THE ESMA PREPARES FOR A POTENTIAL HARD BREXIT

While the outcome of political negotiations between the European Union and the United Kingdom still remain unclear, pragmatic solutions are being implemented in the sphere of financial regulation to limit the market disruptions in the event the UK leaves the EU without an agreement on 29 March 2019.

With this in mind, the ESMA (European Securities and Markets Authority) recently released several decisions and public statements, the result of several months' worth of negotiations between the 27 competent national authorities and with the British Financial Conduct Authority (FCA). These announcements are vital to ensure the proper operation of the single market in the event of a hard Brexit, and also look to reassure the market on the level of preparation of European supervisory authorities.

GUARANTEEING THE EFFICIENT OPERATION OF THE SINGLE MARKET AND THE STABILITY OF THE EURO ZONE: GRANTING ACCESS TO CENTRAL COUNTERPARTIES LOCATED IN THE UK

The key matter in the negotiations between the EU and the UK in terms of financial regulation is the access to central counterparties (or CCPs) located in London. It was unilaterally solved by the European Commission through the publication of an implementing decision in December 2018[1]. This decision determines, for a temporary 12-month period, that the **regulatory framework applicable to central counterparties in the UK is equivalent to the EU framework.**

To render this political decision operational, it was however necessary, in application of article 25(2)(c) of the EMIR[2] regulation, that the ESMA enter into a Memorandum of Understanding (MoU) with the British supervisory authority (in this case, the Bank of England) to enable the coordinated supervision of cross-border activities carried out by British players. An MoU to this end was agreed on 4 February 2019. Without going so far as to reveal the terms of this agreement, which will only come into force in the event of a hard Brexit, the ESMA announced that it had drawn up a cooperation agreement with the Bank of England (read the press release here). The ESMA also indicated that the decisions pertaining to the recognition[3] of British players would be taken before the cut-off date of 29 March 2019, but that they would only take effect if a no Brexit deal was reached between the EU and the UK.

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[1] Commission Implementing Decision (EU) determining, for a limited period of time, that the regulatory framework applicable to central counterparties in the United Kingdom of Great Britain and Northern Ireland is equivalent, in accordance with Regulation (EU) No 648/2012 of the European Parliament and of the Council(C(2018)9139).

[2] EU regulation no. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories. Text with EEA relevance.

[3] In application of article 25(2) of the EMIR, the ESMA is competent to recognise the central counterparties of third countries, subject in particular to the publication by the European Commission of an equivalency decision (article 25(2)(a)) and the conclusion of a cooperation agreement between the ESMA and the competent authority of such third country (article 25(2)(c)).

ORGANISING COOPERATION WITH THE FCA AND GUARANTEEING THE CONVERGENCE OF SUPERVISORY PRACTICES WITHIN EU-27

On 1 February 2019, the ESMA had announced the conclusion of a Multilateral Memorandum of Understanding (MMoU) between the FCA on the one hand, and the 27 competent national authorities on the other (read the press release here). To avoid having a plethora of bilateral cooperation agreements in place between the FCA and each of the 27 competent national authorities, and thereby limit any potential discrepancies and regulatory arbitrage, the ESMA lobbied for the implementation of a single multilateral MOU. This agreement aims to enable parties to exchange information, in particular as regards market supervision. It will also be instrumental in the asset management sector to uphold existing delegation and outsourcing structures put in place between European entities and British entities[4].

AFFORD CLARITY TO STAKEHOLDERS ON IMPLEMENTING CERTAIN PROVISIONS OF EU LAW IN THE EVENT OF A HARD BREXIT

On 5 February 2019, the ESMA published a public statement on the impact of a hard Brexit on ESMA databases and transparency calculations provided for in MiFID II/MiFIR[5]. In the event of a no-deal Brexit, from 30 March 2019 the ESMA will stop receiving any data from British entities, in particular from negotiation platforms and systematic internalisers. The ESMA uses such data to calculate thresholds applicable depending on observed market activity (reference data). To enable market stakeholders to anticipate demands that will be applicable to them in the event of a no-deal Brexit, the ESMA details in its statement the conditions and frequency of calculation of these various thresholds. Considering the uncertainty surrounding the quality of data that will be collected post-Brexit, the ESMA will defer the publication of certain calculations, in particular: the quarterly calculations for the SI-determination for equity instruments and bonds, the quarterly determination of the liquidity status of bonds and the monthly DVC (double volume cap) publications.

The pre-Brexit calculations that integrate British data will therefore continue to apply for several months in the event of a no-deal Brexit.

For the same sake of clarity, on 1 February 2019 the ESMA published another public statement regarding reporting requirements applicable under the EMIR. Lastly, the ESMA clarified in a set of Q&As[6] the way in which certain provisions of EU law would apply in the event of a hard Brexit, in particular the requirements applicable under the transparency and prospectus directives (respectively directives no. 2004/109/EC and 2003/71/EC).

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[4] As a reminder, article 13(1)(d) of EU directive no. 2009/65/EC ("UCITS Directive") and article 20(1)(d) of directive no. 2011/61/EU ("AIFM Directive") require cooperation between the competent authority of the delegating management company located within the EU and the competent authority of the delegatee located outside the EU.

[5] Directive 2014/65/EU of 15 May 2014 (MiFID II) and regulation 600/2014 of 15 May 2014 (MiFIR).

[6] ESMA, "Questions and Answers, Prospectuses, 29th updated version - January 2019" and "Questions and answers, Transparency Directive (2004/109/EC)".

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