

[Draft] explanatory note: Directions under Part 7 of the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (Transitional Powers of the Financial Regulators)

[October 2020]

Introduction

The Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (the FSMA Regulations 2019) give us (and the Bank of England and the Prudential Regulation Authority) the power to temporarily waive or modify obligations in relation to which we have supervisory responsibility or other functions where those obligations have changed under section 8 of the EU (Withdrawal) Act 2018 because of the UK's withdrawal from the EU (the Brexit onshored legislation). This is the so-called Temporary Transitional Power or TTP.

We have previously published directions under the TTP. Below, we highlight the changes made since March and September 2019.

Statutory context

Part 7 of the FSMA Regulations 2019 sets out our powers to make TTP directions. Where we are making a TTP direction, regulation 203 (Notification and publication of transitional directions) requires us to prepare and publish alongside publication of the directions the following material:

- (i) an explanation of the purpose of the direction,
- (ii) such guidance in connection with the direction as the regulator considers appropriate, and
- (iii) a statement to the effect that the regulator is satisfied that giving the transitional directions would not adversely affect the advancement of its key objectives viewed collectively.

This explanatory note and the directions set out this material.

References in this document to:

- the "main directions" are to the main FCA transitional directions,
- "Annex A" are to Annex A of the main directions,
- "Annex B" are to Annex B of the main directions, and
- the "prudential direction" are to the FCA prudential transitional direction.

Purpose of the directions

The purpose of the main directions and the prudential direction is to give effect to our use of the TTP. This gives affected persons time to implement changes arising from the Brexit onshoring legislation after the end of the transition period.

Our approach to using the TTP

On 1 October 2020 we published a statement¹ outlining our intention to use the TTP broadly, with targeted exceptions. This general 'standstill' means that, for most requirements, firms and other regulated persons will not need to comply with changes to their regulatory obligations resulting from Brexit onshored legislation from the end of the transition period (i.e. 11pm on 31 December 2020). Instead, they will generally be able to continue to comply with the requirements as they had effect before the end of the transition period for a limited time (until 31 March 2022). However, in the areas described in the statement as key requirements where we are not using the TTP, we expect firms and other regulated persons to prepare to comply with the onshored changes by 31 December 2020. In the remaining areas where we do not apply the TTP, we expect firms and other regulated persons to take reasonable steps during the TTP period to ensure compliance, at the latest by 31 March 2022. Firms and other regulated persons will need to be in full compliance with the onshored changes by 31 March 2022. .

To identify exceptions to our use of the TTP, we used the following criteria:

- (i) where a failure to meet the onshored requirements would adversely affect the advancement of our key objectives, viewed collectively,
- (ii) where we have material supervisory concern about delay in firms' or other regulated persons' compliance, and
- (iii) where compliance with pre-exit requirements is impossible or impracticable.

The Treasury has already introduced numerous transitional arrangements to address many of the most significant changes to regulatory obligations. We set out a list of these transitional provisions and regimes in our 1 October statement. Where there are existing transitional arrangements we have not generally used the TTP, as we do not expect disruption to arise. In some cases we have done so, for example, in relation to certain credit rating agencies beyond the scope of the Treasury's transitional provision and in the consumer credit field (amendments to the Consumer Credit (Amendment)(EU Exit) Regulations 2018 concerning disclosure of information specified in paragraph 8 of Annex A to the main directions).

We are also not generally using the TTP in relation to changes to the regulatory perimeter, including in relation to financial promotions. The legislative amendments made by the Treasury in these areas include transitional provisions. Subject to exceptions including those referred to in the main directions at paragraph 4.2D that concern the change to the regulated activity of managing a UCITS and the exemption concerning certain central banks.

As noted in our 1 October statement, for some provisions the effect of the TTP may interact with proposed powers² for the Treasury to make equivalence decisions. In line with the Bank of England (Bank) and the Prudential Regulation Authority (PRA), our directions apply the 'standstill' in the following areas of overlap:

- (i) Capital calculations for EEA exposures; and
- (ii) Use of credit ratings issued by EU entities for regulatory purposes.

For all other areas, we are not at this stage using the TTP in a way that achieves the same outcome as the Treasury making an equivalence decision. We will keep this approach under review. Directions made under the TTP will automatically cease to apply in relation to any areas where the Treasury subsequently makes an equivalence decision that has the same effect as the TTP.

