



Regulatory Roundup

March 2018

Issue 95



Page **In this Complyport Regulatory Roundup:**

- 2 **GDPR – Are you ready?**
On 25 May 2018, the GDPR will come into effect for all firms operating within Europe as well as firms outside of Europe which have data come in from, go through, or end up in, the European Union. As part of this regulation, individuals will be afforded enhanced rights regarding their data
- 3 **Proposed changes to the AIFM and UCITS Directives**
The European Commission have published a proposed directive and a proposed regulation amending the AIFMD and the UCITS Directive to facilitate cross-border marketing of funds, including pre-marketing under the AIFMD
- 5 **ESMA prohibits binary options and restricts CFDs to protect retail investors**
ESMA has announced a ban on the provision of binary options to retail investors in the EU and placed restrictions on the provision of contracts for differences to retail investors in the EU
- 8 **ESMA updated Q&As on MiFID/MiFIR, MAR, BMR and CSDR**
ESMA has updated its Q&As on the Markets in Financial Instruments Directive and Regulation, the Market Abuse Regulation, the Benchmarks Regulation, and the Central Securities Depository Regulation
- 10 **Brexit: Draft UK EU Withdrawal Agreement**
The Draft UK EU Withdrawal Agreement published on 19 March 2018 contains no mention of the financial services industry whilst confirming that the transitional period will last from Brexit day on 29 March 2019 until 31 December 2020
- 12 **SONIA benchmark reform**
The date and time of the publication of the SONIA benchmark is changing on Monday 23 April 2018. Friday 20 April 2018 will be the final day for which SONIA will be calculated and published by the Wholesale Market Brokers' Association using the current methodology
- 13 **Key Dates**

If any of these topics raise questions or a need for guidance or support, please do not hesitate to contact robert.easterbrook@complyport.co.uk



The Compliance Register
Platinum Awards 2015

Winner:
Customer Support Excellence



Best Compliance Services Provider

GDPR – Are you ready?



Useful Links:

- [Complyport Webinar – 28 February 2018](#)
- [General Data Protection Regulation \(“GDPR”\) – Deadline Approaching](#)
- [GDPR – The biggest change to Europe’s Data Protection rules in 20 years](#)

Key Date:

Are you ready for 25 May 2018?

Of relevance to:

All firms

Are you ready? On 25 May 2018, the General Data Protection Regulation (“GDPR”) will come into effect for all firms operating within Europe as well as firms outside of Europe which have data coming in from, going through, or ending up in, the European Union. As part of this regulation, individuals will be afforded enhanced rights regarding their data.

This would include:

- Data minimisation – Ensuring firms acquire, keep and use only data that they need to operate. This also includes securing informed consent for the use of personal data.
- The right to be forgotten – Under GDPR, individuals have extended control over their data. They can request to know what data firms hold on them and can ask for said data to be deleted.
- HR and employee records – Unless a firm has a good reason to retain ex-employees’ data, it should be deleted.
- Data safeguarding – Ensuring firms have adequate protection policies in place.

Questions to ask yourself

- Do you have the correct procedures to deal with data enquiries in place?
- Do you know what data you hold and how long you are allowed to hold it for?
- What steps have you taken to protect data?
- Is your firm’s need for the data it holds justified and can this be evidenced?

These questions will need to be answered to ensure proper compliance under GDPR.

Any FCA or other regulatory record keeping requirements need to be complied with.

Complyport GDPR Webinar

Recently, Complyport ran a webinar on GDPR which covered the challenges firms are facing during the implementation stage and how data protection can be managed after 25 May 2018. You can listen to a recording of the [webinar here](#).

Proposed changes to the AIFM and UCITS Directives



Useful Links:

- [EC Press Release: Capital Markets Union: breaking down barriers to cross-border investments and accelerating delivery](#)
- [Proposed EU Directive \(PDF\)](#)
- [Proposed EU Regulation \(PDF\)](#)
- [EC Communication: Completing the Capital Markets Union by 2019 - time to accelerate delivery](#)

Key Date:

Adoption planned by May 2019

Of relevance to:

All UCITS Management Companies, AIFMs and those managing AIFs

The European Commission (“EC”) has published a proposed directive and a proposed regulation amending Directive 2011/61/EU on Alternative Investment Fund Managers (“AIFMs”) and Directive 2009/65/EC on Undertakings for Collective Investment in Transferable Securities (“UCITS”) to facilitate cross-border marketing of funds, including pre-marketing under the AIFM Directive.

