

United Kingdom: The FCA's Brexit Temporary Transitional Power and temporary permissions regimes

A guide for firms

In brief

With the end of the Brexit transition period rapidly approaching, regulated firms must ensure that they are prepared to comply with their new obligations from 31 December 2020 when EU law ceases to have effect in the UK and the post-Brexit UK regulatory regime will instead apply. The European Union (Withdrawal) Act 2018 (EUWA) will "onshore" into UK law existing EU legislation which has direct effect in the UK at the end of the transition period and preserve existing UK laws which implement EU obligations. As part of this onshoring process, some legislation and regulatory requirements have been amended so that they work in a UK-only context, which means that there will be some areas where the requirements on firms and other regulated persons have changed.

To help firms adapt to these new requirements, HM Treasury (HMT) has established the Temporary Transitional Power (TTP), which gives UK financial regulators – the Financial Conduct Authority (FCA), the Prudential Regulation Authority (PRA), and the Bank of England (BoE) – the power to make transitional provisions in relation to financial services legislation for a temporary period.

For EEA firms conducting business in the UK, the temporary permissions regimes will take effect when the Brexit transition period ends on 31 December 2020. They have been established to help these firms and investment funds continue their UK business with minimal disruption when the EEA passporting regime ends at the end of the transition period.

This briefing sets out what firms need to know about the FCA intends to apply the TTP and the temporary permissions regimes – including key areas not subject to transitional arrangements, for which firms need to make preparations without delay. Note that transitional provisions and temporary permissions regimes established by the PRA and BoE are not covered by this briefing.

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How does the TTP work?

The Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (the FSMA Regulations 2019) give the FCA, PRA and BoE the power to temporarily waive or modify obligations in relation to which they have supervisory responsibility or other functions where those obligations have changed as a result of onshored legislation. During the duration of the TTP period, firms can continue to comply with the requirements as they had effect before the end of the transition period while they prepare for compliance with the new UK regulatory framework.

The FCA intends to apply the TTP on a broad basis from the end of the transition period until 31 March 2022, allowing firms the duration of the TTP period to prepare for full compliance with the onshored UK regime by 31 March 2022. After 31 March 2022, all onshored changes will apply without modification. Firms do not need to notify the regulators of their intention to take advantage of the directions made under the TTP.

The FCA has made two sets of draft transitional directions under the TTP (accompanied by an [explanatory note](#)):

- The **main transitional directions** (with Annexes [A](#) and [B](#)). These directions contain a standstill direction that covers mainly conduct requirements. The standstill direction builds in optionality, meaning that while firms will not breach a requirement if they continue to comply with the obligation as they did before the end of the transition period, it is also open to them to comply with the post-transition period obligation. As explained below, TPR firms can also benefit from "substituted compliance" relating to certain "switched on" UK home state rules.
- The **prudential transitional direction** (with Annex). This direction covers onshored prudential requirements (such as capital requirements and recovery and resolution requirements) that the FCA shares with the BoE and the PRA. It does not allow optionality, making it mandatory for firms to continue to comply with the effect of requirements as they did before the end of the transition period.

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

The TTP applies to "relevant obligations" as defined by regulation 199 of the FSMA Regulations 2019. All of the following conditions must be satisfied in order for an obligation to be a "relevant obligation":

- the obligation is imposed by or under an enactment – meaning an Act of Parliament, retained direct EU legislation, Northern Ireland legislation or subordinate legislation, including rules made by the FCA, PRA and the BoE;
- the obligation is not an excluded obligation, which are those obligations to satisfy the threshold conditions in relation to a regulated activity or those imposed by or under rules made under section 64A or 137O of the Financial Services and Markets Act 2000 (including codes of conduct for approved persons and senior managers, i.e. the Code of Conduct sourcebook (COCON), and threshold codes, i.e. the Threshold Conditions sourcebook (COND)),
- the regulator has responsibility for supervising, or has other functions relating to, the person's compliance with the obligation, and
- as a result of the operation of an exit instrument (i.e., a statutory instrument made under the EUWA or exit instrument made by the regulators relating to binding technical standards (BTS)), the obligation:
 - begins to apply in the person's case, or
 - applies in the person's case differently from how it would, but for the exit instrument, apply in the person's case.

The TTP generally will not apply to the regulatory perimeter, including authorisation or registration, or the financial promotions regime. In particular, the TTP will not apply to onshoring changes made to:

- the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001;
- the Financial Services and Markets Act 2000 (Financial Promotions) Order 2005); or
- the Financial Services and Markets Act 2000 (Exemptions) Order 2001).

The standstill direction

Under the standstill direction, where, as a result of the operation of an exit instrument, a relevant obligation:

- begins to apply to a person, the relevant obligation shall not apply to that person; and
- applies to a person differently from how it would but for an exit instrument, the obligation is modified so that a person does not breach it if they comply with the obligation as it applied immediately before the end of the transition period.

