

A blue-toned background image featuring a financial line chart with multiple data series and a grid. The chart shows various trends, including a sharp decline followed by a recovery and another decline.

LATHAM & WATKINS

9 December 2020

Financial Regulation Monthly Breakfast Webcast

Overview



Brexit – latest developments, including contrasting the UK and EU positions on share trading, short selling, and prospectuses

LIBOR – LIBOR transition update, and the FCA's new powers under the Benchmarks Regulation from the Financial Services Bill

Potential reforms to the UK Listing Regime

FCA Review of Delayed Disclosure of Inside Information



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Brexit – latest developments, including contrasting the UK and EU positions on share trading, short selling, and prospectuses

Anne Mainwaring and Markus Krueger

Regulator expectations in the run up to the end of the transition period

- Day 1 requirements called out by the FCA
 - Transaction reporting
 - Readiness for the switch from ESMA FIRDS to FCA FIRDS
 - FCA has published its cutover plan for firms migrating to FCA FIRDS
 - MAR
 - Note commentary from the FCA in PMB 32
 - Market-making exemption under the Short Selling Regulation
 - HMT equivalence decision
 - Note commentary from the FCA in PMB 32

Regulator expectations in the run up to the end of the transition period

- Business and contract continuity
- Use of standard contractual clauses in relation to transfers of personal data from the EU to the UK
- **Additional test:** even where temporary transitional relief applies, firms must ensure that they have considered whether delaying compliance with a relevant onshored requirement will create a risk of significant harm

Key market issues: ESMA public statement on the impact of the end of the transition period on the trading obligation for derivatives

- ESMA has issued a statement on the potential for conflicting requirements where derivatives fall within the scope of the EU and UK DTOs
- ESMA considers there is no evidence that 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
- This is because most UK trading venues that offer trading in derivatives subject to the DTO have established new trading venues in the EU 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

Key market issues: ESMA public statement on the impact of the end of the transition period on the trading obligation for derivatives

- UK branches of EU investment firms are likely to be subject to the DTO in both the EU and the UK - ESMA notes that this situation is challenging and may require changes to current business practices in order to ensure compliance with EU law
- One option - trade in-scope derivatives on US swap execution facilities as these are eligible under both the EU and UK DTOs
- ESMA's view is that this situation is primarily a consequence of the way in which the UK has chosen to implement the DTO
- FCA response?