The EC has adopted a package of measures to deepen the Capital Markets Union (“CMU”), along with publishing the Communication *“Completing Capital Markets Union by 2019 – time to accelerate delivery”*. The EC is committed to put in place all building blocks of the CMU by mid-2019. The measures presented here and the remaining CMU proposals that will be presented by May 2018 make it possible that legislation can be adopted before European Parliament elections in mid-2019.

The package includes:

- proposals on facilitating the cross-border distribution of collective investment funds, which also amends European Union (“EU”) Regulation No 345/2013 on European venture capital funds (“EuVECA”) and Regulation No 346/2013 on European social entrepreneurship funds (“EuSEFs”);
- a proposal for an enabling EU framework on covered bonds;
- a proposal for an enabling framework on European crowdfunding service providers for businesses;
- a proposal on the law applicable to the third-party effects of assignments of claims; and
- a Communication on the applicable law to the proprietary effects of transactions in securities.

This article will concentrate on the first bullet point; please contact Complyport should you require further information on the other four bullet points. We note there is no mention of the Markets in Financial Instruments Directive (“MiFID”) in the package.

continued on [next page](#)

Proposed changes to the AIFM and UCITS Directives



continued from [previous page](#)

Summary of Proposals

- AIFMs will need to facilitate subscriptions and redemptions by retail investors;
- marketing communications should present the risks and rewards of investing in Alternative Investment Funds (“AIFs”) and UCITS;
- fund marketing rules must be published by national regulators and maintained centrally by the European Securities and Markets Authority (“ESMA”);
- verification of compliance with national provisions, if required, must be decided within 10 working days;
- local levies, fees or charges must be proportionate to supervisory tasks carried out and published on regulators’ websites;
- ESMA must maintain a central database on all AIFMs, UCITS Management Companies, AIFs and UCITS;
- the EuVECA and EuSEF Regulations will allow managers to test investors’ appetite for opportunities or strategies through pre-marketing.

See full article on the Complyport website for more detailed information:

<https://www.complyport.com/proposed-changes-aifm-ucits-directives/>

ESMA prohibits binary options and restricts CFDs to protect retail investors



Useful Links:

- [ESMA Q&As on MiFID II and MiFIR \(PDF\)](#)
- [ESMA Q&As on MAR \(PDF\)](#)
- [ESMA Q&As on BMR \(PDF\)](#)
- [ESMA Q&As on CSDR \(PDF\)](#)
- [ESMA Frequently Asked Questions on these product intervention measures \(PDF\)](#)

Key Date:

Applicable from two months, for CFDs, and one month, for binary options, after publication in the Official Journal of the EU 'in the coming weeks'

Of relevance to:

All firms providing contracts for differences and/or binary options to retail investors

The European Securities and Markets Authority ("ESMA") has announced temporary product intervention measures restricting the marketing, distribution or sale of contracts for differences ("CFDs") to retail investors in the European Union ("EU") and banning the marketing, distribution or sale of binary options to retail investors in the EU.

ESMA's product intervention measures will be applied to the provision of CFDs including rolling spot forex and financial spread bets, and binary options to retail investors. The Financial Conduct Authority supports ESMA's application of EU-wide temporary product intervention measures and expects to consult on whether to apply these measures on a permanent basis.

This is the first time ESMA has used the new product intervention powers afforded to it under the Markets in Financial Instruments Regulation ("MiFIR") and follows a Call for Evidence in January 2018 on potential product intervention measures on contracts for differences and binary options to retail investors. It may set the tone for further crackdowns on other leveraged instruments.

