AB Trading Advisors

+44 (0)20 3405 0201

contact@abderivs.com

Brexit: Unresolved Issues in Derivatives Regulation

20 - Dec - 2020

The Short Read

When the Brexit transition period comes to an end at 11:00pm on 31 December 2020 (the "Transition Period End Date"), the United Kingdom ("UK") will become a "third country" for the purposes of European Union ("EU") law.

Pursuant to the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020) (the "Withdrawal Act"), directly applicable EU law will be "onshored" into domestic UK law as "retained EU law" subject to further amendments by secondary legislation to ensure that such retained law can operate and function correctly in a UK-specific context and to remedy any deficiencies as a result of the UK no longer being a member state of the EU[1]. It is by this mechanism that: (1) the European Market Infrastructure Regulation[2] ("EU EMIR") will take effect in the UK as UK-onshored EMIR[3] ("UK EMIR"); and (2) the Markets in Financial Instruments Regulation[4] ("EU MiFIR") will take effect in the UK as UK-onshored MiFIR ("UK MiFIR").

Action has been taken by the sell-side and governmental and regulatory bodies to mitigate certain effects and impacts of the change in, as well as the possible dual application of, legal regimes. However, a number of unresolved and partially-resolved issues remain, which may result in disruption to the derivatives market.

Amongst other things, counterparties will need to determine:

- whether they are in scope of EU EMIR;
- whether they are in scope of UK EMIR;
- if in scope of EU EMIR, whether there are changes to their current obligations under EU EMIR;
- if in scope of UK EMIR, whether any new obligations will arise; and
- how to deal with certain inherent conflicts between the EU and UK derivatives regulatory regimes.

This *Briefs for the Buy side* focuses on some of these key issues.

The Full Read

In the context of the EU and the UK derivatives regulatory regimes, we set out below a high level consideration of some of the key unresolved and partially-resolved issues that counterparties will need to consider, along with their implications.

Exchange-Traded Derivatives or OTC Derivatives?

Issue to be resolved

Under EU EMIR, an "OTC derivative" or an "OTC derivative contract" is a derivative contract which is not executed on an EU regulated

market or on a third country market which is considered as equivalent to an EU regulated market (pursuant to Article 2a of EU EMIR). Before the Transition Period End Date, exchange-traded derivatives traded on a UK market ("UK ETDs") are not considered to be OTC derivatives, as they are executed on an EU regulated market. Following the Transition Period End Date, UK regulated markets will become third country markets for the purposes of EU EMIR and the European Commission (the "EC") has so far not adopted implementing acts making an equivalence determination in respect of UK regulated markets under Article 2a of EU EMIR. This will have the effect that, from the Transition Period End Date, all UK ETDs will be considered as "OTC derivative contracts" under EU EMIR.

Under UK EMIR, the same issue arises insofar as a derivative which is not executed on a UK regulated market or on a third country market considered as equivalent to a UK regulated market will be considered to be an "OTC derivative" or an "OTC derivative contract" for the purposes of UK EMIR. However, in contrast to the EC's stance under EU EMIR, HM Treasury has determined that, under UK EMIR, each EEA state regulated market is equivalent for this purpose[5]. The effect being that counterparties in scope of UK EMIR can continue to treat derivatives traded on EEA state regulated markets as exchange-traded derivatives and not as OTC derivatives for the purposes of UK EMIR.

Why does it matter?

When counterparties determine their classification status pursuant to EU EMIR, they will need to include UK ETDs in their clearing threshold calculation (see "*Regulatory Classification Status*" below). This may cause a counterparty previously below a clearing threshold to now exceed it, considering that UK ETDs were not previously taken into account for this purpose. In turn, this may result in a counterparty becoming subject to additional and/or more stringent requirements in respect of OTC derivatives under EU EMIR (including reporting and clearing) as a result of exceeding a clearing threshold and its new resultant regulatory classification status.

