LATHAM & WATKINS

The Edinburgh Reforms — Where Are We Now?

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As the pace of reform increases, we take a look at key developments and the timeline ahead.

Significant progress has been made on the Edinburgh Reforms since they were announced in December 2022, with developments gathering pace before the summer break. Given the breadth and speed of the reforms, now is a good time to take stock of where things stand and what we can expect in the months ahead. In this publication, we highlight some of the key developments and set out expected dates for future progress.

The Financial Services and Markets Act 2023 (the Act)

The Act received Royal Assent on 29 June 2023, and commencement dates have now been set for most of the provisions. Some provisions took effect immediately, and the majority will take effect on 29 August 2023, although many provisions set up powers or frameworks for HM Treasury or the regulators to take certain actions (for example, powers to designate and oversee critical third parties). Therefore, many of the changes that the Act envisages will not occur immediately.

Dealing with retained EU law (REUL)

The Act is vast and covers many areas, but one of its key purposes is to set up the framework for the repeal and restatement of financial services REUL. Now that the Act is in place, the process of replacing financial services REUL with UK-specific legislation and rules can commence. The intention is that most firm-facing provisions will be moved to sit in regulator rules, which are a more appropriate medium as they can be adapted and updated more easily than legislation. Repeal dates will be set for each piece of REUL listed in the Schedule to the Act in a staged manner, and the aim is that nothing will be repealed until the replacement measures are ready (unless a piece of REUL is not being replaced). Financial services REUL will not be subject to automatic repeal. The first Commencement Order for the Act sets a repeal date for almost 100 pieces of financial services REUL which are considered unnecessary and which will not be replaced. These pieces of REUL implemented EU law by making amendments to UK legislation, and the Act preserves the amendments they made, so they can be removed without consequence.

HM Treasury previously set out which core files of REUL it will be working through, and identified which files will be prioritised in tranches 1 and 2. HM Treasury has now provided an update on the timings for repealing and restating the REUL in those tranches, and remains committed to making significant progress by the end of 2023.

The Act makes some interim amendments to REUL, in particular to MiFID and EMIR to implement parts of the Wholesale Markets Review (see below). The Act also grants HM Treasury powers to make transitional amendments to financial services REUL before it is repealed, in accordance with certain purposes.

Future tranches will be set out in due course, and HM Treasury also intends to identify which files will be subject to a “lift and shift” approach, meaning that they will not be subject to policy change when rewritten into the UK framework (although review could of course take place at a later date). An update on timings is expected when the next Regulatory Initiatives Grid is published in November 2023.

The restatement of REUL using the UK model of regulation will leave certain gaps, which the Act addresses. It creates the Designated Activities Regime (DAR) so that HM Treasury can bring certain activities into the scope of regulation without also subjecting persons carrying on those activities to authorisation and full supervision requirements. The DAR will be used in areas like the new UK Public Offers and Admissions to Trading Regime, but could be used to regulate new activities in the future.

Further, the Act gives the Bank of England and the FCA supervisory and rule-making powers in relation to certain financial market infrastructures (FMIs), such as central counterparties, as requirements for such entities currently sit in REUL. These provisions will also allow for the establishment of a UK consolidated tape. The Act makes provision for an FMI Sandbox to be established to enable firms to test and adopt new technologies and innovations. HM Treasury is currently consulting on the first sandbox under these powers — a Digital Securities Sandbox.

Securities and Markets

Prospectus regime

HM Treasury and the FCA are working on the new Public Offers and Admissions to Trading Regime to replace the UK prospectus regime. HM Treasury is finalising the necessary legislation, which it expects to make before the end of the year. Meanwhile, the FCA has published a series of engagement papers on various aspects of the regime that fall within its rule-making remit, which close for comment at the end of September 2023 (please see Latham's related blog posts here and here). The FCA plans to consult on its rule proposals next year.

