EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL MARKETS UNION

Brussels, 8 February 2018

NOTICE TO STAKEHOLDERS

WITHDRAWAL OF THE UNITED KINGDOM AND EU RULES IN THE FIELD OF POST-TRADE FINANCIAL SERVICES

The United Kingdom submitted on 29 March 2017 the notification of its intention to withdraw from the Union pursuant to Article 50 of the Treaty on European Union. This means that, unless a ratified withdrawal agreement[1] establishes another date, all Union primary and secondary law will cease to apply to the United Kingdom from 30 March 2019, 00:00h (CET) ('the withdrawal date').[2] The United Kingdom will then become a 'third country'.[3]

Preparing for the withdrawal is not just a matter for EU and national authorities but also for private parties.

In view of the considerable uncertainties, in particular concerning the content of a possible withdrawal agreement, all stakeholders are reminded of legal repercussions which need to be considered when the United Kingdom becomes a third country.

Subject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date, EU rules on financial markets, in particular 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[4] (EMIR)[5], Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012[6] (MIFIR), 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

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1 Negotiations are ongoing with the United Kingdom with a view to reaching a withdrawal agreement.

2 In accordance with Article 50(3) of the Treaty on European Union, the European Council, in agreement with the United Kingdom, may unanimously decide that the Treaties cease to apply at a later date.

3 A third country is a country which is not a Member State of the EU.

4 OJ L 201, 27.7.2012, p. 1.

5 Including, once agreed by the European Parliament and the Council, the Commission proposal (COM (2017) 331) for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs.

6 OJ L 173, 12.6.2014, p. 84.

amending Regulation (EU) No 648/2012[7] (SFTR), Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems[8] (SFD), no longer apply to the United Kingdom.

1. DERIVATIVES

- As of the withdrawal date, derivatives traded on a UK regulated market will no longer fulfil the definition of exchange traded derivatives (**ETDs**) under EU law. According to Article 2(32) of MIFIR, ETDs are derivatives traded on an EU regulated market, or on a third-country market considered to be equivalent.[9] Thus, under EU law[10], as of the withdrawal date, ETDs traded on a UK regulated market will be over-the-counter (**OTC**) derivative contracts.

- An ETD that becomes an OTC derivative will thus become subject to all EMIR requirements applicable to OTC derivatives transactions: all OTC derivatives transactions count towards the calculation of the clearing threshold in accordance with the provisions of EMIR[11], and will be subject to the EMIR clearing obligation where one has been adopted[12] as well as certain risk mitigation techniques (notably the exchange of margins).

- OTC derivatives that are subject to the clearing obligation must be cleared by a central counterparty (CCP) which is authorised and established in a Member State of the EU or a CCP established in a third-country and which is recognised by the European Securities and Markets Authority (ESMA) under Article 25 of EMIR to clear that class of OTC derivative.[13] As of the withdrawal date, CCPs established in the United Kingdom will be third-country CCPs which would need to be recognised under EMIR before they could be used to fulfil the clearing obligation.[14] Counterparties will not be

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7 OJ L 337, 23.12.2015, p. 1.

8 OJ L 166, 11.6.1998, p. 45.

9 An ETD is "a derivative that is traded on a regulated market or on a third-country market considered to be equivalent to a regulated market […], and as such does not fall within the definition of an OTC derivative as defined in Article 2(7) of EMIR", see Article 2(32) of MIFIR.

10 OTC derivative contracts are those not traded on an EU regulated market or traded on third-country regulated market that is not subject to an equivalence decision. See Article 2(7) and Article 2a of EMIR.

11 See, in particular, Articles 2a, 13, 25 and 75 of EMIR.

12 The following products are currently subject to a clearing obligation: interest rate swaps in Euro, Japanese Yen, US Dollar, Norwegian Krona, Polish Zloty and Swedish Krona; and index credit default swaps.