AB Trading Advisors' View and Comment

Trade associations have been lobbying the EC to make an equivalence determination in this respect (including a letter from trade associations including the International Swaps and Derivatives Association, Inc. ("ISDA") and the Alternative Investment Management Association to the EC dated 30 November 2020[6] (the "Article 2a Letter")). There would seem to be no objective justification why the EC will not (currently) reciprocate the approach taken by HM Treasury. Although it is to be hoped that such an equivalence determination will be forthcoming, there is little so far to suggest it will happen before the Transition Period End Date. Including UK ETDs in the clearing threshold calculation under EU EMIR but excluding them for the same calculation under UK EMIR may result in an entity having differing regulatory status classifications and clearing obligations under the two regimes. One mitigating factor is that the clearing threshold calculations are required to be performed only once every 12 months under EU EMIR, with many market participants adopting 17 June as their annual calculation date. As such, one would expect no immediate impact on EMIR regulatory classification status for many market participants, and this 'delay' may allow the EC the time it needs to make the required equivalence determination.

Regulatory Classification Status

Issue to be resolved

Counterparties will need to consider whether their EU EMIR classification status has changed as a result of the UK becoming a third country under EU EMIR, as well as how to classify themselves under UK EMIR. Classification will depend on the location of the counterparty and, where a counterparty is an alternative investment fund (an "AIF") or Undertaking for the Collective Investment in Transferable Securities (a "UCITS"), the location of the alternative investment fund manager (an "AIFM") or UCITS management company.

The following examples illustrate how classifications may change:

- A non-EU AIF[7] managed by a UK AIFM[8]:
  - before the Transition Period End Date, is a 'financial counterparty' under EU EMIR (an "EU FC");
  - after the Transition Period End Date, will be a hypothetical[9] 'financial counterparty' under EU EMIR; and
  - after the Transition Period End Date, will be a 'financial counterparty' under UK EMIR (a "UK FC").

In this example, the non-EU AIF will be indirectly subject to EU EMIR and directly subject to UK EMIR.

- An EU AIF managed by a UK AIFM:
  - before the Transition Period End Date, is an EU FC under EU EMIR;
  - after the Transition Period End Date, will still be an EU FC under EU EMIR; and
  - after the Transition Period End Date, will be a UK FC.

In this example, the EU AIF will be directly subject to both EU EMIR and UK EMIR.

- A UK trading vehicle (not being an AIF):
  - before the Transition Period End Date, is a 'non-financial counterparty' under EU EMIR (an "EU NFC");
  - after the Transition Period End Date, will be a hypothetical 'non-financial counterparty' under EU EMIR; and
  - after the Transition Period End Date, will be a 'non-financial counterparty' under UK EMIR (a "UK NFC").

In this example, the UK trading vehicle will be indirectly subject to EU EMIR and directly subject to UK EMIR.

Refresher: clearing thresholds and 'Large' and 'Small' classifications

Under EU EMIR, an entity that is an actual or hypothetical EU FC must also determine if it is (i) an actual or hypothetical Large EU FC or (ii) an actual or hypothetical Small EU FC. A Large EU FC is an EU FC which exceeds *any* clearing threshold and a Small EU FC is one that does not exceed *any* clearing threshold[10].

Under EU EMIR, an entity that is an actual or hypothetical EU NFC must also determine if it (i) has exceeded a clearing threshold (in which case it will be an actual or hypothetical "EU NFC+" in respect of the asset class(es) for which the clearing threshold has been exceeded) or (ii) has not exceeded a clearing threshold (in which case it will be an actual or hypothetical "EU NFC-" in respect of the asset class(es) for which the clearing threshold has not been exceeded).

In either case, if the clearing threshold calculation is not performed, an entity's status will automatically be that of an actual or hypothetical Large EU FC or EU NFC+ for all asset classes (as applicable). For more detail on how the clearing threshold calculations are calculated, please see our June 2020 edition of *Briefs for the Buy side*[11].

The same clearing threshold calculations are required to be carried out under UK EMIR, with the result that an entity will also need to determine if it is an actual or hypothetical Large UK FC, Small UK FC, UK NFC+ in one or more asset classes or UK NFC- in respect of all asset classes.