Listing regime

The FCA has also consulted on significant reforms to the UK listing regime (see Latham's related Client Alert), which would replace the existing premium and standard listing segments with a single segment for equity shares in commercial companies. The FCA plans to issue a further consultation on wider changes to the UK listing regime in the autumn, which will include proposed revisions to the listing rules. These changes will help to implement the outstanding recommendations from Lord Hill's Listings Review.

Secondary Capital Raising Review

As announced in December 2022, HM Treasury is working with the Department for Business and Trade (the DBT) to deliver the recommendations made to government as part of the Secondary Capital Raising Review. The DBT is expected to propose changes to the Companies Act to take forward these recommendations.

In the meantime, the Digitisation Taskforce, which is considering the digitisation of shareholdings as recommended by the Secondary Capital Raising Review, published its interim report on 10 July 2023 and will engage with the industry on the questions and potential recommendations it has identified before the final report is provided to the government in early 2024.

Investment research

The Investment Research Review published its final report on 10 July 2023, making seven recommendations that the government has committed to take forward (please see Latham's related blog post). These recommendations include removing compulsory research unbundling. The FCA will consult on changes to its rules on an "accelerated timetable" with a view to finalising the changes in the first half of 2024.

Wholesale Markets Review

Significant progress has been made on implementing the outstanding recommendations of the Wholesale Markets Review. The FCA published final rules in May 2023 with amendments to post-trade transparency for equities, including pre-trade transparency waivers, the tick size regime, the reporting regime for SIs, and the introduction of the new "designated reporter regime". The FCA plans to consult on the transparency regime for fixed income and derivatives markets later this year. Changes have also taken effect that streamline the process for determining when firms that trade commodities or emission allowances as an ancillary activity need to be authorised as an investment firm, and remove the obligation to inform a retail client when the overall value of their portfolio depreciates by 10% or more.

Numerous changes are addressed through transitional amendments to MiFID and EMIR, made under the Act. Many of these take effect on 29 August 2023. Changes include removing the double volume cap and the share trading obligation, amending the definition of an SI, and realigning the scope of the derivatives trading obligation and EMIR clearing obligation. The FCA will also be given responsibility for the pre-trade transparency waivers regime for equities and the pre- and post-trade transparency regime for fixed income and derivatives markets. Changes will be made to the commodity position limits regime, with an FCA consultation due later this year.

The Act sets out the framework to implement a UK consolidated tape. HM Treasury has published draft legislation which will facilitate the emergence of a UK consolidated tape, and the FCA is consulting on the framework for a UK consolidated tape for bonds, with the regime expected to be in place by 2024.

The FCA has published its final guidance on the trading venue perimeter (see Latham's related blog post). The Chancellor also announced that the new intermittent trading venue is expected to be up and running by the end of 2024. There are further plans for the FCA to work with the industry to develop a playbook for market operators and participants to follow during a market outage, but the timing is not yet clear.

Short selling

HM Treasury has published its response to the Short Selling Review, and a further consultation on parts of the regime relating to sovereign debt. HM Treasury plans to increase the disclosure threshold from 0.1% to 0.2% of total issued share capital and to replace the current public disclosure regime based on individual net short positions with an aggregated net short position disclosure regime. It will delegate other parts of the regime to the FCA for the FCA to make replacement rules. The FCA plans to consult on its rules in 2024.

Securitisation

HM Treasury has published near-final legislation that should be made before the end of 2023. This legislation will allow for the replacement of most firm-facing requirements with regulator rules. The PRA is consulting on its replacement rules in the areas for which it has responsibility and plans largely to preserve the existing requirements. The equivalent FCA consultation on its rules is due shortly. In the meantime, the Act makes transitional amendments to the regime to allow an equivalence regime for simple, transparent, and standardised securitisations originated in non-UK jurisdictions to be established.

Banking Regulation

The PRA consulted earlier this year on removing the CET1 deduction requirement for non-performing exposures that are treated as insufficiently covered by firms' accounting provisions, and to remove the related reporting requirements. A Policy Statement is expected later this year.