¹ See, <https://www.fca.org.uk/brexit/onshoring-temporary-transitional-power-ttp>

² See, <https://www.legislation.gov.uk/ukSI/2019/541/contents/made>

Working with the Bank/PRA

We agreed with the PRA and the Bank that the following Treasury statutory instruments (SIs) would be solely for their consideration as part of their TTP directions:

- (i) The Deposit Guarantee Scheme and Miscellaneous Provisions (Amendment) (EU Exit) Regulations 2018
- (ii) Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018
- (iii) Financial Markets and Insolvency (Amendment) (EU Exit) Regulations 2019
- (iv) Solvency 2 and Insurance (Amendment etc.) (EU Exit) Regulations 2019³
- (v) Bank of England (Amendment) (EU Exit) Regulations 2018
- (vi) Credit Institutions and Insurance Undertakings Reorganisation and Winding Up (Amendment) (EU Exit) Regulations 2019
- (vii) Uncertificated Securities (Amendment and EU Exit) Regulations 2019
- (viii) The Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment etc., and Transitional Provision) (EU Exit) Regulations 2020

Changes to our directions between publication on 29 March 2019 and publication of drafts on 1 October 2020

The main changes that we have made to the main directions and prudential direction since publishing them on 29 March 2019 are:

- (i) The main directions and the prudential direction have been updated to reflect prudential instruments that have been made since 29 March 2019. We are continuing with our previous approach of applying the pre-IP completion day regime (with the exceptions as set out before), and have updated the prudential direction and annex to take into account new HMT legislation, and FCA exit instruments, since 29 March 2019.
- (ii) We have applied the standstill direction in the main directions to the changes made by the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 to paragraphs 2 and 3 of the Schedule to the Financial Services and Markets Act 2000 (Exemption) Order 2001, meaning that EEA Central Banks and the ECB may continue to rely upon their status as exempt persons for the duration of the TTP.
- (iii) The previously made directions have been revoked.
- (iv) The main directions and the prudential direction are generally to apply until 31 March 2022. Exceptions to that approach include for specified credit rating agencies where the TTP applies for one year and in relation to certain consumer credit information where the period is 5 months (in line with the Treasury transitional).

³ As well as related BTS under Solvency II.

- (v) We have applied the main directions more widely to areas where we had not identified relevant obligations, for the avoidance of doubt. Examples include:
 - a. certain amendments to consumer credit legislation,
 - b. legislation concerning credit transfers and direct debits in euro,
 - c. amendments to the E-money and Payment Services Regulations,
 - d. legislation concerning insurance distribution,
 - e. legislation concerning payment accounts, and
 - f. legislation concerning the Packaged Retail and Insurance-based Investment Products Regulation.
- (vi) We have provided more explanation about alternative investment and related funds and also collective investment funds. In particular, we have provided further explanation of the existence of the temporary marketing permission scheme.
- (vii) We have updated Annex A in relation to EMIR to take account of a new Commission Delegated Regulation and an FCA instrument relevant to covered bonds and to apply the TTP to the definition of "intragroup transaction" in Article 3 UK EMIR to avoid the removal of the Credit Value Adjustment exclusion in Article 382(4)(b) of CRR.
- (viii) We have applied the main directions to additional Binding Technical Standards under the Markets in Financial Instruments Directive.
- (ix) We have updated Annex A in relation to the Securities Financing Transitions Regulation. The TTP is not generally applied to relevant obligations, such as reporting to an FCA registered trade repository or trade repositories giving access to that data to the FCA. The 1 October statement and Annex A give further details.
- (x) We have updated Annex A in relation to payment services. We have excluded from the TTP the onshored regulatory technical standards on strong customer authentication and secure communication, this includes requirements enabling the functioning of open banking as well as new security requirements. The 1 October statement and the FCA's approach document for payment services provide more detail.
- (xi) We have updated Annex A in relation to Securitisation, largely to take into account various new Binding Technical Standards (BTS) made under the Securitisation Regulation. These generally relate to existing areas excluded from the TTP in our September 2019 publication, and have been incorporated into those exclusions, for example:
 - a. onshored BTS relating to STS notification templates have been excluded from the TTP, consistent with the existing exclusion relating to notification of the FCA of a securitisation considered 'STS'.
 - b. onshored BTS relating to registration and operational standards for securitisation repositories have been excluded from the TTP, consistent with the existing exclusion for a securitisation repository to be established in the UK in order to be eligible to be registered under the Securitisation Regulation.

Other new BTS relating to Securitisation have been treated differently, namely those relating to transparency requirements, where we have applied the TTP so that originators, sponsors and SSPEs may use both existing and onshored disclosure templates.

The full detail of how and where the TTP applies and does not in this field is set out in Annex A.