Notifying the UK Financial Conduct Authority (the "FCA") of UK EMIR status

The FCA has stated[12] that a notification must be made to it by UK FCs and UK NFCs if they exceed the clearing threshold under UK EMIR. This must be done after 1 January 2021 but before 17 June 2021, and all UK FCs and UK NFCs must do so even if a previous notification has been made to the FCA that they were a Large EU FC or EU NFC+ under EU EMIR. Similar to the position under EU EMIR, if an in scope entity at any time no longer exceeds the UK EMIR clearing threshold, the FCA must be notified.

AB Trading Advisors' View and Comment

If an entity's classification status has changed under EU EMIR, it will be necessary to update any representations or other documentation relevant to classification (whether provided in ISDA EMIR Classification Letters or other representation letters, the ISDA Master Agreement itself or via ISDA Amend). In addition, where an entity's trading relationship becomes subject to UK EMIR, it should consider notifying its counterparty of its UK EMIR classification status. We are able to provide template notification letters that can be used for such purposes.

Due to the issues discussed in the section "*Exchange-Traded Derivatives or OTC Derivatives*" above, an entity may be a Small UK FC or a UK NFC- for the purposes of UK EMIR, but a Large EU FC or EU NFC+ for the purposes of EU EMIR. As noted by the trade associations in the Article 2a Letter, adverse impacts of re-classification as a Large EU FC or EU NFC+ include: (i) a counterparty being treated as a Large EU FC being subject to mandatory clearing under the EU EMIR clearing obligation; (ii) a counterparty being treated as an EU NFC+ being subject to mandatory clearing under the EU EMIR clearing obligation, bilateral exchange of margin and other risk mitigation obligations under EU EMIR; (iii) the inability of an EU NFC+ to rely on an EU FC to mandatorily report OTC derivatives transactions under EU EMIR on its behalf; and (iv) certain transactions of such EU FCs or EU NFC+s becoming subject to the derivatives trading obligation under EU MiFIR (see also the section "*Derivatives Trading Obligation*" below).

EU EMIR / UK EMIR References in Documentation

If a trading relationship was previously subject to EU EMIR but post the Transition Period End Date will instead be subject to either (i) UK EMIR only (for example where a UK AIFM managing a non-EU AIF trades OTC derivatives with a UK dealer) or (ii) both EU EMIR and UK EMIR (for example where a UK AIFM managing a non-EU AIF trades OTC derivatives with an EU dealer), then the terms of existing trading documentation will need to be revisited to ensure that it remains compliant with the requirements and obligations under the relevant regime(s). The majority of required changes should be cosmetic, given that obligations under both regimes should be aligned as at the Transition Period End Date.

AB Trading Advisors' View and Comment

ISDA has published a bank of template clauses to reflect updates to the relevant legislative references[13].

On 17 December 2020, ISDA published the ISDA 2020 UK EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol[14] (the "UK EMIR Protocol") which enables parties subject to UK EMIR to amend the terms of certain agreements (including ISDA Master Agreements) to reflect the portfolio reconciliation and dispute resolution requirements imposed by UK EMIR. The UK EMIR Protocol also includes a disclosure waiver to help ensure parties can meet the various reporting and record keeping requirements under UK EMIR without breaching any applicable confidentiality restrictions (see also AB Trading Advisors' View and Comment in the section "*Reporting Requirements*" below). Counterparties expecting to be subject to UK EMIR should consider adhering to the UK EMIR Protocol ahead of the Transition Period End Date.

Dealer counterparties should also be contacted to establish how such changes and updates will be effected.

Clearing Obligation

Issue to be resolved

Under EU EMIR, OTC derivative contracts subject to the EU EMIR clearing obligation can be cleared only in an EU authorised central counterparty (a "CCP") or a third country CCP that has been recognised by the European Securities and Markets Authority ("ESMA") pursuant to EU EMIR to clear that class of OTC derivatives. Therefore, unless UK based CCPs are so recognised after the Transition Period End Date, entities subject to mandatory clearing under EU EMIR would not be able to use a UK CCP to satisfy the EU EMIR clearing obligation.

