Brexit: Implications for MIFIR and EMIR reporting

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Introduction

On 23 June 2016, the majority of UK voting public committed Britain to withdraw from the European Union following a fiercely fought referendum. The British public were given a simple 'leave' or 'remain' option, but the negotiations on the conditions for the UK exit have been anything but simple.

"Brexit means Brexit"

On the face of it, this doesn't seem to be a particularly helpful statement from the Prime Minister. Whist Brexit is clearly shorthand for Britain's withdrawal from the EU, the real question is how this exit should be effected and what the resulting relationship with the EU should be. This is not a simple question of a 'hard' or 'soft' exit, as there is a wide range of possibilities for the resulting alignment with the EU.

The ultimate 'hard Brexit' is the 'no deal' Brexit, which would see the UK leaving the EU on World Trade Organisation terms – i.e. Britain would be treated the same as any other third country to the Union and would not be offered any preferential treatment or access to the EU's markets. Equally, EU countries would not be offered preferential treatment or access to the UK's markets. Crucially, this would also mean that there would be no 'transition period' either. This appears to be a 'scorched earth' solution that could be detrimental to both sides.

The ultimate soft Brexit would see the UK remaining within the EU single market and customs union, paying potentially more for the privilege, being subject to all its laws, including freedom of movement of people, but having no say or influence over the formation of those rules. Remarkably, this is still consistent with the referendum result, but not an outcome any 'Brexiteer' thought they were voting for. No one yet knows how closely the UK will be aligned with the EU post-Brexit. We know that the UK will withdraw from the EU on 29 March 2019, unless there is a dramatic last minute decision for a second referendum, or if there is an agreement to delay withdrawal to allow further negotiation. This latter possibility would require the separate agreement of all the other EU-27 countries, many of whom might be getting a little impatient with the whole process.

Transition period

The negotiations haven't been a complete failure as there has been an agreement for a possible 'transition period' to allow for an orderly withdrawal of the UK. This transitional period would run from the withdrawal date through to 31 December 2020 and the UK Treasury believes this implementation period will allow the two regions to have access to each other's markets on current terms. However, the transition period is wholly conditional on a withdrawal agreement being agreed between the UK and the European Commission ahead of Brexit. A no deal Brexit means no transition period. Set against this background of uncertainty, this paper examines the possible outcomes and implications for MiFIR transaction reporting and EMIR trade reporting.

What are the implications for MiFIR and EMIR reporting?

Regulatory reporting might seem low down on the overall list of Brexit priorities, but market abuse detection and monitoring for systemic risk remain fundamental obligations for regulators.
HM Treasury at least appears confident that there will be no disastrous cliff edge facing financial firms at the start of the implementation period:

> *"During this period, EU financial services firms operating in the UK, and UK financial services firms operating in the EU, will be able to continue to undertake regulated activities, either by means of passporting rights or under other relevant EU frameworks. Similarly, UK financial market infrastructures that are authorised under the existing EU framework, such as central counterparties, will continue to be able to provide services to the EU. EU and third country (non-EU) financial market infrastructures that have existing authorisation or recognition under EU legislation will continue to be able to provide services to the UK, enabling access to financial market infrastructures without disruption."*[1]

The Treasury is confident that this implementation period will be in place between 29 March 2019 and 31 December 2020 and assurances have already been made to inbound firms that additional UK authorisation or recognition will not be required during the implementation period under a "temporary permissions regime". Unfortunately, the Commission and ESMA do not seem to be as vocal with the same assurances. Perhaps this is unsurprising since the UK authorities appear to have more to gain from a pragmatic solution minimising the disruption to financial stability whilst other EU authorities may have the additional concerns of defending EU stability in the face of rising populism. The concerns of financial industry participants and, ultimately, financial stability appear to be at risk in a game of high stakes brinkmanship.

[1] HM Treasury's approach to financial services legislation under the European Union (Withdrawal) Act
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/720298/HM_Treasury_s_approach_to_financial_services_legislation_under_the_European_Union__Withdrawal__Act.pdf

What will be the impact on ARMs and Trade Repositories?

The current gap between the two sides can be clearly demonstrated through the impact on the infrastructure supporting MiFIR transaction reporting and EMIR trade reporting. Despite the reassuring words from the Treasury on the uninterrupted provision of financial market infrastructure, Brexit will have a profound and immediate impact on Approved Reporting Mechanisms (ARMs) and Trade Repositories irrespective of whether there is a transition period or not.

