

UK Firms Granted Extra 15 Months for Brexit Onshoring Preparations

The FCA, Bank of England, and PRA have published updated rules for firms post-Brexit and intend to delay many (but not all) onshoring changes.

Key Points:

- The FCA has published an updated version of the FCA Handbook, together with a related guide, which contains the rules that will apply at the end of the transition period.
- The FCA, Bank of England, and PRA intend to apply the Temporary Transitional Power on a broad basis after the end of the transition period for 15 months, until 31 March 2022.
- Key areas where transitional relief will not be given and firms need to be ready to comply with by 1 January 2021 include certain reporting obligations and market abuse requirements.
- The FCA and PRA Dear CEO letter to PRA-regulated firms outlines final preparations for the end of the Brexit transition period.

The UK left the EU on 31 January 2020 with a Withdrawal Agreement. It has entered a transition period which is due to end at 11 p.m. on Thursday 31 December 2020. Until this date, EU law will continue to apply in the UK. On 1 October 2020, the FCA, Bank of England, and PRA published updated rules and guidance that will apply to firms at the end of the transition period, together with details on how they intend to use the Temporary Transitional Power (TTP) in relation to financial services legislation post-Brexit. The UK regulators have confirmed that they will give firms an additional 15 months after the end of the transition period, until 31 March 2022, to meet the majority of their Brexit onshoring obligations. However, firms will still need to comply with certain specified measures by 31 December 2020.

The FCA and PRA have also published a [Dear CEO letter](#) to all PRA-regulated firms preparing for the end of the transition period, highlighting key areas where firms need to take final steps to ensure that they are prepared for the end of the transition period.

Updated version of the FCA Handbook

The FCA has published an updated version of the FCA Handbook. Readers using the FCA Handbook website in 2020 and wishing to view the post transition period version of the FCA Handbook rules and guidance, can now navigate via the FCA Handbook Table of Contents to the future date of 1 January

2021. The updated version of the FCA Handbook shows the rules that will apply at the end of the transition period, including those changes made through Brexit onshoring.

Nausicaa Delfas, Executive Director of International at the FCA, has highlighted, *“We are approaching the end of the transition period, so firms should be completing their final preparations. To help firms to prepare and provide clarity, we have published a version of our Handbook that will apply from the end of this year, which includes the changes made through the onshoring process”*.

The FCA has made a large number of EU exit-related instruments to amend its Handbook in preparation for the end of the transition period. The FCA Handbook website incorporates all of the FCA’s EU exit-related instruments that have been made up to and including 30 September 2020. Further FCA exit-related instruments are expected to be made later in 2020 and incorporated into the FCA Handbook website at that time.

Guide to the FCA Handbook Post-Brexit Transition

To assist readers of the FCA’s Handbook website, the FCA has also published a [“Guide to the FCA Handbook for Post-Brexit Transition”](#). Readers should consult the FCA Handbook together with the related guide on and after the end of the transition period.

The FCA has confirmed that the guide is not intended, and should not be relied on, as guidance on what rules, guidance, or other requirements may apply to a particular person/firm, or as a substitute for independent legal advice on that person’s/firm’s circumstances. The purpose of the guide is to explain how to read the FCA Handbook and other legislative provisions after the end of the transition period in light of the various instruments and directions made by the FCA and HM Treasury.

EU non-legislative material

The three European Supervisory Authorities (ESAs) — ESMA, EIOPA, and the EBA — have the power to issue non-legally binding “Guidelines and Recommendations”. The ESAs also publish other non-legislative material such as Opinions and Q&A documents. Although this broad range of non-legislative material has not been incorporated into UK law post-Brexit, the FCA has [confirmed](#) that it considers that the majority of EU non-legislative material will remain relevant after the transition period ends to both the FCA and market participants in their compliance with regulatory requirements, including provisions in the FCA Handbook.

After the end of the transition period, it is also possible that the FCA may determine that firms, financial institutions, or market participants are no longer expected to “make every effort to comply” with a particular pre-transition period guideline; for example, due to changes made to the relevant legislation. In these circumstances, the FCA may issue additional guidance accordingly.

Non-FCA Handbook material

Non-FCA Handbook guidance includes Dear CEO letters, technical notes, and case studies. The FCA has [clarified](#) that it is not generally amending non-FCA Handbook guidance relating to EU law or EU-derived law. However, firms should continue to take this guidance into account before and after Brexit if related EU or EU-derived provisions become or remain UK law.