Equally, under UK EMIR, OTC derivative contracts subject to the UK EMIR clearing obligation can be cleared only in a UK authorised CCP or a third country CCP that has been recognised by the Bank of England pursuant to UK EMIR to clear that class of OTC derivatives. Therefore, unless EU based CCPs are so recognised after the Transition Period End Date, entities subject to mandatory clearing under UK EMIR would not be able to use an EU CCP to satisfy the UK EMIR clearing obligation.

Why does it matter?

If EU CCPs are not recognised for the purposes of UK EMIR and if UK CCPs are not recognised for the purposes of EU EMIR then, after the Transition Period End Date, in circumstances where both the UK EMIR and the EU EMIR clearing obligation applies, the parties' respective clearing mandates could be satisfied only by trading on a non-EU / non-UK CCP which has been recognised under both regimes (most probably CCPs in the United States).

The operational challenges and cost implications of having to migrate contracts and collateral to alternative CCPs would be significant.

Has it been resolved?

For the time being, yes. ESMA has announced that UK established CCPs (being ICE Clear Europe, LCH Limited and LME Clear Limited) will be recognised as third country CCPs under EU EMIR and will be eligible to provide their services in the EU[15]. However, these recognition decisions are time limited until 30 June 2022. Under the UK's temporary recognition regime, an EU CCP currently permitted to offer clearing services in the EU may continue to do so in the UK after the Transition Period End Date if it has submitted an application for recognition. As with the EU's recognition of UK CCPs, recognition of EU CCPs for the purposes of UK EMIR by the Bank of England is also limited to three years (extendable by 12 month periods).

Reporting Requirements

Issue to be resolved

Counterparties must carefully consider any changes in their reporting obligations under EU EMIR and any new reporting obligations under UK EMIR after the Transition Period End Date. If an entity is subject to the EU EMIR reporting regime, it must report to an EU trade repository – and if subject to the UK EMIR reporting regime, it must report to a UK trade repository. In the case of a UK AIFM managing an EU AIF that trades derivatives, both the EU EMIR and the UK EMIR reporting regimes will apply, in which case compliance with reporting obligations under both regimes will be necessary.

It will also be necessary to consider the mandatory delegation provisions under both reporting regimes. As a refresher: (i) under Article

9(1a) of EU EMIR, an EU FC will be solely responsible and legally liable for reporting OTC derivatives on behalf of an EU NFC- (i.e. it has a dual reporting obligation both for itself and the EU NFC-); and (ii) under Article 9(1a) of UK EMIR, a UK FC will be solely responsible and legally liable for reporting OTC derivatives on behalf of a UK NFC- (the "FC Mandatory Reporting Regime")[16]. Therefore, an EU NFC- that currently relies on its UK FC counterparty to report OTC derivatives under the EU EMIR FC Mandatory Reporting Regime will need to either report the OTC derivative transactions itself or contractually delegate reporting to the UK FC[17]. Similarly, a UK NFC- cannot rely on its EU FC counterparty to report OTC derivatives under the UK EMIR FC Mandatory Reporting Regime and will need to either report the OTC derivative transactions itself or contractually delegate reporting to the EU FC.

The other form of mandatory delegation relates to AIFMs and UCITS management companies[18]. In the case of an AIF or a UCITS, the responsibility and legal liability for reporting the details of OTC derivative contracts is that of the AIFM or the UCITS management company (under Articles 9(1b) and 9(1c) of EU EMIR and UK EMIR) (the "Manager Mandatory Reporting Regime").

Our interpretation[19] is that, in respect of AIFs and AIFMs, the Manager Mandatory Reporting Regime only applies: (i) under EU EMIR, to an EU AIFM; and (ii) under UK EMIR, to a UK AIFM.

