Circular C19/XXX
Interpretation of References to EU Legislation in the Clearing Rules in the event of a 'No Deal' Brexit

Category
Regulations

Attachments
None

The contents of this Circular constitute interpretative Guidance and are issued pursuant to Rule 109(f) and 109(g).

This Circular will apply if the UK exits the European Union ("**EU**") in circumstances where no final or transitional withdrawal agreement has been agreed between the UK and the EU27 which stipulates that EU laws will continue to apply in the UK. If there is a so-called "no deal" Brexit without such an agreement, directly applicable EU legislation (for example, EU regulations, regulatory technical standards and implementing technical standards) will be incorporated into UK law with modifications on "exit day" by virtue of the European Union (Withdrawal) Act 2018 (the "**EUWA**"). This process, known as "on-shoring", would result in there being two versions of a directly applicable EU legislative act, which may be relevant to the Clearing Rules: (1) the version as enacted in the EU, which is directly applicable throughout the EU (and, in certain cases, the EEA); and (2) the version on-shored into UK law. Moreover, the UK will cease to be a member state of the EU. The UK will also have implemented EU directives, but it will be no longer subject to such directives nor a member state.

There are various references to EU legislation in the Rules and Procedures of the Clearing House. Paragraphs 1 and 2 of Schedule 8 to the EUWA aim to clarify the appropriate post-Brexit interpretation of references to EU legislation in existing UK statute, "on-shored" directly applicable EU legislation, and documents relating to either a UK statute or a piece of on-shored EU legislation. As discussed in a memorandum published by The City of London Law Society, these provisions are not, however, applicable to contracts, such as the Clearing Rules and Procedures and other contractual documentation of the Clearing House. The Clearing House has therefore published this Circular to provide guidance to Clearing Members on how references to EU legislation in its Clearing Rules and Procedures should be construed after the UK leaves the EU.

Where a reference to an EU regulation or directive appears in the Clearing Rules, or is imported by more generic wording such as the "Applicable Laws" definition, the context in which such reference is used should be considered when interpreting it. In particular, the Clearing House will apply the following principles for the purposes of determining how a reference to an EU law should be read post-Brexit in a "no deal" scenario:

- Where the reference is to an EU regulation, it should be interpreted as follows:

The reference concerns an obligation on, or otherwise applies to, the Clearing House or a UK Clearing Member	The reference concerns an obligation on, or otherwise applies to, an EU Clearing Member
The regulation as it forms part of UK domestic law by virtue of section 3 of the EUWA, and as amended by UK domestic law from time to time.	The regulation as it applies in the EU, and as amended by EU law from time to time.

- Where the reference is to an EU directive, it should be interpreted as follows:

The reference concerns an obligation on, or otherwise applies to, the Clearing House or a UK Clearing Member	The reference concerns an obligation on, or otherwise applies to, an EU Clearing Member
The UK domestic law corresponding to the directive or provision thereof.	The EU directive, as amended by EU law from time to time and as implemented in the relevant member state of the EU Clearing Member.

We note that some Clearing Members may be EU-headquartered and have a UK branch, or be UK-headquartered and have an EU branch. For such Clearing Members, provisions of both EU and UK legislation will be relevant and EU legislative references should therefore be read as to both the EU law and the corresponding UK domestic law, in

each case to the extent applicable depending on the structure of the Clearing Member and the scope of the relevant legislation.

As regards EU Clearing Members that benefit from the UK Temporary Permissions Regime under the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018, requirements under both EU legislation and corresponding UK domestic laws will be relevant. Similarly, UK Clearing Members with one or more cross-border regulatory licences in an EU member state post-Brexit, or which operate under any EU member state grandfathering arrangements (whether akin to the UK Temporary Permissions Regime or otherwise), should construe references to EU legislation in the Regulations post-Brexit as including (to the extent applicable): (a) the relevant EU regulation or directive; (b) the UK on-shored regulation or UK domestic laws corresponding to the directive (as applicable); and (c) national laws of the relevant EU member state in respect of third country firms corresponding to the regulation or directive.

By way of example of the general approach set out above, Rule 201(a)(x) and Rule 206 require Clearing Members to maintain sufficient "Capital". For EU Clearing Members, this means "own funds" (regulatory capital) under the CRD IV package (consisting of Directive 2013/36/EU and Regulation (EU) No 575/2013 ("**CRR**")). Following a no-deal Brexit, UK Clearing Members would be required to comply with capital requirements under the UK on-shored version of the CRR while the CRR as it applies in the EU would continue to be applicable to EU Clearing Members. Similarly, the Rules make reference to different types of segregated account "for purposes of EMIR and MiFID II" and the applicable legislation will depend on the Clearing Member in question. The obligation on UK Clearing Members to provide such accounts for their clients will be imposed under EMIR and MiFIR as on-shored in the UK. For EU Clearing Members, EMIR and MiFIR as they apply in the EU will instead be applicable. More generally, the reference to "EMIR" in the definition of "Applicable Law" in the Rules would also need to be interpreted differently depending on whether the relevant obligation being considered is on a UK Clearing Member or an EU Clearing Member. Where firms are established in the EU and have a branch in the UK, or vice versa, or operate under cross-border licences, then both sets of rules may apply (as noted above).

The following exceptions to the general approach set out in the above tables have been identified:

1. A reference to an EU law relating to emission allowance units issued under the EU Emissions Trading Scheme (ETS) should be interpreted as a reference to the regulation or directive as it applies in the EU and as amended from time to time by the EU, since the UK will no longer participate in that scheme post-Brexit.

2. Where there is a collective reference to EU member state laws transposing an EU directive, such implementing measures should be read to include UK domestic law corresponding to the EU directive.

3. As regards the European Market Infrastructure Regulation (Regulation (EU) No 648/2012, "**EMIR**"):

    a) Post-Brexit, the Clearing House will continue to be recognised by the Bank of England for the purposes of providing services as a CCP under EMIR as on-shored in the UK ("**UK EMIR**"). However, the Clearing House will also, upon exit day, be recognised as a "third-country CCP" by the European Securities and Markets Authority ("**ESMA**") under EMIR (as it applies in the EU, "**EU EMIR**") for the purposes of providing services to Clearing Members and trading venues in the EU.

    b) The principles for interpreting references to EU regulations above will apply equally to EMIR in most situations. For example, where a reference to EMIR concerns the Clearing House's authorisation as a CCP or requirements that apply to CCPs under EMIR, the reference should be interpreted as a reference to UK EMIR. Where a reference concerns a Clearing Member, for example where it relates to Applicable Laws encompassing the clearing obligation, transaction reporting or client segregation requirements, the appropriate interpretation will depend on where the Clearing Member is based.

    c) However, while UK EMIR will be most important to the Clearing House, the third-country CCP provisions in EU EMIR will continue to apply to the Clearing House and certain other sections of the remainder of EU EMIR may be relevant to the extent necessary to retain the Clearing House's recognition by ESMA under the Commission Decision determining the UK's regulatory framework for CCPs to be equivalent (Commission Implementing Decision (EU) 2018/2031 of 19 December 2018).

    d) Accordingly, references to Governmental Authority and Regulatory Authority in the Clearing Rules will

continue to cover ESMA and other relevant EU regulatory, administrative or governmental bodies or courts.

4. In relation to references to EU data protection legislation in the Clearing Rules, please refer to Circular C19/053 of 15 March 2019, which contains amendments to the Clearing Rules to address Brexit-related data protection issues.

The interpretative guidance contained in this Circular, as well as the data protection-related amendments contained in Circular C19/053, will come into effect at 11pm on the date of publication.

Signed:

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