ARMs are Data Reporting Service Providers ('DRSPs') and need to be located in an EU Member State in order to operate for EEA participants[2]. Neither ESMA nor the Commission has any interest in ensuring that UK DRSPs can continue to act for EU participants. This contrasts sharply with the attitude shown by the UK authorities. Whilst EEA DRSPs under MiFID will no longer be able to operate in the UK without new authorisation from the FCA, the Treasury has obligingly informed them that a temporary authorisation regime will allow them to continue to operate in the UK post Brexit for up to one year in the event that there is no agreement on the implementation period.[3] This has created an uneven playing field as UK DRSPs have had to incur additional costs in setting up separate entities and employing staff within one of the other EU member states and seeking authorisation ahead of Brexit.

The situation with Trade Repositories is less clear. Whilst EMIR Article 55(2) requires a trade repository to be established within the Union in order to registered, EMIR also fully recognises (under Article 77) the possibility of a trade repository established under a third country to be recognised by ESMA to provide services to EU entities. However, one of the conditions for this recognition to be granted is for the third country that authorises and supervises the trade repository to be recognised by the Commission as having an "equivalent and enforceable regulatory and supervisory framework".[4] In a demonstration of apparent inflexibility, given the high stakes in play, ESMA told the UK trade repositories that this equivalency wasn't an option for them to continue to offer their services to EU clients immediately after Brexit as the UK remains in the EU and is not yet a third country. It has therefore categorically stated to the UK trade repositories that they need to set up separate entities within another EU Member State, to employ new people and systems and complete a new authorisation process if they wish to continue their activities within the EU post Brexit. The UK appears to offer a more pragmatic solution with a temporary registration regime in order to minimise disruption. This offers a less onerous application process for entities wishing to register as a new trade repository.

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[2] Article 4(1)55 MiFID https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065&from=en
[3] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746247/MiFI__Amendment___EU_Exit__Regulations_3-10-18C.PDF
[4] EMIR Article77(2)a)

What will be the potential disruption for firms on 1 April 2019?

For MiFIR, anecdotal evidence suggests that the 'UK' ARMs setting up new entities within the EU-27 are receiving excellent advice and support from the national competent authorities in the countries they are establishing their new entities. The authorisation process for ARMs is relatively simple and much of the documentation required follows the same template they have completed for authorisation in the UK. With the UK adopting a pragmatic approach enabling non-UK ARMs to continue offering services to UK clients, we are hopeful that there will be limited scope for disruption of MiFIR transaction reporting for both UK and EU-27 clients post Brexit – at least in the provision of infrastructure providers.

Again, for EMIR trade reporting the situation is less clear. The majority of existing trade repositories are UK entities – DTCC, UnaVista, CME Trade Repository, ICE Trade Vault and Bloomberg TR. Most of the UK trade repositories have announced plans to open new entities in one of the EU-27 countries, but ESMA still needs to approve new applications to ensure a smooth transition post Brexit. ESMA recently announced that whilst "TRs currently registered with ESMA have implemented contingency plans in preparation of a no-deal Brexit scenario… some actions still need to be completed" by the UK TRs to register entities in the EU to avoid losing their registration on March 29[5]. However, even if the infrastructure providers remain in place, there are still concerns about other disruptions Brexit may bring to the reporting regulation, even though the initial reporting regimes in the UK are initially expected to be pretty much a copy out of the EU regulations.

There is an interesting issue regarding the remediation of data quality issues, particularly in relation to EMIR trade reports, for EU regulators to address. A large proportion of the historical data within EMIR trade repositories will have been submitted by UK firms. If this data is found to be incorrect, it is not clear how this will be corrected as these firms will no longer fall within EU jurisdiction. The responsibility cannot fall on the trade repositories as they have no ability to force previous clients to back report.

Questions to ask:

Have you signed up to an ARM or trade repository for the regime you need to report under?

Have you budgeted for the potential increased costs in reporting?

[5] ESMA Public Statement, Contingency plans of Credit Rating Agencies and Trade Repositories in the context of the United Kingdom withdrawing from the European Union, 9 November 2018 https://www.esma.europa.eu/sites/default/files/library/esma80-187-149_public_statement_brexit_cras_trs.pdf

New Developments

As signaled in ESMA's public statement on issues affecting reporting[6], UK counterparties will not need to update or amend any report submitted to an EMIR trade repository (in the event of a no deal Brexit). However, since these reports are likely to be ported to a UK trade repository, it is probable that the FCA will require complete and accurate reporting.