Onshoring and the TTP

HM Treasury has given the UK regulators the power to make transitional provisions to financial services legislation for a temporary period, with the aim of helping firms adapt to their new regulatory obligations post-Brexit.

FCA's approach to the TTP

The FCA has published a new [webpage](#) on how it intends to use the TTP, in which the regulator reconfirms its intention to apply the TTP on a broad basis from the end of the transition period until 31 March 2022. Consequently, firms and other regulated persons do not generally need to prepare now to meet the changes to their UK regulatory obligations brought about by onshoring.

For those areas in which the TTP applies, firms and other regulated persons can continue to comply with their existing regulatory obligations for a limited period. The FCA also expects firms to use the duration of the TTP period to prepare for full compliance with the onshored UK regime by 31 March 2022.

However, the FCA has also listed the areas where the TTP will not apply, and where it expects firms to start preparing now to comply with these obligations immediately after the transition period. The FCA has confirmed that *"[t]he power will in most cases give firms more time to adapt to their new obligations. There are some areas where it would not be appropriate for us to apply the TTP, including where doing so could run counter to our objectives: in those key areas, we continue to expect firms and other regulated entities to prepare now to comply with the changes to their regulatory obligations by 31 December 2020"*.

The key areas where the FCA expects firms to be preparing to comply with changed obligations ready for 31 December 2020 are:

- **MiFID II transaction reporting requirements:** The UK's transaction reporting regime under MiFID II will change as a result of Brexit, including connected obligations such as the requirement to submit financial reference data. This includes the need for trading venues to transaction report for transactions on their venues by their European Economic Area (EEA) members, and EEA firms in the temporary permissions regime who operate through a UK branch to start transaction reporting to the FCA.
- **EMIR reporting obligations:** All firms and central counterparties (CCPs) that enter into derivatives transactions in scope of EMIR will be required to report the details of those transactions to an FCA-registered Trade Repository (TR). TRs will also be required to provide the relevant UK authorities with access to that data.
- **SFTR reporting obligations:** All financial counterparties, including third country branches, central securities depositories (CSDs) and CCPs who enter into securities financing transactions in scope of the SFTR will be required to report details of those transactions to an FCA-registered TR. TRs will also be required to provide the relevant UK authorities with access to that data.
- **Certain requirements under MAR:** Issuers that have securities admitted to trading or traded on UK markets (and persons discharging managerial responsibilities within the issuer) will be required to submit information to the FCA, regardless of any existing obligations under EU law to provide this information to an EU authority. Persons professionally arranging or executing transactions will also be required to report Suspicious Transaction and Order Reports (STORs) to the FCA where they are registered or have their head office in the UK, or, in the case of a branch, where the branch is situated in the UK. This requirement will be regardless of any obligations under EU law to report STORs to an EU authority where they are registered or have their head office in the EU, or, in the case of a branch, where the branch is situated in the EU.

- **Issuer rules:** Issuers that have securities admitted to trading on UK regulated markets will be required to submit information to the FCA and disclose certain information to the market after the end of the transition period.
- **Contractual recognition of bail-in:** To safeguard resolvability, firms will need to include contractual recognition of bail-in terms in all new or materially-amended liabilities governed by the law of an EEA State, except for unsecured liabilities that are not debt instruments.
- **Client Assets Specialist Sourcebook rules (CASS):** CASS will be disapplied for EEA branches of UK firms. These firms must (i) segregate UK client money from EEA branch money; and (ii) ensure that EEA branch money will no longer be held under the CASS statutory trust.
- **Market-making exemption under the Short Selling Regulation:** Any firm wishing to use the exemption for market-making activities under the Short Selling Regulation will be required to join a UK trading venue and notify the FCA of their intention to use the market maker exemption 30 days ahead of their intended use. Any notifications already made to the FCA will remain valid after the transition period.
- **Use of credit ratings for regulatory purposes:** Once the transition period ends, all ratings will need to be issued or endorsed by a credit ratings agency (CRA) that is registered or certified with the FCA in order to be eligible for regulatory use in the UK.
- **Securitisation:** UK originators and sponsors must notify the FCA using the onshored STS notification templates from the end of the transition period, where their UK securitisations meet the criteria for being simple, transparent, and standardised (STS) under the onshored Securitisation Regulation, in order for those securitisations to qualify as UK STS.
- **Electronic commerce EEA firms:** The TTP does not apply to EEA e-commerce firms, which have been excluded under the E-commerce Directive.
- **Mortgage lending after the transition period against land in the EEA:** Where loan contracts entered into after the end of the transition period are secured on land in the EEA, they will no longer be regulated mortgage contracts but may instead be regulated credit agreements.
- **Payment services — strong customer authentication and secure communication:** The regulatory technical standards on strong customer authentication and secure communication are onshored into FCA binding technical standards (the UK-RTS). The TTP does not apply to the UK-RTS.