CFDs that offer leveraged exposure to price, level or value changes in underlying asset classes and have existed as a speculative short-term investment product provided to a niche client base in some EU jurisdictions for several years. However, in recent years, concerns have been raised about the widening distribution of CFDs to a mass retail market, despite the products being complex and deemed inappropriate for the large majority of retail investors.

The measures will be published in the Official Journal of the EU in 'the coming weeks' and will start to apply, for binary options, one month later and, for CFDs, two months later. Under MiFIR, ESMA can only introduce temporary intervention measures on a three monthly basis. Before the end of the three months, ESMA will consider the need to extend the intervention measures for a further three months.

continued on [next page](#)

ESMA prohibits binary options and restricts CFDs to protect retail investors



continued from [previous page](#)

Binary Options – agreed measure

- A prohibition on the marketing, distribution or sale of binary options to retail investors.

ESMA believes the prohibition is needed to protect investors due to the products' characteristics, most notably the combination of the promise of high returns and easy-to-trade digital platforms which, in an environment of historical low interest rates, has created an offer that appeals to retail investors.

CFDs – agreed measure

- A restriction on the marketing, distribution or sale of CFDs to retail investors.

The restrictions announced by ESMA include:

1. Leverage limits on the opening of a position by a retail investor from 30:1 to 2:1, which vary according to the volatility of the underlying:
 - 30:1 for major currency pairs;
 - 20:1 for non-major currency pairs, gold and major indices;
 - 10:1 for commodities other than gold and non-major equity indices;
 - 5:1 for individual equities and other reference values;
 - 2:1 for cryptocurrencies;
2. A margin close out rule on a per account basis. This will standardise the percentage of margin (at 50% of minimum initial required margin) at which providers are required to close out one or more of a retail investor's open CFDs;
3. Negative balance protection on a per account basis. This will provide an overall guaranteed limit on retail investor losses;
4. A restriction on the incentives offered to trade CFDs; and
5. A firm-specific risk warning, including the percentage of losses on a CFD provider's retail investor accounts, delivered in a standardised way.

continued on [next page](#)

ESMA prohibits binary options and restricts CFDs to protect retail investors



continued from [previous page](#)

Significant Investor Protection Concern

ESMA, along with National Competent Authorities (“NCAs”), has concluded that there exists a significant investor protection concern in relation to CFDs and binary options offered to retail investors due to:

- their complexity and lack of transparency;
- the particular features of CFDs – excessive leverage – and binary options – structural expected negative return and embedded conflict of interest between providers and their clients;
- the disparity between the expected return and the risk of loss; and
- issues related to their marketing and distribution.

ESMA and these NCAs have identified the marketing, distribution and sale through on-line channels and the associated aggressive marketing techniques used by a number of firms have led to significant investor protection concerns.

NCAs’ analyses on CFD trading across different EU jurisdictions shows that 74-89% of retail accounts typically lose money on their investments, with average losses per client ranging from €1,600 to €29,000. NCAs’ analyses for binary options also found consistent losses on retail investors’ accounts.

ESMA’s Chair, Steven Maijor, says that the new measures on CFDs will ensure that investors cannot lose more money than they put in.

ESMA also concludes that the inherent complexity of the products and, in the case of CFDs, their excessive leverage, has resulted in significant losses for retail investors.

ACTION REQUIRED

All relevant firms should read the details in the Additional Information as some of the measures have quite onerous implications.

For example, the standardised risk warning and basis for calculation and publication of percentage of retail CFD accounts that lost money over the last 12 months is relatively simple to calculate for established firms. Those firms without a 12-month track record or no activity on accounts during a 12-month calculation period will have to publish the 74-89% range of losses found by the NCAs in their analysis. This could impact a firm that has not yet launched as the ‘generic’ percentage will probably be higher than that of already regulated firms with ‘live’ data, causing a client to believe they would be worse off with the new firm.

Please do not hesitate to [contact Complyport](#) should you require any assistance in this matter.