[6] ESMA70-151-1997, 1 February 2019

What is the impact on non-UK and non-EU firms operating from branches within UK/EU?

MiFIR transaction reporting captures MiFID investment firms, irrespective of geographic location, and branches of third country investment firms operating within the EEA. The UK will also require UK branches of EU firms to report to the FCA under its equivalent transaction reporting regime.[7] This implies that there will be duplicate reporting for UK branches within the EU and for EU branches within the EEA. The entities impacted will have to contract with separate ARMs and will have to be aware of any changes to the reporting requirements (such as the potential changes to the private individual identifiers).

Questions to ask:

Have you prepared for any possible dual reporting?

This could include different reporting standards and new contracts with ARMs and trade repositories.

[7] Market in Financial Instruments (amendment) (EU text) Regulations 2018: explanatory information https://www.gov.uk/government/publications/draft-markets-in-financial-instruments-amendment-eu-exit-regulations-2018

How might data sharing work?

Currently, it appears that the EU is far more dependent on the UK for the trade and transaction reports it receives than the UK is on the EU. Some countries receive around 80% of the MiFIR transaction reports from UK firms and it is estimated that EU authorities are dependent on UK reports for over 50% of the EMIR trade reports that they receive[8]. Of course, this dependence could change if more UK firms migrate to the EU post-Brexit, but there are still serious doubts on EU authorities' abilities to monitor for market abuse and systemic risk without UK data. In what may be seen as a conciliatory statement, the FCA CEO has made clear the UK's intent to help EU authorities meet their objectives:

> *"The FCA is a significant sharer of cross-border data. We pass on around 70% of the transaction reports we receive to our counterparts across the EU, and we are committed to continue this if it is possible."*[9]

Sharing of data is certainly possible through a memorandum of understanding (MoU), although there may be some residual doubts on the transfer of personal data within a MiFIR transaction report, and it appears that both sides are keen to have this in place before the withdrawal date. Without an agreement to systematically share transaction reports between the UK and EU, there will be a greater reliance on trading venues to report on behalf of members not captured by the respective reporting regimes.

For EMIR, it appears that there is little danger of EU regulators losing the history of trades stored within the current UK based trade repositories as these repositories will be obliged to port that data to another EMIR trade repository if they cease to be an ESMA registered trade repository. However, the issue of outstanding trades is another reason for seeking a pragmatic solution on data sharing. If no agreement is found, the EU regulators may not receive any further updates to outstanding trades within their trade repositories. Similarly, the UK would not want to start with empty trade repositories (presuming all the data has to be ported without leaving a copy) and it would seem to be difficult to justify obliging UK firms to re-report trades to UK trade repositories having already reported them to an EU trade repository. Of course, this presumes that the outstanding trades between UK and EEA firms do not have to be novated to affiliates or to other CCPs on the withdrawal date. The recent statement from ESMA on its plans to review UK CCP and CSD recognition applications is extremely welcome in this respect. [10]

New developments

1. *In its public statement on issues affecting reporting…under Article 9 of EMIR[11], ESMA stated that in the event of a 'no deal Brexit, all outstanding trade (and presumably position) reports*

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[8] Trade and Transaction Reporting Conference, Stockholm 17 October 2018
[9] Speech by Andrew Bailey delivered at the City Banquet, London 25 October 2018 https://www.fca.org.uk/news/speeches/brexit-and-financial-services-where-have-we-got-to
[10] ESMA Public Statement, ESMA70-151-2032, 19 December 2018, https://www.esma.europa.eu/sites/default/files/library/esma70-151-2032_esma_statement_recognition_of_uk_ccps_and_csd_in_no_deal_brexit.pdf
[11] ESMA70-151-1997, 1 February 2019, https://www.esma.europa.eu/sites/default/files/library/esma70-151-1997_statement_brexit_emir_data.pdf

submitted by 'UK counterparties' to an EU trade repository will be terminated by the trade repository with a termination date of "2019-03-29". Additionally, it also stated that data submitted by an EMIR trade repository could be ported to a UK trade repository should the counterparty require it. It is telling that the FCA is still "considering this statement further to determine whether additional clarification is required for UK reporting counterparties and UK TRs who will become subject to our supervision after Exit Day".[12] However, we understand that the EMIR trade repositories will migrate data submitted by UK counterparties to the new UK trade repositories. which should provide a seamless transition for UK counterparties and the UK FCA alike.