13 See Article 4(3) of EMIR.

14 See Article 4(3) of EMIR and, once agreed by the European Parliament and the Council, the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs and the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central

able to fulfil their clearing obligation under EMIR in CCPs established in the United Kingdom as long as those CCPs are not recognised by ESMA under EMIR.

- The obligation to clear transactions through an authorised CCP established in the EU or a recognised CCP established in a third country also applies to counterparties established in third countries, where the contract has a direct, substantial and foreseeable effect within the EU or where such an obligation is necessary or appropriate to prevent the evasion of any provisions of EMIR.[15]

- The loss of EU authorisation of CCPs established in the United Kingdom will affect their ability to continue performing certain activities (e.g. compression) and fulfilling certain obligations (e.g. default management) with regard to contracts concluded before the withdrawal date.

- A higher capital charge will apply to exposures resulting from positions in derivatives held by credit institutions and investment firms established in the EU and their subsidiaries in non-recognised CCPs established in the EU[16]. This is because only authorised CCPs established in the EU and recognised CCPs established in a third country are qualifying CCPs[17] (QCCPs) which have a favourable treatment under CRR.[18]

- Counterparties in the EU and counterparties in third countries to which the clearing obligation applies should therefore examine their derivatives portfolios. All counterparties (including counterparties established in third countries), be they a financial institution or a non-financial company above the clearing threshold, should ensure that they fulfil the clearing requirements. Where derivatives are concluded via an intermediary or cleared via an intermediary (i.e. clearing member, client of a clearing member or an indirect client), counterparties should ensure that their contract with that intermediary duly complies with the applicable legal requirements.

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counterparty, the registration and supervision of trade repositories and the requirements for trade repositories.

15 For further details, see Article 4 EMIR and Commission Delegated Regulation (EU) No 285/2014 of 13 February 2014 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on direct, substantial and foreseeable effect of contracts within the Union and to prevent the evasion of rules and obligations, OJ L 85, 21.3.2014, p.1.

16 See Articles 300 to 311 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (CRR).

17 See Article 497 of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (CRR).

18 See Article 4(1)(88) of CRR, subject to the transitional provisions of Article 497 of CRR and Commission Implementing Regulation (EU) 2017/2241 of 6 December 2017 (transitional period lasts for third-country CCPs until 15 June 2018).

2. TRADE REPOSITORIES AND REPORTING

- Derivatives or securities financing transactions which are subject to the reporting obligation under EMIR or SFTR must be reported by counterparties to an EU registered trade repository or to a third-country trade repository recognised by the European Securities and Markets Authority (ESMA) under Article 77 of EMIR.[19] As of the withdrawal date, trade repositories established in the United Kingdom will be third-country trade repositories.

- The obligation to report a derivative contract to a duly registered or recognised trade repository is addressed to the counterparties. All counterparties, be they financial or non-financial, must ensure that this requirement is fulfilled. Where reporting to a trade repository is delegated to a third party, counterparties should ensure that their contract guarantees compliance with all applicable legal requirements in EMIR and/or SFTR.

- The requirement for counterparties to keep a record of any derivative contract that has been concluded and of any modification thereto must continue to be fulfilled by counterparties for at least five years following the termination of the contract.[20]

- Systems will no longer be able to be designated by the United Kingdom under the Settlement Finality Directive.[21] As of the withdrawal date, systems currently designated by the United Kingdom will lose their designation under the Settlement Finality Directive along with the rights and benefits that entails for them and their participants. This is without prejudice to any specific provisions in national law of Member States.[22]

This notice is without prejudice to any equivalence decisions that may be adopted by the EU.[23]

The website of the Commission on Post-trade services (https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/post-trade-services_en) provides for general information concerning post-trade services. These pages will be updated with further information, where necessary.

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19 See Article 9 of EMIR and Article 4 of SFTR.

20 See Article 9(2) of EMIR.

21 See Article 2(a) of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (SFD).

22 See Recital 7 of the SFD.

23 See in particular Articles 2a, 13, 25 and 75 EMIR.