Part 6 of the main transitional direction provides guidance on the operation of the standstill direction. For example, money-laundering legislation may require enhanced due diligence after the end of the transition period for EEA entities in circumstances where it is not



required prior to the end of transition. The standstill direction means that a person who does not carry out such enhanced due diligence will not be in breach of the legislation; the person will still need to comply with the due diligence standards which existed prior to the end of transition.

The standstill direction only applies in the cases set out in Annexes A and B to the main transitional direction. **Annex A** sets out how the TTP applies and where it does not apply across regulatory requirements that arise from changes in secondary legislation made by HMT and the FCA's instruments amending BTS. **Annex B** sets out how the TTP applies and where it does not apply to FCA rules. Firms must ensure that they consider the Annexes carefully to determine the application of the standstill direction to their circumstances.

As explained further below, the TTP does not apply to rules that apply only to firms in the temporary permissions regimes.

The prudential direction

As noted above, the prudential direction covers onshored prudential requirements that the FCA shares with the BoE and the PRA, and does not provide for optionality. Firms must continue to comply with the effect of requirements as they did before the end of the transition period.

The Annex to the prudential direction (at page 10 of the prudential direction) sets out its application across regulatory requirements that arise from changes in secondary legislation made by HMT and the FCA's instruments amending BTS, as well as FCA rules.

Interaction with equivalence decisions and other transitional regimes

In some circumstances, the effect of the TTP may interact with powers conferred on HMT to make equivalence decisions. Directions made under the TTP will automatically cease to apply in relation to any areas where HMT subsequently makes an equivalence decision that has the same effect as the TTP.

There are a number of other transitional provisions and regimes which have been introduced under the EUWA. The TTP will not apply to those transitional provisions and regimes. Firms will need to comply with any obligations in accordance with the specific provision or regime. The FCA has published a non-exhaustive **list** of these provisions and regimes.

Key requirements where the TTP does not apply

There are key areas where the FCA will not make transitional provision. **Firms must start preparing now to comply with these obligations from 31 December 2020.** We summarise the most relevant of these key requirements below.

MIFID II transaction reporting requirements

Firms should prepare to comply with changes to the UK's transaction reporting regime under the Markets in Financial Instruments Directive (MiFID II), including connected obligations such as the requirement to submit financial reference data. The following firms will need to take action to prepare for the end of the transition period:

- All firms who want to access the FCA's Financial Instruments Reference Data System (FCA FIRDS) to support their transaction reporting obligations will need to utilise (either directly or via a third party) the FCA FIRDS publication tool.
- UK trading venues will need to prepare to transaction report for transactions on their venues by their EEA members who are not operating through a UK branch and who report to their home state within the EEA and will become third-country firms as regards the UK after the end of the transition period.
- EEA firms who operate through a UK branch, and who enter the TPR, will need to begin preparations to either connect directly to the Market Data Processor (MDP) System or use an Approved Reporting Mechanism (ARM) to be able to transaction report to the FCA by the end of the transition period. Note that some firms may need to change their ARM, if their current ARM is not planning to make use of the temporary authorisation regime for EEA Data Reporting Service Providers (DRSPs) or is not connected to the MDP by the end of the transition period – early preparation in this regard is critical, as connecting to an ARM or directly to the MDP can take several weeks.

FCA FIRDS will replace the European Securities and Markets Authority's (ESMA) FIRDS to support transaction reporting obligations. FCA FIRDS is similar to ESMA FIRDS, but some fields will work differently. FCA FIRDS is available for firms to use for testing purposes until December 2020. .

EMIR reporting obligations

The TTP does not apply to onshoring changes for firms and central counterparties (CCPs) subject to the reporting obligation under the onshored European Market Infrastructure Regulation (EMIR) regime or to the onshored requirements for trade repositories (TRs). All firms and CCPs that enter into derivatives transactions within the scope of EMIR should prepare to report details of those transactions to an FCA-registered TR; the TR will be obliged to provide the relevant UK authorities with access to that data.



SFTR reporting obligations

The TTP does not apply to onshoring changes for firms, to central securities depositories (CSDs) or CCPs subject to the reporting obligation under the onshored Securities Financing Transactions Regulation (SFTR) regime, or to the onshored requirements for TRs. All financial counterparties, including third country branches, CSDs and CCPs who enter into securities financing transactions in scope of the SFTR should prepare to report details of those transactions to an FCA-registered TR. The TR will be obliged to provide the relevant UK authorities with access to that data.

The TTP will apply where one of the counterparties to a securities financing transactions is a member of the European System of Central Banks (ESCB); however, where firms are subject to MiFIR transaction reporting obligations, the TTP will not apply to those obligations and they will need to report these securities financing transactions to the FCA under the onshored MiFIR.