Primary Market Bulletin 32 – Getting Ready for Brexit

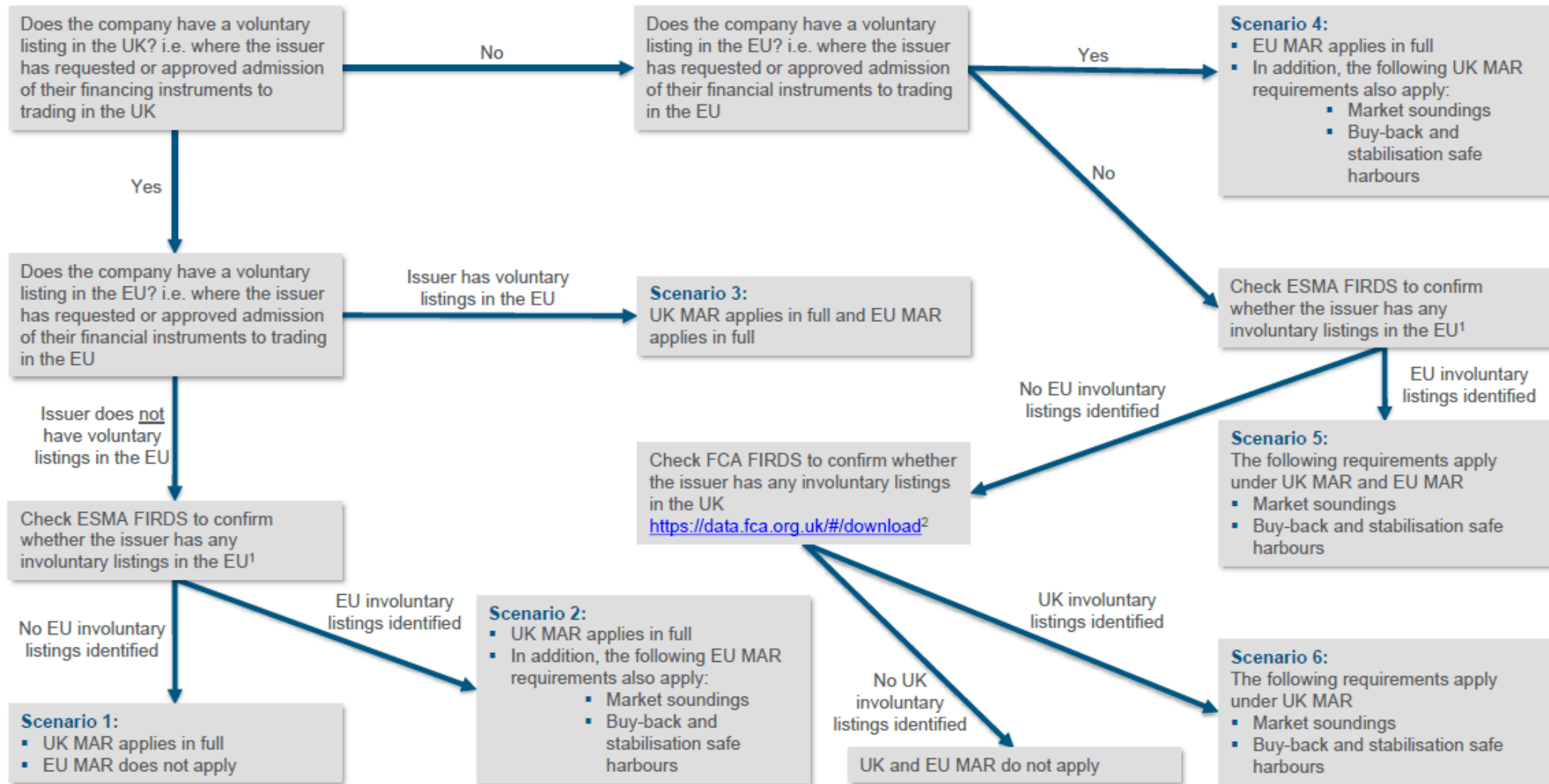
Key changes under UK Market Abuse Regulation

- Useful summary by the FCA, focusing on duplicative notification requirements in relation to delay in disclosing inside information and PDMR dealing. Also some guidance on the buy-back and stabilisation exemptions under UK MAR
- Any issuer that has requested or approved admission to trading or approved trading of its financial instruments on a UK trading venue will be required to:
 - Send notifications on delayed disclosure of inside information to the FCA in addition to any notifications required in the EU
 - Ensure PDMR reports are made to the FCA (irrespective of whether they are also required to report in the EU)

Primary Market Bulletin 32 – Getting Ready for Brexit

- Buy-back programmes:
 - For shares admitted to trading in the UK, issuers should continue to report to the FCA each transaction relating to the buy-back programme (including those transactions which do not take place on a UK trading venue)
 - For shares admitted to trading in the EU, issuers should continue to report to the EU competent authority of the trading venue in line with EU MAR
- Stabilisations:
 - For securities traded in the UK, issuers, offerors, or entities undertaking the stabilisation, should continue to report all stabilisation transactions to the FCA (including those transactions which do not take place on a UK trading venue)
 - Where the securities are traded on an EU trading venue, issuers, offerors, or entities undertaking the stabilisation, should continue to report to the EU competent authority of the trading venue in line with EU MAR

Flowchart: how to determine when the issuer related obligations under UK MAR and EU MAR apply