The government is also looking to reform the ring-fencing regime and published a Call for Evidence on aligning the ring-fencing and resolution regimes earlier in 2023. A consultation on short-term reforms to the ring-fencing regime, including on increasing the threshold for the regime from £25 billion to £35 billion, was expected mid-2023 but has not yet materialised.

HM Treasury has indicated that it plans to progress work on implementing Basel 3.1 and the new "strong and simple" capital framework for smaller banks, and restating the Capital Requirements Directive and Capital Requirements Regulation, in 2024.

Governance

HM Treasury and the regulators have published papers calling for input on the effectiveness, scope, and proportionality of the SMCR (see Latham's related blog post). The papers were open for responses until 1 June 2023, and feedback is awaited.

While the tone of the papers suggested that HM Treasury and the regulators do not envisage a radical overhaul, industry feedback could drive improvements and simplifications to the regime.

ESG

The government published an updated Green Finance Strategy on 30 March 2023, outlining expected timings for various ongoing initiatives (see Latham's related blog post). The government has repealed statutory deadlines to make technical taxonomy criteria under REUL, and plans to consult on the Taxonomy Regulation and the UK Green Taxonomy by the end of 2023. The FCA has recently confirmed that its Policy Statement on Sustainability Disclosure Requirements and investment labels is now expected in Q4 2023.

HM Treasury consulted on proposals for a regulatory regime for ESG ratings providers earlier in 2023 (see Latham's related blog post). The consultation set out the regime's proposed scope. Once the scope is decided, HM Treasury will consult on draft legislation, and the FCA will need to devise appropriate Handbook materials.

Introducing this legislation will take time, and therefore in 2022, the FCA appointed the International Capital Market Association and the International Regulatory Strategy Group to convene an industry group to develop a voluntary Code of Conduct for ESG data and ratings providers (the Code). The aim of the Code is to help raise standards in the short term, and to apply to any firms that fall out of scope of potential future regulation. The FCA recently welcomed the publication of a consultation on the Code, which is open until 5 October 2023 with the intention that the Code will be updated and finalised by the end of 2023.

PRIIPs

HM Treasury has now published the response to its consultation on a new UK retail disclosure regime to replace the PRIIPs Regulation. The response confirms the intention to entirely remove all firm-facing retail disclosure requirements currently set out in the PRIIPs Regulation from legislation, and provide the FCA with the necessary powers to deliver the new UK regime. HM Treasury plans to publish draft legislation by the end of 2023 that will enable the FCA to do this. The FCA will issue a consultation on the replacement regime in due course.

Consumer Credit

HM Treasury has published the response to its first consultation on the strategic direction of reforms to the Consumer Credit Act 1974. The response confirms HM Treasury's plans to move forward with an "ambitious overhaul" of the regime, which will include moving many provisions of the Act into FCA rules. HM Treasury will now undertake policy development to produce more detailed proposals. It aims to publish a second-stage consultation in 2024.

Reform is likely to take a number of years to deliver, as it will include changes to primary legislation, consultation on new FCA rules, and transitional periods to allow industry to prepare and adapt to the new regime. HM Treasury is therefore considering whether a phased approach to implementation would be feasible.

Insurance

HM Treasury and the PRA are working on the detail for the reform of UK Solvency II announced in November 2022. HM Treasury has developed early drafts of the legislation that will implement the reforms. The proposals are expected to be implemented in phases, with key proposals relating to the risk margin to be in force by the end of 2023, for amendments to the matching adjustment regime to follow at the end of June 2024, and for the remainder of the proposals to be in place by the end of 2024.

Meanwhile, the PRA has issued a consultation setting out proposals to deliver reforms in most of the areas of the Solvency II review in which the government has not chosen to legislate directly, including in relation to encouraging entry to the UK market and reducing the administrative and reporting regime for insurers. A second consultation, planned for September 2023, will cover reform proposals for life insurers relating to investment flexibility and the matching adjustment. The PRA also intends to consult in early 2024 on transferring the remaining firm-facing Solvency II requirements from REUL into the PRA Rulebook and other policy materials.