Certain requirements under MAR

Issuers that have securities admitted to trading or which are traded on UK markets (and persons discharging managerial responsibilities within the issuer) should prepare to submit information required under the Market Abuse Regulation (MAR) regime to the FCA at the end of the transition period. This applies regardless of any existing obligations under EU law to provide such information to an EU authority.

Persons professionally arranging or executing transactions should prepare to report Suspicious Transaction and Order Reports (STORs) to the FCA at the end of the transition period, where such persons are registered in the UK or have their head office in the UK, or in the case of a branch, where the branch is situated in the UK. This applies regardless of any existing obligations under EU law to report STORs to an EU authority.

The FCA's [Primary Market Bulletin 21](#) provides further information on these requirements.

CASS requirements

The Client Assets Sourcebook (CASS) will be disapplied for EEA branches of UK firms after the end of the transition period. The TTP will not apply to these changes. These firms should prepare to segregate UK client assets from EEA branch assets, and ensure that EEA branch money is no longer held under the CASS statutory trust.

Market-making exemption under the SSR

Any firms which want to utilise the exemption from market-making activities under the EU retained version of the Short Selling Regulation (SSR) will need to prepare to join a UK trading venue, and must notify the FCA of their intention to use the market maker exemption 30 days ahead of their intended use.

Use of credit ratings for regulatory purposes

Users of credit ratings should prepare to use credit ratings issued or endorsed by a credit ratings agency (CRA) that is registered or certified with the FCA. After the end of the transition period, all ratings will need to be issued or endorsed by a CRA registered or certified with the FCA in order to be eligible for regulatory use in the UK. There are, however, some transitional provisions allowing ratings issued or endorsed in the EU before the end of the transition period to be used for regulatory purposes in the UK for up to a year after exit, provided certain conditions are met. The TTP does not apply to other amendments to the CRA Regulation, its tertiary legislation or the onshoring legislation for CRAs.

Firms subject to onshored Capital Requirements Regulation (CRR) should note that the TTP does not apply to the UK versions of external credit assessment institution (ECAI) mappings under the CRR.

Securitisation

UK originators and sponsors should be prepared to 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. Transitional measures under the onshored Securitisation Regulation will allow EU STS securitisations issued up to two years after the end of the transition period, and which remain on ESMA's STS list, to qualify as UK STS. Prospective UK Securitisation Repositories (SRs) will need to apply to the FCA in order to register and operate in the UK.

Electronic commerce EEA firms

Any firm planning to carry on a new regulated business via e-commerce in the UK from the end of the transition period will need to consider whether they require UK authorisations. Such firms should make urgent plans to apply. The TTP does not apply to EEA e-commerce firms. Note, however, that e-commerce firms will have a contracts run-off regime under Part 4 of the Electronic Commerce and Solvency 2 (Amendment etc.) (EU Exit) Regulations 2019.

Payment Services: SCA-RTS

The regulatory technical standards on strong customer authentication and secure communication (SCA-RTS), which have applied since September 2019, are onshored into FCA RTS (UK-RTS). The UK-RTS are in substantially the same form as the SCA-RTS and therefore,



while the TTP does not apply and firms will need to fully comply with the UK-RTS from the end of the transition period, the practical impact is unlikely to be particularly burdensome.

How do the temporary permissions regimes work?

The temporary permissions regime (TPR) and temporary marketing permissions regime (TMPR) create a temporary regime which will, for a limited period after the end of the transition period, allow:

- inbound EEA firms to continue operating in the UK within the scope of their passport permission (as it stands at the end of the transition period) while seeking full UK authorisation, if required;
- EEA UCITS funds to continue marketing in the UK while seeking UK recognition; and
- EEA and UK AIFs that were marketed in the UK by EEA fund managers to continue to be marketed in the UK for a limited period during which time the fund manager will need to notify the FCA under the relevant legislation.

Where the TTP applies to a rule, then that transitional relief also applies to firms in the TPR. However, firms in the TPR and TMPR will need to comply with the obligations that are specific to those regimes – these are mainly as set out in the [Exiting the European Union: Temporary Permission and Financial Services Contracts Instrument 2019](#). Importantly, **the TTP does not apply to rules which specifically apply to firms in the TPR and TMPR**, including (among others) the Principles for Businesses, certain rules relating to fees and levies, status disclosure rules, specific rules relating to safeguarding client money and custody assets, and certain rules relating to the Approved Persons Regime and the Senior Managers and Certification Regime.

