Explanatory note: FCA Transitional Direction for the Derivatives Trading Obligation (a direction under Part 7 of the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (Transitional Powers of the Financial Regulators))

30 December 2020

Introduction

The Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (the FSMA Regulations 2019) give us (and the Bank of England and the Prudential Regulation Authority) the power to temporarily waive or modify obligations in relation to which we have supervisory responsibility or other functions where those obligations have changed under section 8 of the EU (Withdrawal) Act 2018 because of the UK's withdrawal from the EU (the Brexit onshored legislation). This is the so-called Temporary Transitional Power or TTP.

Statutory context

Part 7 of the FSMA Regulations 2019 sets out our powers to make TTP directions. Where we are making a TTP direction, regulation 203 (Notification and publication of transitional directions) requires us to prepare and publish alongside publication of the directions the following material:

(i) an explanation of the purpose of the direction,
(ii) such guidance in connection with the direction as the regulator considers appropriate, and
(iii) a statement to the effect that the regulator is satisfied that giving the transitional directions would not adversely affect the advancement of its key objectives viewed collectively.

This explanatory note and the direction set out this material.

Purpose of the direction

The Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018 (SI 2018/1403) and related technical standards, and the Main FCA Transitional Directions already provide arrangements for continuity and mitigating disruption as at the end of the transition period and afterwards. The latter do not make provision in relation to the derivatives trading obligation at article 28 of the Markets in Financial Instruments Regulation (MiFIR).

The purpose of the direction is to give effect to the TTP to modify the derivatives trading obligation in order to mitigate the disruption that the FCA considers could reasonably be expected to arise from compliance with onshored obligations, in particular obligations in article 28 of MiFIR, upon and in the period after the end of the transition period.

Guidance

The direction takes effect from the end of the transition period (11 pm on 31 December 2020). The direction may be varied or revoked. The direction includes guidance to help firms understand the effect of our direction. Our statement on use of the Temporary Transitional Power to modify the UK's derivatives trading obligation also provides further information to assist firms.

Effect on prevention or mitigation of disruption

We are satisfied that the direction will prevent or mitigate disruption that could reasonably be expected to arise for firms and other regulated persons, viewed collectively, from compliance with the unmodified obligations viewed collectively, for the period in relation to which the direction is to have effect.

Effect on advancement of our key objectives

We are satisfied that the direction does not adversely affect the advancement of our key objectives (ensuring that relevant markets work well, securing an appropriate degree of consumer protection, protecting and enhancing the integrity of the UK financial system and promoting effective competition in the interests of consumers in specified markets) viewed collectively. More specifically, given the significant volume of the onshoring changes to which firms and other regulated persons and counterparties would need to adjust to in a short timeframe, using the TTP allows for an orderly transition. This limits disruption.

Consultation with other regulators and the Treasury on use of the TTP

We are obliged to consult the Treasury on a draft of the proposed direction. The Bank, the PRA and the FCA are also subject to an obligation to consult each other on the use of the TTP.

The direction has benefited from close coordination and consultation with the Treasury, the Bank and the PRA.