¹Access https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_firds → Type the name of the issuer into the 'keyword search' → if the search returns instruments relevant to the issuer there are involuntary listings in the EU → if the search does not return instruments relevant to the issuer there are not involuntary listings in the EU

²<https://data.fca.org.uk/#/download>

Primary Market Bulletin 32 – Getting Ready for Brexit

Summary of changes in relation to Short Selling Regulation

- The FCA sets out a summary of the requirements of the onshored UK Short Selling Regulation which will take effect on 1 January 2021, in particular in relation to the market making exemption and how net short reporting will work
- Any firm wishing to use the exemption for transactions for market making activities will be required to join a UK trading venue and notify the FCA of their intention to use the market maker exemption in writing 30 days ahead of their intended use

Primary Market Bulletin 32 – Getting Ready for Brexit

- As a result of an equivalence decision taken by HM Treasury, EEA market makers will not need to become members of a UK trading venue to be able to use the UK SSR market maker exemption from the end of this year – but will however, still need to provide the FCA with a notification or a copy of any notification made to another competent authority at least 30 days before the end of the transition period

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- Reporting to the FCA
 - To determine whether a position in shares should be notified to the FCA:
 - Check FCA FIRDS to see whether a share is traded in the UK
 - Check the UK list of exempted shares to see if the share is exempt
 - If the share is on FCA FIRDS but not exempt, position holders should send their notification to the FCA via its Electronic Submission System
- UK list of exempted shares
 - Will be published on the FCA's website from 1 January 2021 and will cover:
 - The FCA's list of exempted shares containing all shares admitted to trading on UK trading venues where their principal trading venue is outside the UK
 - ESMA's list of exempted shares as at the end of the transition period - the shares on this list will remain exempt from some of the requirements in the UK SSR for 2 years

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- **Reminder of previous guidance on Brexit changes:** The FCA points to PMB 21, PMB 22 and PMB 24 where it sets out the effect onshoring of EU legislation will have on the Listing Rules, DTRs, the Prospectus Rules, MAR and the Short Selling Regulations
- **HM Treasury equivalence decisions on financial services:** The FCA notes the equivalence decisions made by HM Treasury in November 2020 in respect of financial services (nothing directly relevant to LRs, PRs, DTRs or MAR)

Primary Market Bulletin 32 – Getting Ready for Brexit

- **Act early if seeking passport of prospectuses by year end:** The FCA flags that ESMA is launching a new prospectus register system before the end of the year – it strongly encourages any issuers seeking passports to arrange their passports well in advance of 31 December 2020 given the introduction of the new system during the holiday period and the potential for an increased number of required passports in light of Brexit

Primary Market Bulletin 32 – Getting Ready for Brexit

- **ESMA Q&A on PR:** The FCA will continue to have regard to EU non-legislative materials where relevant, “taking account of Brexit and on-going domestic legislation”. The FCA will consider on a case by case basis whether it is appropriate to set out its expectations of issuers on any ESMA Q&As published from 1 Jan 2021
- **Takeovers, mergers or divisions – prospectus exemptions:** EU draft legislation relating to the minimum content for Exemption Documents has not yet been adopted and, if not in force by the end of the year, will not become part of UK law on 1 Jan 2021. However, HM Treasury will have the power to specify the minimum content requirements for exemption documents and recommends issuers contact the FCA’s Listing Transactions department if guidance is needed in relation to Exemption Documents

Getting Ready for Brexit – German Perspective

- **Cross-border Business** into EU27 / Germany
 - BaFin echoes EBA and ESMA position that with a view to transition period, institutions had ample time to prepare for a no-deal Brexit (EBA “reminder” 9 Nov 2020)
 - Reliance on reverse solicitation viewed critically
 - Some facilitation by BaFin with regard to process, e.g. registration for research distribution in EU27 possible prior to 1 Jan 2020; similarly, “third country” fund distribution notification possible prior to 1 Jan 2020