The following examples illustrate how reporting obligations may change:

- In respect of a non-EU AIF managed by a UK AIFM:
  - before the Transition Period End Date, the EU EMIR reporting regime applies (and, specifically, the EU EMIR Manager Mandatory Reporting Regime) and the UK AIFM is responsible and legally liable for reporting OTC derivatives to an EU trade repository and the non-EU AIF is responsible and legally liable for reporting exchange-traded derivatives to an EU trade repository;
  - after the Transition Period End Date, the EU EMIR reporting regime will no longer apply; and
  - after the Transition Period End Date, the UK EMIR reporting regime applies (and, specifically, the UK EMIR Manager Mandatory Reporting Regime) and the UK AIFM will be responsible and legally liable for reporting OTC derivatives to a UK trade repository and the non-EU AIF will be responsible and legally liable for reporting exchange-traded derivatives to a UK trade repository.

- In respect of an EU AIF managed by a UK AIFM:
  - before the Transition Period End Date, the EU EMIR reporting regime applies (and, specifically, the EU EMIR Manager Mandatory Reporting Regime) and the UK AIFM is responsible and legally liable for reporting OTC derivatives to an EU trade repository and the EU AIF is responsible and legally liable for reporting exchange-traded derivatives to an EU trade repository;
  - after the Transition Period End Date, the EU EMIR reporting regime will continue to apply but the EU EMIR Manager Mandatory Reporting Regime will not apply to the AIFM as it is no longer an EU AIFM. As such, the EU AIF is responsible and legally liable for reporting all derivatives to an EU trade repository; and
  - after the Transition Period End Date, the UK EMIR reporting regime also applies (and, specifically, the UK EMIR Manager Mandatory Reporting Regime) and the UK AIFM is responsible and legally liable for reporting OTC derivatives to a UK trade repository and the EU AIF is responsible and legally liable for reporting exchange-traded derivatives to a UK trade repository.

- In respect of a small UK trading vehicle (i.e. a UK NFC-):
  - before the Transition Period End Date, the EU EMIR reporting regime applies (and, specifically, the EU EMIR FC Mandatory Reporting Regime) and: (A) where the counterparty of a UK NFC- is an EU FC, then (i) the EU FC is responsible and legally liable for reporting OTC derivatives to an EU trade repository and (ii) the UK NFC- is responsible and legally liable for reporting exchange-traded derivatives to an EU trade repository; and (B) where the counterparty of a UK NFC- is not an EU FC, then the NFC- is

responsible and legally liable for reporting all derivatives to an EU trade repository;

- after the Transition Period End Date, the EU EMIR reporting regime will no longer apply; and
- after the Transition Period End Date, the UK EMIR reporting regime applies (and, specifically, the UK EMIR FC Mandatory Reporting Regime) and: (A) where the counterparty of a UK NFC- is an EU FC (or other non-UK FC counterparty), then the NFC- is responsible and legally liable for reporting all derivatives to a UK trade repository and (B) where the counterparty of a UK NFC- is a UK FC, then (i) the UK FC is responsible and legally liable for reporting OTC derivatives to a UK trade repository and (ii) the UK NFC- is responsible and legally liable for reporting exchange-traded derivatives to a UK trade repository.

AB Trading Advisors' View and Comment

Both the FCA[20] and ESMA[21] have published notices setting out their expectations for derivatives reporting post the Transition Period End Date. The FCA has made clear that derivatives reporting is a key area, will not be included within the temporary transitional powers[22] and that entities subject to the reporting obligation under UK EMIR must be ready to perform their obligations from the Transition Period End Date. As such, it is critical that market participants understand their obligations under the respective regimes, particularly where a reporting obligation may arise which did not exist before. It is likely that buy-side firms will need to make changes to existing delegated reporting agreements with dealer counterparties to reflect either: (i) the application of a new reporting regime (or a second applicable reporting regime); or (ii) the application or disapplication of a Manager Mandatory Reporting Regime, to adequately distinguish between those derivative contracts for which the AIFM or UCITS management company is responsible for reporting (and therefore is the delegate) and those derivative contracts for which the AIF or UCITS is responsible for reporting. In addition, new delegated reporting agreements may be needed where the FC Mandatory Reporting Regime no longer applies to a trading relationship.