The areas listed above are also explained in more detail on the FCA's new webpage, "[Key requirements of firms](#)".

Due to the scale and complexity of some of the key areas listed, the FCA has also confirmed its intention to "act proportionately", by not taking enforcement action against firms and other regulated persons for not meeting all requirements straight away, where there is evidence they have taken reasonable steps to prepare to meet the new obligations by 31 December 2020. Where firms and other regulated persons are not fully prepared by that date, the FCA has stated that it would expect them to comply with the new obligations as soon as reasonably practicable.

Bank of England and PRA's approach to the TTP

The Bank of England and PRA have also jointly published a [webpage](#) confirming that they intend to adopt the same approach in relation to the TTP as the FCA. Therefore, PRA-regulated firms and Bank-regulated financial market infrastructures (FMIs) will not need to have completed preparations to implement changes in UK law by the end of the transition period.

There are three key exceptions where the TTP will not be used to delay onshoring changes to firm's obligations: contractual recognition of bail in rules, contractual stays, and Financial Services Compensation Scheme (FSCS) protection. The TTP does not apply to areas with existing specific transitional provisions.

The Bank of England and PRA have confirmed that all areas of the onshored MiFIR and certain areas of EMIR are exempt from the scope of the transitional power if the effect of the transitional power could be achieved by HM Treasury making an equivalence decision or direction. However, this approach will be kept under review. In some areas, use of the transitional power will produce the same effects as HM Treasury finding the EU jurisdictions equivalent under specific provisions in UK legislation. Where HM Treasury makes an equivalence decision or direction in these areas, the relevant provisions will become excluded from any application of TTP.

Transitional provisions and regimes

The FCA has published a new [webpage](#) on transitional provisions and regimes. The FCA lists the transitional provisions and regimes, including the:

- Temporary Permission Regime (TPR)
- Financial services contracts regime (FSCR)
- Temporary marketing permission regime for UCITS and AIFs
- Transitional provision for temporary permission firms in UK MiFIR

The FCA reminds firms that the TTP does not apply to the transitional provisions and regimes set out above.

Where an area already contains a transitional provision or regime, the FCA has confirmed that it generally does not propose to apply the TTP beyond that transitional provision or regime. For example, in relation to the transitional provision for EEA prospectuses approved before the end of the transition period, the TTP will not affect a person's duty to comply with the new onshored requirements for EEA prospectuses that have not been approved by the end of the transition period.

Transitional directions

In order to understand the legal framework of the TTP, firms should refer to the FCA's new [webpage](#) on transitional directions and read the FCA's main [transitional directions](#), together with Annexes [A](#) and [B](#), the [explanatory note](#), and the [FCA's prudential transitional direction](#).

The FCA has stated that it proposes to make the final TTP directions towards the end of the transition period, and expects to publish them in December.

The FCA explains that:

- Annex A to the main FCA transitional direction sets out how the TTP applies and where it does not apply to legislation, including in relation to binding technical standards (BTS).
- Annex B (FCA Rules) to the main FCA transitional directions sets out how the TTP does and does not apply to FCA rules. The TTP does not apply to rules that apply only to temporary permission firms (including Part 6 financial services contracts firms) and temporary marketing permission managers. However, the rules themselves include provision to ensure that the transition is smooth.

The TTP does not apply to various FCA rules, including FEES rules and levies rules applying to the temporary permission regime and various rules in: PRIN, GEN, MIPRU, IPRI(INV), COBS, ICOBS, MCOB, BCOBS, CASS, MAR, SUP, COMP, COLL, CONC, FUND, LR, PRR, DTR; and rules referring to UCITS management companies specified in Annex B.

