



Preparatory measures by ESMA in the context of the United Kingdom withdrawing from the European Union (II). June 2019.

29 March 2019 marked the end of the two-year negotiation period for the United Kingdom (UK) granted under Article 50 of the Treaty on European Union (EU) to those Member States that decide to leave the Union in order to organise their exit in the most orderly manner possible. However, at the UK's request, the European Council agreed, in its meeting held on 21 March, to extend the negotiation period to 22 May provided the Withdrawal Agreement was approved by the House of Commons by 29 March or until 12 April 2019 in the event of a failure to meet this condition.

On 10 April, the European Council agreed, at the request of the UK, to extend the negotiation period for a second time. The leaders of both Parties set 31 October 2019 as the deadline for the UK to leave the EU (Brexit), unless the Withdrawal Agreement is ratified before that date.

As a result of this new context, the European Securities and Markets Authority (ESMA), has been forced to adjust some of the measures that it had already adopted with regard to Brexit. Following on from the article published in the CNMV's International Bulletin of February this year, the most significant adjustments and measures adopted by ESMA over recent months are described below.

Main adjustments

On 28 March, ESMA published a statement in which, as a result of the first extension, it announced that for all those measures adopted in relation to Brexit, reference to 29 March should now be read as 12 April, with this change also affecting data management.

In addition, it confirmed that it was working with the European Commission (EC) and the other two European Supervisory Authorities (EBA and EIOPA) to adjust Delegated Regulations (EU) 2019/396 and (EU) 2019/397 on the clearing obligation and risk management procedures, respectively, for certain derivative contracts in order to exempt from these obligations, only for a period of 12 months, the novations that take place with the sole objective of replacing counterparties established in the UK with counterparties established in a Member State.

In addition, in the area of clearing, on 5 April ESMA reported the renewal of recognition decisions for the three central counterparties (CCPs) established in the United Kingdom - LCH Limited, ICE Clear Europe Limited and LME Clear Limited - and a Central Securities Depository (CSD) - Euroclear UK and Ireland Limited - in order to reflect the first extension to the negotiation period. It thus adapted to the modifications introduced on 3 April by the EC in its equivalence decisions in relation to the frameworks applicable to the CCPs and the CSD in the UK (Commission Implementing Decisions (EU) 2019/544 and 2019/545).

Statements published in the area of markets

In the area of secondary markets, one of the main consequences of the UK's withdrawal from the EU will be that the UK's trading venues will be treated as third country trading venues for the purpose of the application of EU law. In anticipation that, on the date that the UK leaves the EU, the EC might not have recognised their equivalence, ESMA has published several statements relating to compliance with certain obligations set out in legislation on markets in financial instruments (MiFID II and MiFIR) in this context.

One of the most controversial issues is likely to be the impact of Brexit with regard to compliance with trading obligations for shares laid down in MiFIR, which establishes that investment firms may only conclude transactions in shares admitted to trading, either on a regulated market or traded on an EU trading venue, on a third-country trading venue if that venue has previously been assessed as equivalent. This requirement is not applicable to transactions in shares traded in the EU on a non-systemic, ad hoc, irregular and infrequent basis. With the aim of providing the market with greater legal certainty, on 19 March ESMA issued a first statement setting out its position with regard to correct application of this obligation in the case of shares traded both on EU27 and UK trading venues in the absence of an equivalence decision in respect of the UK. Accordingly, the initially published criterion, applicable in the event of a no-deal Brexit and for a limited period, consisted of considering that this obligation applies to all shares with ISINs issued in an EU27 Member State, together with those issued in Iceland, Liechtenstein and Norway, as well as UK shares with ISINs starting with the prefix GB providing they qualify as liquid in the EU27. However, ESMA qualified its position on the matter in a second statement published on 29 May, with the aim of reducing the potential impact created by a no-deal Brexit and as a result of the new comments received from the sector. In this statement, ESMA informed that only shares that have an ISIN from an EU27 country or from Iceland, Liechtenstein and Norway will be subject to the trading obligation for shares.

However, prior to these two statements, on 7 March, ESMA published another statement addressing various aspects regulated by MiFID II/MiFIR and by the Benchmarks Regulation.