- (xii) We have updated Annex A to include the Prospectus (Amendment etc.) (EU Exit) Regulations 2019, including application of the standstill to the definition of 'regulated market' in a limited number of areas.
- (xiii) We have included other recently made Treasury Exit SIs and indicated that we have not identified any relevant obligations requiring application of the standstill.
- (xiv) We have updated Annex A in relation to the Market Abuse Regulation further guidance is included in Annex A row 23.1 relating to amended notification requirements under Article 16 of the Regulation.
- (xv) We have updated Annex A to exclude the changed obligations in the [draft] Equivalence Determinations for Financial Services (Amendment etc.) (EU Exit) Regulations 2020 [presently laid before Parliament].
- (xvi) We have applied Annex B more widely to our Handbook, for example, to:
 - a. specified amendments in our Training and Competence sourcebook,
 - b. our Conduct of Business Handbooks,
 - c. our Supervision Manual,
 - d. our Dispute Sourcebook,
 - e. our consumer credit sourcebook (CONC),

Guidance about the directions

We have made two sets of directions: the main directions (with Annexes A and B) and the prudential direction (with an annex). The directions will take effect from the end of the transition period (11 pm on 31 December 2020) until midnight on 31 March 2022. After 31 March 2022, all onshored changes will apply without modification. Both directions include guidance to help firms and other regulated persons understand the effect of our directions. Our 1 October statement also provides further information to assist firms and other regulated persons.

Main directions

These directions contain a standstill direction that covers mainly conduct requirements. The standstill direction builds in optionality. This means that firms - including temporary permission (TP) firms⁴ – and other regulated persons will not breach a requirement if they continue to comply with the obligation as they did before the end of the transition period, but it is also open to them to comply with the post-transition period obligation.

TP firms can additionally benefit from the TP substituted compliance direction which allows for substituted compliance with European Economic Area (EEA) Home State rules in certain areas, in a similar way to our approach to the application of rules to TP firms (see the rules in GEN 2.2.26R). The TP rules in GEN 2.2.26R set out that where the TTP applies to a rule, then that transitional relief also applies to TP firms.

⁴ This term includes supervised run-off firms under Part 6 of the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018.

The TP substituted compliance direction applies where the temporary permission legislation⁵ leads to changed obligations in provisions other than UK rules⁶ for TP firms. Specific exclusions to the TP substituted compliance direction are set out in Part 5 of the transitional direction, together with guidance. The TP substituted compliance direction is not limited to those matters set out in annexes A and B.

Part 5 also sets out directions allowing for substituted compliance for specified incoming firms in relation to the onshored Distance Marketing Regulations.⁷ The standstill direction only applies in the areas specified in the annexes to the direction.

Annex A applies the standstill direction across regulatory requirements that arise from changes in secondary legislation made by the Treasury and the FCA's instruments amending binding technical standards.

Annex B to the direction sets out the application of the standstill direction to our Handbook. The annexes include guidance on the changed obligations and the effect of the standstill direction where it applies.

These directions also set out areas where the standstill direction will not apply, including some changes to the perimeter.

Whilst our analysis has shown that many of the amendments do not give rise to changes for firms or other regulated persons, we have nonetheless applied the standstill direction widely for the avoidance of doubt in many areas.

Prudential direction

This direction covers onshored prudential requirements (such as capital requirements and recovery and resolution requirements) that we share with the Bank and the PRA. It does not allow optionality, making it mandatory for firms to continue to comply with the effect of pre-exit requirements. This is in line with the Bank's and the PRA's approach.

Set of directions

Together, the main directions and the prudential direction are a set of directions for the purposes of regulation 200(7) of the FSMA Regulations 2019.

Effect on prevention or mitigation of disruption

We are satisfied that the set of directions will prevent or mitigate disruption that could reasonably be expected to arise for firms and other regulated persons, viewed collectively, from compliance with the unmodified obligations viewed collectively, for the period in relation to which the set of directions is to have effect.

Effect on advancement of our key objectives

We are satisfied that the set of directions does not adversely affect the advancement of our key objectives (ensuring that relevant markets work well, securing an appropriate degree of consumer protection, protecting and enhancing the integrity of the UK financial system and

⁵ Regulations 8(3), 11(3), 28(3) and 34(3) of the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018.

⁶ Obligations which are reserved before exit day to firm's home state under a relevant directive.

⁷ The Financial Services (Distance Marketing) Regulations 2004, S.I. 2004/2095 (as amended).

promoting effective competition in the interests of consumers in specified markets) viewed collectively. More specifically, given the significant volume of the onshoring changes to which firms and other regulated persons and consumers would need to adjust to in a short timeframe, using the TTP allows for an orderly transition. This limits disruption. However, in circumstances where we consider there is a risk to our key objectives, we have created exceptions to our use of the TTP.

Consultation with other regulators and the Treasury on use of the TTP

We are obliged to consult the Treasury on a draft of the proposed directions. The Bank, the PRA and the FCA are also subject to an obligation to consult each other on the use of the TTP.

The set of directions published today has benefited from close coordination and consultation with the Treasury, the Bank and the PRA. We also exchanged with the Bank and the PRA our respective draft directions in relation to the implementation of the power.

Next steps

We invite firms and other regulated persons to continue to engage with us on the impact of our use of the TTP and to make us aware of any specific changes that they believe are not fully accounted for going forward.