ESMA updated Q&As on Markets in Financial Instruments Directive and Regulation, Market Abuse Regulation, Benchmarks Regulation and Central Securities Depository Regulation



Useful Links:

- [ESMA Q&As on MiFID II and MiFIR \(PDF\)](#)
- [ESMA Q&As on MAR \(PDF\)](#)
- [ESMA Q&As on BMR \(PDF\)](#)
- [ESMA Q&As on CSDR \(PDF\)](#)

Key Date:

Applicable from
23 March 2018

Of relevance to:

All firms affected by MiFID/MiFIR, MAR, BMR and/or CSDR

The European Securities and Markets Authority (“ESMA”) has updated its Questions and Answers (“Q&As”) on the implementation of the Market Abuse Regulation (“MAR”), the Markets in Financial Instruments Directive and Regulation (“MiFID II”/“MiFIR”), the Benchmarks Regulation (“BMR”), and the Central Securities Depository Regulation (“CSDR”).

Q&As on MiFID / MiFIR

ESMA has updated the following Q&As:

- Question 8 in Section 7 Inducements (research)
Can macro-economic analysis be considered research that can be paid for from an RPA and client research charges under Article 13(1)(b) of the MiFID II Delegated Directive?
- Question 9 in Section 7 Inducements (research)
How should research related to fixed income, currencies or commodities (FICC) be treated for the purposes of the MiFID II inducements restriction for firms providing portfolio management or independent investment advice (Article 24(7) and (8))?
- Question 11 in Section 8 Post-sale reporting
What does “hold a retail client account” mean in the context of Article 62(2) of the MiFID II Delegated Regulation?
- Question 12 in Section 8 Post-sale reporting
For the purpose of Article 62(1) of the MiFID II Delegated Regulation, if the same threshold is exceeded again and again during the same reporting period, should the firm report the fact to the client each time the threshold is exceeded?
- Question 7 in Section 9 Information on costs and charges
How should investment firms use the product’s costs as presented in the PRIIPs KID?

continued on [next page](#)

ESMA updated Q&As on Markets in Financial Instruments Directive and Regulation, Market Abuse Regulation, Benchmarks Regulation and Central Securities Depository Regulation



continued from [previous page](#)

- Question 6 in Section 12 Inducements
How should investment firms providing the investment service of portfolio management treat inducements received after 3 January 2018 with regards to financial instruments in which the firm has invested on behalf of the client before that date?
- Question 1 in Section 15 Other Issues
The term “ongoing relationship” is used in various articles in the MiFID II Directive and the MiFID II Delegated Regulation. How should this term be understood?

Q&As on MAR

Q5.1 now reads: “Are credit institutions required under MAR to publish systematically the results of the Pillar II assessment and/or any information received in relation to the Minimum Requirement for own funds and Eligible Liabilities (MREL) exercise?”

Q&As on BMR

ESMA has included one new answer to Question 6.1 relating to how supervised contributors should apply Article 16 during the transitional period ending on the date an administrator is authorised or registered with its National Competent Authority or 1 January 2020, whichever is the earlier.

Q&As on CSDR

The changes:

- A new CSD Question 1(c) on Authorisation and supervision of CSDs is added:
Should the CSD links a CSD has established or intends to establish at the time of its application for authorisation under Article 16 of CSDR be assessed for the purpose of granting authorisation to that applicant CSD?
- CSD Question 4(a) on Conduct of business rules is modified:
Does Article 35 of CSDR allow CSDs to use internal or proprietary messaging standards in their communication procedures with the participants of the securities settlement system they operate and the market infrastructures they interface with?
- A new CSD Question 10(d) on Requirements for CSD links is added:
Are links between CSDs participating in T2S interoperable links as defined in the CSDR?

See full article on the Complyport website for more detailed information:

<https://www.complyport.com/esma-updated-qas-on-mifid-mifir-mar-benchmarks-regulation-and-central-securities-depository-regulation/>

Brexit: Draft UK EU Withdrawal Agreement



Useful Links:

- [Draft UK EU Withdrawal Agreement \(PDF\)](#)
- [Bloomberg article - EU digs in over banks' post-Brexit access, but divisions emerge](#)
- [Chancellor's HSBC speech: financial services](#)

Key Date:

29 March 2019

Of relevance to:

All firms in the UK's financial services sector

The Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ("Draft UK EU Withdrawal Agreement") was published on 19 March 2018, showing the agreed transitional period will last from Brexit day on 29 March 2019 until 31 December 2020, a period of 643 days (just over 21 months). There is no specific mention of the financial services industry within the document.