UK implementing aspects of the Insurance Distribution Directive will be repealed on 29 August 2023, as most of these have already been incorporated in the FCA Handbook. Full repeal is planned for later in 2023. HM Treasury will make legislation, and the FCA will launch a consultation, later in 2023 to complete the replacement of these files.

Payments

Legislation has been made to remove certain conditions on the use of the FCA's rulemaking power in relation to payments regulation. This legislation ensures that the FCA has sufficient powers to make rules for payment services and e-money, so that the FCA can make rules to replace repealed REUL in this area. The FCA is working with HM Treasury on a new safeguarding regime, followed by further work on a new prudential regime, changes to agents' oversight, and possible extensions to the SMCR and the Financial Services Compensation Scheme (FSCS).

Looking to the future of payments regulation, the government has launched a Future of Payments Review to report on the steps needed to deliver world-leading retail payments in the UK. Further, the government is still considering the case for introducing a retail Central Bank Digital Currency (or "digital pound") and ran a consultation to inform future work in this area which closed on 7 June 2023.

Expected Timings 2023

We set out below expected upcoming timings, based on dates provided by the government and the regulators.

7 August 2023	• FCA consultation on the securitisation regime
H2 2023	• FCA to publish a Feedback Statement and Consultation Paper on the future retail disclosure framework • FCA to consult on amending its rules on research unbundling • Government to consult on short-term reforms to the ring-fencing regime
September 2023	• Further PRA consultation on Solvency II
9 October 2023	• New FCA guidance on the trading venue perimeter takes effect
Q4 2023	• PRA Policy Statement on banks' non-performing exposures • FCA Policy Statement on Sustainability Disclosure Requirements and investment labels • FCA consultation on the resilience of money market funds • FCA consultation on the Insurance Distribution Directive • FCA consultation on the transparency regime for fixed income and derivatives markets • FCA consultation on commodity position limits • FCA feedback on its prospectus regime engagement papers
December 2023	• Interim report by Accelerated Settlement Taskforce due • FCA Policy Statement on the consolidated tape for bonds
By end of 2023	• HM Treasury to publish draft legislation on the new UK retail disclosure regime, short selling, money market funds, and the Insurance Distribution Directive • HM Treasury to make legislation on the new Public Offers and Admissions to Trading Regime, the securitisation regime, and data reporting services providers (to facilitate the consolidated tape) • Government consultation on UK Green Taxonomy • Voluntary Code of Conduct for ESG data and ratings providers to be finalised • Solvency II risk margin reduction takes effect

Expected Timings 2024

We set out below expected upcoming timings, based on dates provided by the government and the regulators.

1 January 2024	• Repeal of Article 92(b) of the UK Capital Requirements Regulation (minimum requirements for own funds and eligible liabilities) • Repeal of European Long-Term Investment Fund Regulation • Repeal of parts of the Payment Accounts Regulations 2015
Early 2024	• Further PRA consultation on Solvency II • Digitisation Taskforce to publish final recommendations and implementation plan
H1 2024	• FCA to make final rules on research unbundling (subject to consultation)
Q2 2024	• Proposed implementation date for regulator rules on the securitisation regime
29 April 2024	• Outstanding FCA changes to equity secondary markets rules take effect
2024	• HM Treasury to publish a second-stage consultation on reform of the Consumer Credit Act 1974 • FCA to consult on specific rule proposals for the new Public Offers and Admissions to Trading Regime • FCA to consult on its rules under the short selling regime
Mid 2024	• Solvency II matching adjustment reforms take effect

2024 onwards	• HM Treasury to make legislation:
	  • to implement Basel 3.1, implement the new “strong and simple” capital framework for smaller banks, and restate the Capital Requirements Directive and Capital Requirements Regulation
	  • to replace the existing payment services and e-money regimes
	  • on the new UK retail disclosure regime, short selling, and money market funds

31 December 2024	• Proposed implementation date for the remainder of the Solvency II reforms
By end of 2024	• Intermittent trading venue expected to be up and running

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