Rules applying to firms in the TPR

Firms in the TPR are treated as having a UK Part 4A permission (with the exception of payments and e-money firms), which means that they will come within the full scope of the FCA's supervision and rule-making powers. Generally, firms in the TPR will need to comply with the rules that currently apply to them (i.e. prior to the end of transition) based on the activities they undertake, either in the UK or in their home EEA member state. After the transition period ends, the FCA will become responsible for supervision of any home state rules that apply. These rules can be grouped into three main categories:

- FCA rules that currently apply (as at the end of the transition period).
- "Switched on" UK home state rules: these rules implement the requirements of EU directives, which before the end of the transition period are reserved to the home state and therefore not applied to EEA firms by the FCA. The application of these "switched on" rules is subject to "substituted compliance" – if a firm can demonstrate that it continues to comply with the equivalent home state rules in respect of their UK business, it will be deemed to comply with the FCA's "switched on" rules. Substituted compliance applies where the firm's home state has exercised a discretion afforded by an EU directive in a different way to the UK, including where the discretion has been exercised not to implement any requirement at all (where this is a permitted option), as well as where the UK has exercised a discretion expressly permitted by an EU directive to go beyond what is required by a EU directive to gold-plate a home state rule and the home state has not. Directions on substituted compliance are set out in the FCA's [draft main transitional directions](#).
- Certain other UK rules which the FCA believes are necessary to provide appropriate consumer protection or relate to funding requirements. For example, the Principles for Businesses will generally apply in full to firms in the TPR. There are also specific rules relating to fees and levies, status disclosure, safeguarding client money and custody assets, and the Approved Persons Regime and the Senior Managers and Certification Regime (among others) that will specifically apply to the firms in the TPR. The TTP does not apply to these rules.

Rules applying to fund operators in the TMPR

Funds being marketed under the TMPR will continue to be subject to the same UK rules that applied to them as at the end of the transition period, and the FCA will supervise them on that basis. The FCA will not supervise compliance with any rule that applies to the fund or the fund manager in their home state, so substituted compliance is not relevant in this context. Firms will be required to submit information about non-UK EEA funds directly to the FCA, as the fund's home state regulator may not be obliged or allowed to send this information to the FCA; this requirement relates merely to a copy of the information provided to the home state regulator, rather than the provision of any new or different information.

PIs, EMIs and RAISPs

EEA payment institutions, EEA electronic money institutions and registered account information service providers (RAISPs) should refer to the temporary permissions regimes established by the [Electronic Money, Payment Services and Payment Systems \(Amendment and Transitional Provisions\) \(EU Exit\) Regulations 2018](#). These regimes are broadly the same as the TPR.



What do firms need to do?

The FCA has reopened the notifications window for its TPR and TMPR. EEA firms and fund managers wishing to use the TPR should notify the FCA by the end of 30 December 2020. EEA firms that have already submitted a notification need take no further action. Fund managers who previously notified may wish to add any new funds they've established to their notification. They must email the FCA by the end of 9 December 2020 of their intention to update their original notification, and will then have from 14 to the end of 30 December 2020 to update their notification with the new funds. Firms may wish to review the FCA's [TPR notifications guide for EEA firms](#) or [TMPR notifications guide for fund managers](#) for guidance on the notification procedure.

Although firms in the temporary permissions regimes will, generally speaking, simply need to comply with the rules which currently apply to them before the end of transition, some systems and controls changes may be required to comply with the limited additional requirements imposed that are not covered by the TTP, or to evidence substituted compliance. However, the FCA does not expect firms to undertake an extensive implementation exercise on entering the temporary permissions regimes.

Firms do not need to notify the regulators of their intention to take advantage of the directions made under the TTP. Where the TTP applies, as outlined above, firms will need to use the TTP period to undertake necessary preparations to ensure full compliance with onshored regulatory obligations by 31 March 2022.

For the key requirements where the TTP does not apply, firms must start preparing now to comply with these obligations from 31 December 2020. While certain key areas such as the SCA-RTS are unlikely to require large operational changes, changes to reporting requirements under MIFID II, EMIR and SFTR could require a significant shift in business processes, and therefore it is important that firms take steps to prepare without delay. The FCA intends to act proportionately, given the scale and complexity of certain changes in relation to these key areas. As a result, the FCA does not intend to take enforcement action against firms who fail to meet all requirements immediately, provided there is evidence that "reasonable steps" have been taken to prepare to meet their new obligations by the end of the transition period. The FCA expects firms to comply with the new obligations as soon as reasonably practicable where they are not fully prepared by 31 December 2020.

For all other areas where the TTP does not apply, the FCA will consider taking regulatory action where it finds serious and foreseeable harm is being or has been caused. However, in doing so, the FCA will consider all known circumstances, including the extent to which firms have taken steps to establish compliance programmes, relevant systems and controls, and training and staff awareness. The FCA will also consider the impact and scale of non-compliance.

The operation and effect of the rules modified (or not) TTP and temporary permissions regimes are complex, and must be considered on a case-by-case basis taking into account a firm's individual circumstances. Firms are strongly advised to seek advice as to the impact that Brexit, and the related transitional regimes, will have on their businesses.