Getting Ready for Brexit – German Perspective

- **German Operations / Subsidiaries**

- ECB/ESMA/BaFin Guidance still stands: Full compliance as of Day 1 expected, but – subject to bilateral arrangements with BaFin
- Key issues in practice:
 - Substance on the ground;
 - Outsourcing to UK operations / dual-hatting arrangements
 - Booking models
 - MiFID II goldplating
- BaFin will need to “learn” about supervising operations that historically have been conducted from UK (e.g. wholesale banking)
- BaFin will rely on (special) role of audit firms in Germany

Getting Ready for Brexit – German Perspective

- **Doing Business with UK as Third-Country**
 - Generally, UK institutions will be treated as other third country institutions
 - Only very limited equivalence decisions, but ESMA announcement to recognize three UK CCPs (Sept. 2020)
 - Effect on various levels, e.g.
 - Credit: Risk weighting of exposure towards UK institutions as third-country risk
 - Payments: eIDAS certificates issued to UK third party providers will be revoked; payments to and from the UK will need to comply with WTR and include additional information, which will need to be verified; SEPA third country rules apply
 - Prospectus: BaFin likely to follow ESMA position - UK approved prospectuses no longer subject to notification (cross-border validity lost), but previously admitted securities will retain their admission in Germany



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LIBOR – LIBOR transition update, and the FCA's
proposed use of its new powers under the
amendments to the Benchmarks Regulation from the
Financial Services Bill
Becky Critchley

LIBOR transition update – timing?

- Based on (and subject to consultation and change):
 - ICE upcoming consultations on LIBOR cessation
 - FCA statements announcing its consultation on new benchmarks powers

LIBOR CURRENCY	ICE ADMINISTRATION CEASING IN CURRENT FORM	'FCA'S' SYNTHETIC LIBOR?
GBP	31 December 2021	Likely (all settings?)
USD: one-week and two-month US dollar LIBOR USD: all other settings	31 December 2021 30 June 2023	Unlikely Unlikely
YEN	31 December 2021	Possible (but not for all settings)
EURO	31 December 2021	Unlikely
SWISS FRANC	31 December 2021	Unlikely

FCA statement and consultation on new benchmarks powers

- On 18 November 2020, the FCA published:
 - Two consultations with respect to the FCA's proposed approach to:
 - Designating an unrepresentative benchmark using new powers under the proposed Article 23A of the UK BMR
 - Requiring changes to a critical benchmark, including its methodology, using new powers under proposed Article 23D of the UK BMR
 - A statement on amendments to be made to the UK BMR by the Financial Services Bill 2019-21

FCA statement and consultation on new benchmarks powers

- Consultations close on 18 January 2021
- The FCA will consult in Q2 of 2021 on its approach to the exercise of its powers under the proposed Article 21A (prohibition on new use) and Article 23C (exception from the prohibition for legacy use)
- The FCA will further consult in 2021 in relation to any decision to exercise the proposed Article 23D (orderly cessation of an Article 23A benchmark) power in respect of LIBOR

Article 23A consultation - designation of a critical benchmark

- Article 23A enables the FCA to designate a critical benchmark that has become unrepresentative, or is at risk of becoming unrepresentative, as an “Article 23A benchmark”
- Such designation:
 - Gives rise to a prohibition on the use of that benchmark by UK supervised entities, subject to any exemptions made by the FCA
 - Empowers the FCA to take certain actions including to require changes to the benchmark’s methodology for any continued use

Article 23A consultation - designation of a critical benchmark

- The FCA indicates a number of reasons why it might designate an “Article 23A benchmark”:
 - To signal to users that the benchmark’s wind-down is imminent
 - To trigger the automatic prohibition that applies to Article 23A benchmarks (subject to any exemptions made by the FCA)
 - To support the orderly wind-down of the benchmark (for example, by requiring methodology changes to allow its continued use in exempted contracts)