These include, firstly, compliance with the trading obligation for certain derivatives (interest-rate swaps and index credit default swaps) in the context of Brexit. ESMA recognises that only when the EC has adopted an equivalence decision will UK trading venues be deemed eligible for complying with this obligation. In the meantime, bearing in mind that following the UK's announcement of its decision to withdraw from the EU some of the UK venues where these derivatives are traded have decided to establish new venues in the EU27, ESMA has undertaken to closely monitor how the liquidity of these contracts develops.

Similarly, in the event that UK trading venues have not received the equivalence declaration on the Brexit date, ESMA undertook to: (1) assess whether these venues comply with the criteria set out in ESMA opinion ESMA70-154-467, so that investment firms trading on them are not required to make transactions public via an approved publication arrangement and (2) assess whether these venues comply with the criteria set out in ESMA opinion ESMA70-156-466, so that commodity derivatives contracts traded on them do not need to be considered as economically equivalent over-the-counter contracts for the position limit regime.

With regard to compliance with post-trade transparency requirements, ESMA confirmed in the statement that EU27 investment firms that conclude OTC transactions with UK counterparties after Brexit must make them public through an authorised publication arrangement.

Finally, although MiFID II allows wholesale energy products that are traded on an organized trading facility (OTF) and physically settled to be excluded from its scope, ESMA stated that Brexit will result in derivatives relating to electricity or natural gas produced, traded or delivered exclusively in the UK no longer being considered wholesale energy products in the EU and they may not, therefore, benefit from this exemption. The same will happen if these products are not traded on an EU27 OTF.

In the scope of the Benchmarks Regulation

The statement of 7 March also covered the ESMA register of administrators and third-country benchmarks.

In the event of a no-deal Brexit, UK administrators included in the ESMA register will be deleted as EU administrators. However, during the BMR transitional period, supervised entities will be allowed to continue using benchmarks either recognised or endorsed in the UK or provided by UK administrators.

Endorsement of credit ratings issued by credit rating agencies based in the UK

As in the above case, in the event of a no-deal Brexit, UK-based credit rating agencies (CRAs) will be removed from the ESMA register. In this case, the credit ratings that these agencies have issued may only be used in the EU, for the purpose of complying with prudential requirements, if they are endorsed by an EU-based CRA. However, as a prior step, legislation requires ESMA to perform an assessment of the legal and supervisory framework applicable to CRAs based in third countries. ESMA completed the assessment of the UK framework on 13 February and concluded that it meets all the legal requirements for endorsement. In addition, on 1 February, ESMA reached an agreement on a cooperation arrangement with the FCA in this area, thus complying with another of the requirements necessary for the endorsement to take place. However, it will be the EU CRAs that will ultimately decide whether or not to endorse, assuming the responsibility with regard to the existence of objective reasons to do so.

In its statement of 15 March, ESMA reported that four UK-based CRAs were already members of a group comprising a registered EU27 CRA. Specifically, Fitch Ratings España S.A.U. has notified ESMA of its intention to endorse credit ratings issued by Fitch Ratings Limited and Fitch Ratings CIS Limited and Moody's Deutschland GmbH has notified ESMA of its intention to endorse those of Moody's Investors Service Ltd and Moody's Investors Service EMEA Ltd. In addition, two other UK-based CRAs have started to prepare the ground for future endorsements by establishing a CRA in an EU 27 Member State. The new agencies established in the EU27 are A.M. Best (EU) Rating Services B.V and DBRS Rating GmbH.

Links of interest:

[Update on the UK's withdrawal from the European Union - preparations for a possible no-deal Brexit scenario on 12 April](#)

[ESMA has adopted new recognition decisions for the three UK CCPs and the UK CSD in the event of a no-deal Brexit on 12 April](#)

[Impact of Brexit on the trading obligation for shares \(Article 23 of MiFIR\) I](#)

[Impact of Brexit on the trading obligation for shares \(Article 23 of MiFIR\) II](#)

[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](#)

[Endorsement of credit ratings elaborated in the United Kingdom in the event of a no-deal Brexit](#)