Similar issues arise in the context of the EU Securities Financing Transactions Regulation[23] ("EU SFTR") where: (i) an EU 'financial counterparty' is responsible for reporting securities financing transactions ("SFTs") on behalf of both counterparties where its counterparty is a 'NFC-SME'[24]; and (ii) the UK AIFM of an EU AIF and the management company of a UCITS is currently responsible for reporting SFTs on behalf of the EU AIF or UCITS (as applicable). After the Transition Period End Date: (i) a UK 'financial counterparty' will no longer be subject to that mandatory delegation since it is no longer within the EU (and therefore the NFC-SME will need to put in place delegated reporting arrangements with the UK counterparty or otherwise satisfy its SFTR reporting requirements); and (ii) since the UK AIFM will no longer be an EU AIFM, the EU AIF will become responsible and liable for reporting SFTs under the EU SFTR instead of the UK AIFM.

It should also be noted that the confidentiality waiver in the ISDA 2013 EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol (to which parties may have adhered, or may have otherwise incorporated equivalent terms into their trading agreements) which relates to the various reporting and record keeping requirements under EU EMIR and allows parties to comply with their regulatory obligations under EU EMIR without breaching confidentiality restrictions – is not wide enough to also cover UK EMIR. As one potential solution to this, ISDA have published the UK EMIR Protocol (see AB Trading Advisors' View and Comment in the section "*EU EMIR / UK References in Documentation*" above).

Derivatives Trading Obligation

Issue to be resolved

Pursuant to Article 28 of EU MiFIR, those classes of derivatives which have been designated as being subject to the mandatory derivatives trading obligation[25] and are entered into between (i) an EU FC or EU NFC+ and (ii) (a) another EU FC or EU NFC+ or (b) a hypothetical

EU FC or EU NFC+, must be traded exclusively on an EU regulated market, EU multilateral trading facility, EU organised trading facility or a non-EU trading venue recognised as equivalent by the EC (the "EU DTO"). Therefore, unless the EC adopts an equivalence decision with respect to UK based trading venues and the EU DTO, after the Transition Period End Date EU FC and EU NFC+ entities that trade derivatives which are subject to the EU DTO will not be able to satisfy the EU DTO by trading on a UK trading venue.

Equally, under UK MiFIR, those classes of derivatives which have been designated as being subject to the mandatory derivatives trading obligation and are entered into between (i) a UK FC or UK NFC+ and (ii) (a) another UK FC or UK NFC+ or (b) a hypothetical UK FC or UK NFC+, must be traded exclusively on a UK regulated market, UK multilateral trading facility, UK organised trading facility or a non-UK trading venue either recognised as equivalent by HM Treasury or previously recognised as equivalent by the EC (the "UK DTO"). Therefore, unless HM Treasury makes regulations specifying that EU based trading venues are equivalent for the purposes of the UK DTO, then after the Transition Period End Date UK FC and UK NFC+ entities that trade derivatives which are subject to the UK DTO would not be able to trade on an EU trading venue to satisfy the UK DTO.

Why does it matter?

If EU trading venues are not recognised as third country venues for the purposes of the UK DTO and if UK trading venues are not recognised as third country venues for the purposes of the EU DTO then, after the Transition Period End Date, in circumstances where both the UK DTO and the EU DTO apply, the parties' respective derivatives trading mandates could only be satisfied by trading on a non-EU / non-UK trading venue which has been recognised under both regimes. These mutually recognised venues comprise certain trading platforms in Singapore, United States swap execution facilities ("US SEFs") and United States designated contract markets[26]; although, in practice, US SEFs are the only venues which affected counterparties would use.

Has it been resolved?