No definitive paper can be written on the Brexit effect on our industry until such time as the UK and EU make more concrete decisions. However, much comment is being made about the two sides using terms such as "mutual recognition" and "equivalence" to describe the post-Brexit relations they seek, but nothing has yet been decided.

Equivalence provisions can be found in many areas of the financial services industry in Europe and throughout the world (whereby each jurisdiction checks whether the other's regulations achieve a similar outcome to its own), and it appears equivalence is the fallback option if the UK and EU fail to agree a deal. Mutual recognition is a founding principle of Europe's single market for financial services, but the EU is moving beyond mutual recognition towards a single rule book and common supervision.

This further complicates the politics of providing access to non-EU countries and thus the UK (to be known as a 'third-country' after Brexit).

Most of the comment in recent days stems from a Bloomberg article based on a draft document not seen in public, following a speech by the UK Chancellor of the Exchequer, Philip Hammond, on 7 March 2018 in which he explained why it makes sense, for both the UK and the EU, to collaborate closely on cross-border financial services.

The new wording is, according to Bloomberg, in an annex to the draft guidelines for discussion among EU ministers. Earlier drafts didn't mention financial services explicitly, and made clear that the trade agreement the EU intends to strike with the UK wouldn't make special provisions for services.

continued on [next page](#)

Brexit: Draft UK EU Withdrawal Agreement

continued from [previous page](#)

Apparently, the latest draft of the EU's negotiating stance says the bloc will consider offering the UK "improved equivalence" for its financial services. That may mean, for example, the EU will only let UK banks access its market for as long as it considers British rules to be equivalent to the EU's. This is a potentially unstable arrangement as the EU can rescind it at short notice.

In his speech on financial services at HSBC's Canary Wharf headquarters, Mr Hammond said "this may appear to point to a solution based on the EU's established third-country equivalence regime. But that regime would be wholly inadequate for the scale and complexity of UK-EU financial services trade" and "it is hard to see how any deal that did not include services could look like a fair and balanced settlement". He also reminded his audience that "We will start from a unique position... ..with full alignment on Day 1".

It is understood the new draft says "Regarding financial services, the aim should be reviewed and improved equivalence mechanisms, allowing appropriate access to financial services markets, while preserving financial stability, the integrity of the single market and the autonomy of decision making in the European Union. Equivalence mechanisms and decisions remain defined and implemented on a unilateral basis by the European Union."

The main problem with "improved equivalence" seems to be the need for the UK to accept, and adopt in the UK, whatever changes are made to EU rules, without having the option to debate and influence those changes before implementation. It's doubtful Brexiteers were expecting that outcome.

Complyport will, of course, provide further articles as new definitive information is released at EU and/or UK level.

SONIA benchmark reform



Useful Links:

- [SONIA Key Features and Policies document \(PDF\)](#)
- [Bank of England News Release \(PDF\)](#)

Key date:

- 23 April 2018

Of relevance to:

Wealth Managers and Private Banks using SONIA benchmark

The date and time of the publication of the SONIA benchmark is changing on Monday 23 April 2018. Friday 20 April 2018 will be the final day for which SONIA will be calculated and published by the Wholesale Market Brokers' Association ("WMBA") using the current methodology.

For the rate relating to Monday 23 April 2018, SONIA will be calculated by the Bank of England using the reformed methodology and published at 9am on Tuesday 24 April 2018; no data will be published on Monday 23 April 2018.

Introduced in March 1997, SONIA is the Sterling Overnight Index Average. It is a widely used benchmark, including as the reference rate for the sterling Overnight Indexed Swap market. It reflects banks' and building societies' overnight funding rates in the sterling unsecured market.

The Bank of England became the administrator of the SONIA benchmark in April 2016 and has designed its governance arrangements for administering SONIA to be consistent with the IOSCO Principles for Financial Benchmarks.