Article 23D consultation - exercise of powers in relation to an “Article 23A benchmark”

- Article 23D empowers the FCA to require changes to the methodology, input data, rules, and/or contributor code of conduct for contributors to a designated Article 23A benchmark
- Focuses on the exercise specifically in relation to LIBOR and “tough legacy” contracts:
 - *“Contracts and/or instruments that cannot practicably be transitioned away from the benchmark rate by actions or agreements by or between the contract counterparties themselves”*
- The FCA is only permitted to exercise Article 23D powers where such exercise would both:
 - Assist in securing the orderly wind-down of the benchmark
 - Advance either or both of the FCA’s consumer protection objective and the integrity objective

Article 23D consultation - exercise of powers in relation to an “Article 23A benchmark”

- *Assisting in securing the orderly wind-down of the benchmark.* The FCA seeks views from the market on:
 - How the FCA should assess the practicality of contract transition by counterparties (without intervention)
 - How it should assess the number of tough legacy contracts and instruments that are likely to exist
 - What level of tough legacy contracts and instruments is significant enough to justify use of the FCA’s powers

Article 23D consultation - exercise of powers in relation to an “Article 23A benchmark”

- Guidance on whether and how to exercise powers:
 - Availability to the benchmark administrator of robust and transparent inputs
 - Fair approximation of the value the benchmark would have had
 - Least disturbance or disadvantage to affected parties
 - Market support
 - Length of publication on a changed basis
 - Impact on the benchmark administrator

FCA statement on UK BMR amendments by the FS Bill

- The FCA gives an indication of its key decision making process in relation to its Article 23A powers, with a summary of its other powers under the UK BMR
- The FCA does not expect LIBOR to cease or become non-representative before end-2021 as LIBOR panel banks have confirmed to the FCA that they will remain on the LIBOR panels until end-2021
- The FCA emphasises any exercise of its powers is to ensure an orderly wind-down of LIBOR, not to enable the FCA to restore the representativeness of LIBOR

FCA statement on UK BMR amendments by the FS Bill

- Powers will not be used where:
 - Benchmarks (such as LIBOR currency-tenor settings) are little used
 - Where the contracts referencing the benchmark can practicably be amended by contractual counterparties without FCA intervention
 - Where using the powers would not be necessary to protect consumers or market integrity
 - Appropriate alternative inputs to the benchmark methodology are not available



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Potential Reforms to the UK Listing Regime
Chris Horton

The UK's Listing Regime – the potential reforms to the Listing Regime following HM Treasury's call for evidence

Review of UK listing regime by Lord Hill

Call for evidence deadline of 5 January 2021

“The review will seek input and evidence from market participants, based on which it will propose a range of recommendations for how to boost the UK as a destination for IPOs and optimise the capital raising process for companies seeking to list on the main UK markets.”

Seeking views on the following areas:

- Free float requirements
- Dual class share structures
- Track record requirements
- Prospectuses
- Dual and secondary listing

Wider views sought as well

Short term changes and longer term changes too

Can we improve the *“flexibility and proportionality of our regulatory system so as to support growth and innovation”*?



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FCA Review of Delayed Disclosure of Inside
Information
Chris Horton

Recent market trends - FCA review of delayed disclosures

- Under Article 17(1) of MAR an issuer must disclose inside information as soon as possible
- An issuer may delay disclosure if the relevant conditions are met (legitimate interests, not misleading)
- Article 17(4) requires issuers to notify the FCA when the announcement of inside information has been delayed then published
- No need for a notification if announcement made “as soon as possible”
- FCA unsatisfied with the low level of notifications (“DDII”)
- Only a quarter of issuers submitted a DDII in the period under review (July 2016 to November 2018)
- 1,610 DDII notifications in the period
- FCA flags getting advice, training, systems and controls

Recent market trends - FCA review of delayed disclosures

Periodic financial information (“PFI”)