Bank of England and PRA's guidance on transitional directions

The Bank of England has published [guidance](#) supporting draft Transitional Directions that were published on 22 September 2020. The guidance explains:

- The general effect of the Bank of England's transitional direction, which is to generally delay onshoring changes that fall within the remit of the Bank of England until Thursday 31 March 2022
- How firms and FMIs should interpret their regulatory obligations that applied immediately before the end of the transitional period
- Exceptions to the Bank of England's general approach

Firms and FMIs should also note that this guidance is non-binding in nature, that it may be amended from time to time, and that the direction should be followed in the case of any inconsistency with the related guidance.

The PRA has also published [guidance](#) on transitional direction, which explains its specific approach to the use of the transitional power for former passporting firms (in particular, firms in the TPR and Supervised Run-off regime).

PRA and FCA Dear CEO letter on final preparations for end of Brexit transition period

On 9 October 2020, the PRA and FCA published a [Dear CEO letter](#) sent to PRA-regulated firms on their final preparations for the end of the Brexit transition period. In the letter, the UK regulators remind financial institutions that it is imperative they continue to make preparations and engage with clients and customers to minimise any disruption at the end of the transition period.

Key Areas of Focus

Continuity of wholesale banking business and contracts

Firms should continue to take steps to facilitate the continuity of business and contracts. To ensure clients can manage risks related to lifecycle events, firms should proactively engage with affected clients to complete repapering and on-boarding, and novate existing trades where necessary. Firms should ensure that they have fully considered the impact on each client and whether the proposed changes, including any transfer of business if applicable, are in each client's best interests. If firms plan to use national licensing regimes and exemptions in EU Member States, firms should also ensure that they will have everything in place by the end of the transition period to comply with requirements in those Member States.

Data

The use of standard contractual clauses (SCCs) in relevant contracts is one of the available ways that EEA firms can comply with the EU's cross-border personal data transfer laws after the expiry of the transition period. Firms may need to consider whether contracts involving the transfer of personal data to their firm from the EEA (where those contracts have not yet been remediated) need to be updated to comply with EU requirements or to consider other appropriate measures for personal data transfers from

the EEA into the UK, where this is necessary to ensure the continuity of services (e.g. reviewing the position for EU vendors or third parties on which firms' services rely).

Trading venues

If a firm is currently subject to the share and/or derivatives trading obligation, the firm should consider how it will continue to meet its trading obligations in both the EU and UK under a range of scenarios at the end of the transition period, and the implications for its clients. Firms should discuss their plans and assumptions with the FCA, in particular if they plan to make any changes to their current systems and processes.

Payments

After the transition period, processing payments, including direct debits, through Single European Payment Area (SEPA) schemes will require additional information to be included about the debtor in the payment instructions. Firms should therefore continue to take all reasonable steps to avoid disruption to payments. This includes ensuring that the required information is included on SEPA payments where necessary, and that customers are aware of the need to provide the information. In the event that any payments are disrupted, firms should ensure they are ready to communicate promptly with impacted customers to alert them to this and to give them the opportunity to make the payment in an alternative way.

Provision of retail banking services

The UK regulators expect firms with customers in the EEA to establish plans on their approach to servicing existing contracts with those customers. When implementing these plans, firms should take steps to ensure they act in accordance with local law and national regulators' expectations. Firms' decisions should be guided by what is the right outcome for their customers. Further, they should provide timely communications to enable customers to make appropriate decisions and prepare accordingly. In many cases, it would be a poor outcome for the customer for a firm to suddenly stop servicing them. The UK regulators remind firms that if they have identified customers who will be affected by a reduction or cessation in service provision, they should ensure that these customers are treated fairly and provide them with sufficient notice to seek alternative arrangements. These comments by the UK regulators are likely aimed at encouraging firms to deal with the issues now, rather than permitting them (in the FCA and PRA's eyes) to continue to provide services in breach of local laws by claiming they had prioritised customers' interests.

Firms are also reminded to take the necessary steps to manage any remaining operational risks.

Next steps

Firms will be affected in different ways at the end of the transition period depending on the nature of their business and the location of their customers. Firms should take comfort knowing that they can continue to comply with their existing EU obligations in the short term, whilst having more time to prepare for changes to their UK obligations brought on by Brexit onshoring. However, firms must not lose sight of those key areas which they must be ready to comply with by 31 December 2020.

The FCA has published a new webpage, "[Preparing your firm for Brexit: end of the transition period.](#)" which some firms may find helpful when planning the actions they need to take for life post-Brexit.

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