The WMBA is now known as the European Venues and Intermediaries Association ("EVIA"), which promotes and enhances the value and competitiveness of Wholesale Market Venues, Platforms and Arranging Intermediaries. Members of the EVIA cover global markets and facilitate the overwhelming majority of transaction volumes in the Over-The-Counter markets. EVIA's sister association, the London Energy Brokers' Association also provides indices for UK power and European gas, emissions and coal which are used as global pricing benchmarks for the market and for risk management and compliance purposes.

Key Dates



Key Date	Topic
1 March 2018	European Venture Capital Funds and European Social Entrepreneurship Funds – EU Regulation 2017/1991 into force in the UK
12 March 2018	FCA consultation closed on ' Our Approach to Authorisation ' and ' Our Approach to Competition '
19 March 2018	ESMA consultation closed on draft technical standards implementing the Securitisation Regulation
23 March 2018	FCA consultation closed on CP18/4: The European Money Market Funds Regulation
6 May 2018	Law Enforcement Directive – EU Directive 2016/680 into force in the UK, part of the UK's Data Protection Bill currently going through Parliament
25 May 2018	General Data Protection Regulation – EU Regulation 2016/679 in force in the UK, repealing the current Data Protection Directive 95/46/EC
Late Summer 2018	The Insurance Distribution (Regulated Activities and Miscellaneous Amendments) Order 2018 into force in the UK
1 October 2018	Insurance Distribution Directive into force
Bills before Parliament	Sanctions and Anti-Money Laundering Bill Financial Guidance and Claims Bill
TBC 2019	Senior Managers & Certification Regime to cover all FSMA authorised firms, replacing the Approved Persons Regime
10 March 2019	Internalised Settlement reporting requirements – ESMA to issue regulatory and implementing technical standards
13 March 2019	Competition and Markets Authority due to complete their investigation into the supply and acquisition of investment consultancy services and fiduciary management services to institutional investors, including pension schemes, charities, insurance companies and endowment funds.
11pm on Friday 29 March 2019	Brexit – European Union (Withdrawal) Bill currently going through Parliament will repeal European Communities Act 1972 and make other provision in connection with withdrawal of the UK from EU
3 July 2020	End of 30-month period during which the US Securities and Exchange Commission provides market participants with greater certainty regarding their US regulated activities and compliance with MiFID II rules on Investment Research.
31 December 2020	Brexit – end of transitional period

Bespoke, Practical Consulting



Past Regulatory Roundup issues are available at:

www.complyport.com/our-services/regulatory-updates/

You can access our latest news stories at:

www.complyport.com/news/

Alternatively, use the search facility at:

www.complyport.com/

Copyright © 2018 Complyport Limited (“Complyport”). All rights reserved.

The Complyport Regulatory Roundup is provided for information purposes for the named person's use only and represents a summary of the subjects discussed. It is not intended to offer legal opinion, advice or recommendation as to future action and it is provided solely as a discussion document.

Regulatory Roundup is not an offer or financial promotion. It may contain confidential, proprietary or legally privileged information. No confidentiality or privilege is waived or lost by any transmission errors.

If you receive this Regulatory Roundup in error, please immediately delete it and all copies of it from your system, destroy any hard copies of it and notify the sender. You must not, directly or indirectly, use, disclose, distribute, print, or copy any part of this message if you are not the intended recipient. Transmission is not guaranteed to be secure.

Any information contained herein is subject to Complyport's Standard Terms and Conditions of Business which are available upon request.

Complyport and its affiliates do not assume any liability whatsoever for the content of this document, or make any representation or warranties, as to the accuracy or completeness of any information contained in this document.

Complyport is always interested to receive feedback and general comments on either the Regulatory Roundup or [the Complyport website](http://www.complyport.com/).

Comments should be sent to robert.easterbrook@complyport.co.uk

Complyport Limited is a Private Limited Company registered in England and Wales, registered number 04333584. Registered Office: Lynton House, 7-12 Tavistock Square, London WC1H 9LT.