- FCA expect to see a longer period of delay
- Should assume it could be inside information
- Should be more of these DDII (only 159 instances vs results 10,000 announcements)
- Should not see much share price movement
- Broker advice

Recent market trends - FCA review of delayed disclosures

Unscheduled financial information

- Lower number compared to PFI
- Only 18 DDII for 3,132 trading updates
- Should have a shorter delay and a higher share price movement compared to PFI
- However average delay was longer (21 days) than PFI (17 days)
- No legitimate interest to delay this long
- Focus of future FCA monitoring

Recent market trends - FCA review of delayed disclosures

Director / Board Changes

- Longer delay than expected (16 days)
- Not one of the legitimate interests for delay
- Low share price impact

Connected with Latham Podcasts

Brexit & Financial Services: Preparing for the End of the Transition Period

With the end of the Brexit transition period looming, many financial services firms are asking what they need to do between now and the end of the year to ensure regulatory compliance.

In this episode of *Connected With Latham*, Anne Mainwaring, London associate in the Financial Regulatory Practice, joins Stephen Hanks, Manager in the Markets Policy Department at the UK's Financial Conduct Authority, to discuss key focus areas in the run up to, as well as beyond, the end of the transition period. Focus topics include the approach to onshoring, the key MiFID II onshoring changes, and the FCA's approach to implementation review and policy following the end of the transition period.

Listen [here](#) or subscribe via [Apple Podcasts](#), [Google Podcasts](#), [Spotify](#).

Corporate Culture: How to Attain Sustainable Change

Culture has become a point of focus for regulators and corporate stakeholders. The UK Financial Conduct Authority has taken a particular interest in culture and conduct within the financial services sector following the financial crisis. Companies increasingly recognise a need to measure and monitor their culture, yet struggle to do so given its amorphous nature.

In this episode of *Connected With Latham*, London partner Rob Moulton speaks with the authors of "Culture — A Practical Framework for Sustainable Change", London partner David Berman and associate Nell Perks, as well as Nathan Seltzer, Global Vice Chair of the firm's White Collar Defense & Investigations Practice. The team examines how organisations are getting a handle on measuring culture, monitoring for progress, and uncovering problem areas requiring action. They also discuss various culture issues arising from the COVID-19 pandemic and what companies can anticipate as their workforces shift to a hybrid model of working remotely and in the office.

Listen [here](#) or subscribe via [Apple Podcasts](#), [Google Podcasts](#), [Spotify](#).

The podcast cover features a dark purple background with a white waveform graphic. In the top left corner, there is a red square with the text 'Connected with LATHAM' in white. The title 'Brexit & Financial Services: Preparing for the End of the Transition Period' is written in white at the top right. Below the title, there are two circular headshots: one of Stephen Hanks on the left and one of Anne Mainwaring on the right. To the right of Stephen Hanks' headshot is his name and title: 'Stephen Hanks, Manager, Markets Policy Department, Financial Conduct Authority'. To the right of Anne Mainwaring's headshot is her name and title: 'Anne Mainwaring, Associate, London'.

The podcast cover features a dark purple background with a white waveform graphic. In the top left corner, there is a red square with the text 'Connected with LATHAM' in white. The title 'Corporate Culture: How to Attain Sustainable Change' is written in white at the top right. Below the title, there are four circular headshots arranged in a 2x2 grid. To the right of the top-left headshot is the name and title: 'David Berman, Partner, London'. To the right of the top-right headshot is the name and title: 'Nell Perks, Associate, London'. To the right of the bottom-left headshot is the name and title: 'Nathan Seltzer, Partner, London'. To the right of the bottom-right headshot is the name and title: 'Rob Moulton, Partner, London'.

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LATHAM & WATKINS LLP



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Insights and commentary on financial regulatory issues and developments impacting business and innovation in the US, Europe, Asia, and across the world.

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