No. In a Public Statement dated 25 November 2020[27] (the "ESMA DTO Statement"), ESMA reaffirmed its previous position that without an equivalence decision: "… there is no evidence that … market participants will not be able to continue meeting their obligations under [the EU DTO]" and that: "… the continued application of the [the EU DTO] after the [Transition Period End Date] would not create risks to the stability of the financial system".

The FCA, in response to the ESMA DTO Statement, stated that it will consider its position and will publish a statement before the Transition Period End Date.

AB Trading Advisors' View and Comment

If a no-equivalence stalemate continues, then an absurd position will arise whereby EU and UK market participants will have to either: (i) use US SEFs to satisfy the UK DTO or EU DTO, with the result that liquidity is drained out of these markets and into the United States or (ii) limit their trading to counterparties subject to the same derivatives trading obligation, with the result that trading opportunities are limited and pricing will reflect this situation. For many, trading on a US SEF is simply not a viable possibility. The Bank of England estimates derivatives trading worth US$200 billion could be affected[28].

As with the issues discussed in the section "*Exchange-Traded Derivatives or OTC Derivatives*" above, it is puzzling why equivalence has not been forthcoming, given the similarity of the two regimes. Political motivations aside, there would seem to be no impediment to equivalence. Intense lobbying on this matter continues, and it is to be hoped that if a mutual equivalence regime is not agreed then one

side will take unilateral action to resolve the issue. It may be a case of 'who blinks first?'.

The above material is provided in brief, summary form. It is provided for information purposes only and should not be taken to constitute legal advice. Professional legal advice should be obtained before taking or refraining from any action in relation to the above.

[1] In addition, HM Treasury has delegated to (amongst other UK financial regulators) the UK Financial Conduct Authority the power to issue "EU Exit Instruments" to prevent, remedy or mitigate any deficiencies or failures arising from (i) EU regulatory or implementing technical standards which form part of retained UK law or (ii) EU derived provisions of its handbook. See The Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018; available at: https://www.legislation.gov.uk/uksi/2018/1115

[2] 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 (available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ%3AL%3A2012%3A201%3A0001%3A0059%3AEN%3APDF), as amended from time to time including by EMIR REFIT (available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0834&from=EN)

[3] The full suite of amending statutory instruments and EU Exit Instruments making changes to onshore EMIR at the end of the Transition Period End Date by operation of the Withdrawal Act can be found at: https://www.fca.org.uk/markets/emir

[4] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets on financial instruments and amending EMIR (available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0600&from=EN), as amended from time to time.

[5] Pursuant to The European Market Infrastructure Regulation (Article 2A) Equivalence Directions 2020; available at: https://www.legislation.gov.uk/uksi/2019/541/pdfs/uksiod_20190541_en_013.pdf

[6] Available at: https://www.isda.org/a/C7YTE/Equivalence-of-UK-Derivatives-Regulated-Markets-Under-EMIR-Article-2a.pdf

[7] Other than an AIF set up exclusively for the purposes of serving one or more employee share purchase plans or an AIF that is a securitisation special purpose vehicle. (Where an AIF is referenced in this *Briefs for the Buy side*, it is assumed that an AIF is not one of these limited types.)

[8] i.e. Pre-Transition Period End Date, authorised or registered under EU AIFMD; and post-Transition Period End Date, authorised or registered under UK-onshored AIFMD.

[9] i.e. An entity established in a third country that would be a "financial counterparty" or "non-financial counterparty" if it were established in the EU. Sometimes called 'third country' FCs or NFCs, for the purposes of this *Briefs for the Buy side* we use the terms 'hypothetical' FC and 'hypothetical' NFC.

[10] The current clearing thresholds are: (i) EUR 1 billion gross notional value for (x) OTC credit derivative contracts and (y) OTC equity derivative contracts; and (ii) EUR 3 billion gross notional value for (x) OTC interest rate derivative contracts, (y) OTC foreign exchange derivative contracts and (z) OTC commodity derivative contracts and other OTC derivative contracts not mentioned.

