulator for the purposes of subsections (2)(a) and (3)(a) in respect of the above offence).

25. Paragraph 19 (annual report)(a) of Schedule 1ZB to the 2000 Act applies in relation to the recording of decisions made by the Bank of England in exercise of its functions under this Part.

Fees

26.—(1) The Bank of England may require central counterparties to pay fees in connection with the discharge of any of its functions under this Part.

(2) Any fee which is owed to the Bank of England under this regulation may be recovered as a debt due to the Bank.

Craig Whittaker
Paul Maynard

13th November 2018

Two Lords Commissioners of Her Majesty's Treasury

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations are made in exercise of the powers in the European Union (Withdrawal) Act 2018 (c.16) in order to address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom from the European Union, and to make provision for the charging of fees in connection with the exercise of functions conferred upon the Bank of England by these Regulations.

Part 3 amends Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (“EMIR”), and Part 2 makes consequential amendments to Part 18 of, and Schedule 17A to, the Financial Services and Markets Act 2000 (c.8).

Part 4 revokes any implementing acts made under Article 25.6 of EMIR which are in force immediately before exit day. Part 5 provides that any recognition decisions made by the European Securities and Markets Authority in respect of central counterparties under Article 25 before exit day are to cease to have effect on exit day.

Part 6 makes transitional provision in relation to the provision of clearing services in the United Kingdom by central counterparties who are established outside of the United Kingdom and makes provision for the charging of fees.

An impact assessment of the effect that this instrument, and other instruments made by HM Treasury under the European Union (Withdrawal) Act 2018 at or about the same time, will have on the costs of business, the voluntary sector and the public sector is available from HM Treasury, 1 Horse Guards Road, London SW1A 2HQ and is published alongside this instrument at www.legislation.gov.uk.

(a) Schedule 1 was substituted for Schedule 1ZA and 1ZB by Schedule 3 to the Financial Services Act 2012. Paragraph 19 was amended by sections 5 and 130 of the Financial Services (Banking Reform) Act 2013 and paragraph 50 of Schedule 2 to the Bank of England and Financial Services Act 2016.

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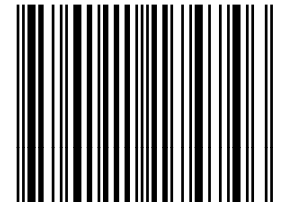
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