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ESMA Updates Statement on the Impact of Brexit on the MiFIR Trading Obligation for Shares

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On May 29, the European Securities and Markets Authority (ESMA) published a revised statement outlining its approach relating to the trading obligation for shares (TO) under Article 23 of the Markets in Financial Instruments Regulation (MiFIR), if the United Kingdom were to leave the European Union (Brexit) without a withdrawal agreement (no-deal Brexit) and without an equivalence decision made by the European Commission.

ESMA explains that its first public statement on this issue published in March 2019 (for more information, see the March 22 edition of *Corporate & Financial Weekly Digest*) significantly reduced the scope of the TO in the event of a no-deal Brexit. However, its new statement is intended to further mitigate potential adverse effects of the application of the TO and to reflect concerns raised by some stakeholders about its earlier guidance.

ESMA believes that an approach to the TO based only on the ISIN of the share would be more likely to minimize risk of market disruption that conflicting EU and UK TOs may create. Therefore, it has decided that the EU TO would not be applied to the 14 GB ISINs included in its previous guidance. Under this revised approach, ESMA assumes that all European Economic Area (EEA) shares (that is, with ISINs from all EEA states) are within the scope of the EU TO. GB ISINs, meanwhile, are outside the scope of the EU TO.

ESMA explains that this approach will avoid any overlaps if the United Kingdom adopts an approach that does not include EEA ISINs under the UK TO. However, if EEA ISINs are included in the scope of the UK TO, this would introduce overlapping obligations and potentially damaging consequences for market participants.

On the same date, the UK Financial Conduct Authority (FCA) published its response to ESMA's statement. While the FCA states that it is encouraged by ESMA's revised approach, it believes that applying the EU TO to all shares with EEA ISINs would still cause market disruption, leading to fragmentation and reduced liquidity in both the EU and UK. It explains that a number of shares with EEA ISINs have both a listing and their main or only significant center of market liquidity on UK markets. Therefore, the ISIN that a share carries does not and should not determine the scope of the TO.

The FCA believes that reciprocal equivalence remains the best way of dealing with overlapping TOs in the European Union and United Kingdom, especially in light of the fact that the United Kingdom has on-shored the same regime. However, in the absence of reciprocal equivalence, the FCA suggests that both UK and EU TOs should be applied in a way that maintains the status quo for a limited period of time after Brexit, enabling longer term solutions to be found.

The FCA adds that, if there is no equivalence determination, it will engage with market participants and trading venues about steps to protect the integrity of UK markets and to ensure that participants in the United Kingdom can continue to achieve high standards of execution for their clients.

ESMA's statement is available [here](#).

The FCA's statement is available [here](#).

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