[11] Available at: https://www.abderivs.com/client-news/emir-refit-obligations-for-june-2020

[12] See the "EMIR news" page of the FCA website (updated on 30 November 2020); available at: https://www.fca.org.uk/firms/european-market-infrastructure-regulation-emir/news

[13] Available at: https://www.isda.org/book/amendments-to-isda-documentation-no-deal-brexit/

[14] Available at: https://www.isda.org/protocol/isda-2020-uk-emir-portfolio-reconciliation-dispute-resolution-and-disclosure-protocol/; together with associated FAQs.

[15] See ESMA's Public Statement "*ESMA to recognise three UK CCPs from 1 January 2020*" dated 28 September 2020; available at: https://www.esma.europa.eu/press-news/esma-news/esma-recognise-three-uk-ccps-1-january-2021

[16] It is generally accepted that if an NFC is an NFC+ in at least one asset class then the FC Mandatory Reporting Regime provisions do not apply to any of that NFC's trades with the FC. See the ISDA document entitled "*EMIR Refit: Financial counterparties legal liability for reporting on behalf of both itself and non-financial counterparties. Operational considerations*"; available at: https://www.isda.org/2020/03/13/emir-refit-fcs-reporting-on-behalf-of-both-itself-and-nfc-clients-operational-considerations/

[17] Whilst EU EMIR does envisage circumstances when a hypothetical EU FC would still be responsible for reporting on behalf of an EU NFC-, the conditions for relying on this (including equivalence decisions being in place) are not yet fulfilled.

[18] Auto-delegation also applies to the authorised entity that is responsible for managing and acting on behalf of an institution for occupational retirement provision (under EU EMIR) and an occupational pension scheme (under UK EMIR), but this is not considered further in this *Briefs for the Buy side*.

[19] Following ESMA's Public Statement entitled "*Issues affecting EMIR and SFTR reporting following the end of the UK transition period on 31 December 2020*" of 10 November 2020 (the "ESMA EMIR/SFTR Public Statement"), available at https://www.esma.europa.eu/sites/default/files/library/esma74-362-881_statement_brexit_emir_and_sftr_data.pdf, we believe that this is the better view.

[20] See the FCA's note entitled "*Reporting of derivatives under UK EMIR after the transition period*"; available at: https://www.fca.org.uk/publication/documents/reporting-derivatives-under-uk-emir-after-transition-period.pdf

[21] See the ESMA EMIR/SFTR Public Statement; *op. cit. fn.* 19 above.

[22] See FCA Press Release entitled "*FCA publishes rules that will apply at the end of the transition period*" updated 2 October 2020; available at: https://www.fca.org.uk/news/press-releases/fca-publishes-rules-will-apply-end-transition-period

[23] Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending EMIR. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2365&from=EN

[24] An NFC-SME is a 'non-financial counterparty' (as defined in EU SFTR) that *does not* exceed, as of its balance sheet dates, at least two of the following three criteria: (1) balance sheet total of EUR 20,000,000; (2) net turnover of EUR 40,000,000; and (3) average number of employees during the financial year of 250.

[25] Currently, eight sub-classes of interest rate swaps and two sub-classes of index credit default swaps. The full list is available at: https://www.esma.europa.eu/sites/default/files/library/public_register_for_the_trading_obligation.pdf

The FCA have indicated that they will publish their own trading obligation register on their website following the Transition Period End Date setting out the classes of derivatives that are subject to the UK DTO, see

https://www.fca.org.uk/publication/documents/supervisory-statement-mifid-end-transition-period.pdf

[26] See: (i) the Annex of Commission Implementing Decision (EU) 2019/541 (available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019D0541&from=EN) for the Singapore trading platforms; and (ii) the Annex of Commission Implementing Decision (EU) 2017/2238 (available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017D2238&from=EN) for the US SEFs and United States designated contract markets.

[27] Available at: https://www.esma.europa.eu/sites/default/files/library/70-155-8842_esma_statement_on_dto_final.pdf

[28] See https://www.reuters.com/article/idUSL8N2IR30C