

MEMO# 32945

November 25, 2020

Brexit: ESMA Statement on the EU Derivative Trading Obligation

[32945]

November 25, 2020 TO: Derivatives Markets Advisory Committee
ICI Global Brexit Task Force RE: Brexit: ESMA Statement on the EU Derivative Trading Obligation

On 25 November 2020, the European Securities and Markets Authority (ESMA) published[\[1\]](#) a final statement[\[2\]](#) concerning the application of the MiFIR[\[3\]](#) derivatives trading obligation (DTO) after the end of the Brexit transition period on 31 December 2020. ESMA published a prior statement on 7 March 2019.[\[4\]](#) ICI Global has been advocating for an equivalence decision by the European Commission covering UK derivative trading venues.[\[5\]](#)

Background

MiFIR[\[6\]](#) requires EU investment firms to conclude transactions in some derivatives[\[7\]](#) on regulated markets (RMs), multilateral trading facilities (MTFs), organised trading facilities (OTFs) or third-country trading venues established in jurisdictions for which the European Commission has adopted an equivalence decision. In its 7 March 2019 statement,[\[8\]](#) ESMA considered that there was no evidence that in case of a no-deal Brexit and in the absence of an equivalence decision by the Commission covering UK trading venues, market participants will not be able to continue meeting their obligations under the DTO. Nevertheless, ESMA committed to monitor the situation closely.

ESMA's Final DTO Statement

In its 25 November 2020 statement, ESMA concludes that it does not consider that a change of its approach is warranted, noting that most UK trading venues that offer trading in derivatives subject to the DTO have established new venues in the EU. Furthermore, while the trading activity on these trading venues is currently limited, those trading venues have onboarded members and participants, including the major liquidity providers, which will allow EU investment firms to comply with the DTO by trading the relevant derivatives in those trading venues after the end of the transition period.

ESMA suggests that the continued application of the DTO after the end of the Brexit transition period will not create risks to the stability of the financial system.

UK Position

In its 25 November 2020 statement, ESMA notes that, absent an equivalence decision, UK

branches of EU investment firms are likely to be subject to the DTO in both the EU and the UK. ESMA acknowledges that this situation is challenging for UK branches of EU investment firms and it may require changes to current business practices in order to ensure compliance with EU law. However, ESMA suggest that this situation is primarily a consequence of the way in which the UK has chosen to implement the DTO.

The Financial Conduct Authority (FCA) acknowledged the potential conflict between EU and UK DTOs in a recent speech,^[9] noting that the FCA remains open to discussions with ESMA as how to minimise any disruption that could arise as a result of overlapping requirements on financial counterparties.

Next Steps

ESMA notes that it will continue monitoring the situation closely to assess whether markets would be sufficiently liquid to allow EU market participants to execute transactions in derivatives subject to the DTO on eligible trading venues after the end of the transition period. The FCA may make an announcement on the UK DTO in due course.

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endnotes

[1] ESMA Press Release: ESMA Sets out its final view on the derivatives trading obligation (DTO), 25 November 2020, *available from* https://www.esma.europa.eu/sites/default/files/library/esma71-99-1443_news_item_dto_final_position.pdf

[2] ESMA Public Statement, Brexit: Impact of the end of the transition period on 31 December 2020 on the trading obligation for derivatives (Article 28 of MiFIR), 25 November 2020, *available from* https://www.esma.europa.eu/sites/default/files/library/70-155-8842_esma_statement_on_dto_final.pdf

[3] Regulation (EU) No 600/2014 on markets in financial instruments, *available from* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0600>

[4] See ESMA's Brexit Preparations section of Memorandum No. 31649, RE: Brexit: A Summary of Key Technical Publications, *available from* <https://www.iciglobal.org/iciglobal/pubs/memos/ci.memo31649.global>

[5] See Memorandum No. 31632, RE: ICI Global Joins Letter Urging EU Recognition of UK Trading Venues in Preparation for Brexit, dated 1 March 2019, *available from* <https://www.iciglobal.org/iciglobal/pubs/memos/ci.memo31632.global>

[6] Article 28

[7] The classes of derivatives subject to the DTO are specified in Commission Delegated Regulation (EU) No 2017/24172 and cover certain fixed-to-float interest rate swaps

denominated in EUR, USD and GBP and two credit default swap indices.

[8] ESMA Public Statement on the Impact of Brexit on MiFID II/MiFIR and the Benchmark Regulation (BMR) – C(6) carve-out, trading obligation for derivatives, ESMA opinions on third-country trading venues for the purpose of post-trade transparency and position limits, post-trade transparency for OTC transactions, BMR ESMA register of administrators and 3rd country benchmarks, 7 March 2019, *available from* https://www.esma.europa.eu/sites/default/files/library/esma70-155-7253_public_statement_mifidii_bmr_provisions_under_a_no_deal_brexit.pdf

[9] Towards end of the transition period: getting ready for a new environment, Speech by Nausicaa Delfas, Executive Director of International, 12/11/2020, *available from* <https://www.fca.org.uk/news/speeches/towards-end-transition-period-getting-ready-new-environment>

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