2. *ESMA published a press release on 1 February announcing two "no-deal Brexit MoUs with FCA".[13] The first of these concerns the exchange of information in relation to the supervision of credit rating agencies and trade repositories. The second was a "multilateral MoU (MMoU) between EU/EEA securities regulators and the FCA covering supervisory cooperation, enforcement and information exchange between individual regulators and the FCA, and will allow them to share information relating to, amongst others, market surveillance, investment services and asset management activities". Sadly, there is insufficient detail to understand the impact on reporting. Whilst we don't believe this will entail the systematic exchange of trade or transaction reports, we hope either FCA or ESMA will provide further details. Potentially, it could lead to an additional overhead if they are asked to react to ad hoc requests for transactional data.*

3. *The European Data Protection Board published an 'opinion' that personal data can be transferred from an EEA country to a third country when appropriate controls are in place'.[14] ESMA believe this will enable the continued exchange of enforcement and supervisory information between securities regulators, which is essential given the number of fields within a transaction report containing personal information.*

4. *ESMA has announced that LCH Ltd, ICE Clear Europe Ltd and LME Clear Ltd will be recognised to provide CCP services in the EU in the event of a no deal Brexit.[15]*

[12] FCA Statement "Requirements for UK trade repositories and reporting counterparties", 1 February 2019, https://www.fca.org.uk/news/statements/requirements-uk-trade-repositories-and-reporting-counterparties
[13] ESMA71-99-1096, 1 February 2019,
[14] https://www.esma.europa.eu/press-news/esma-news/eu-and-global-securities-regulators-welcome-agreement-data-transfer
[15] ESMA71-99-1114, 18 February 2019

What about Reportable Instruments?

Potentially, Brexit could have a significant impact on the universe of MiFIR reportable instruments. Under MIFR, the two main criteria determining whether a financial instrument is reportable are whether the instrument is traded on an EEA trading venue or whether the instrument has an underlying financial instrument that is traded on an EEA trading venue (e.g. a third country or OTC option on Vodafone common stock). This is logical as it mirrors the instruments caught under the Market Abuse Regime. However, if instruments solely traded on UK trading venues were removed, as they are no longer EEA trading venues, it could result in a significant reduction in the MiFIR reportable instrument universe.

There appears to be more certainty on the UK's intended universe of reportable instruments. The UK government has made it clear[16] that the new regime would capture instruments traded on both UK trading venues and EU trading venues. This raises the interesting question on the future of FIRDS and any UK equivalent. The quality of trade and transaction reporting is heavily dependent on an accurate source of reference data being collected by the regulators and shared with the industry. As ESMA will have no authority to collect reference data from UK trading venues[17] and the FCA will have no authority to collect reference data from EU venues, it would appear practical for the two regulators to co-operate and share data they receive. This appears to be particularly pressing for the UK as they would need to build their own version of FIRDS. It is entirely possible that such discussions on co-operation are already in place, but they are not visible to the industry. If there is no agreement on reference data sharing and no contingencies are in place, it is difficult to envisage how the UK, in particular, will procure the reference data it requires to support its transaction reporting regime.

If the FCA were to build its own database of reportable instruments, it may take the opportunity to address one of the problems with FIRDS. FIRDS is being used by many firms to identify the reportable instrument set, but FIRDS contains many instruments that are only tradeable on a systematic internaliser. There are many instances where firms try to report transactions in these instruments away from the systematic internaliser and then find their reports are rejected by the NCA due to the contingent validation between the Venue identifier, FIRDS and the instrument identifier. This might appear to be abstract detail, but it is exactly the kind of issue that distresses compliance officers who are asked to attest to the accuracy and completeness of the firms' transaction reporting.

Questions to ask:

Are you prepared for the potential impact on the universe of reportable instruments?

This could require additional access to reliable reference data.

[16] Draft Statutory Instrument Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746247/MiFI__Amendment___EU_Exit__Regulations_3-10-18C.PDF

[17] If this data is actually required by ESMA.

New Developments

On 1 February, the FCA made an announcement relating to FIRDS and the transaction reporting regime.[18] In the event of a no deal Brexit, i.e. no implementation period, the FCA does indeed intend to replace the current FIRDS source of reference data with its own "FCA FIRDS". In fact, the FCA appears to be quite well advanced in its build – the technical specification has been published, firms will be able test the new system from 21 February and the FCA will begin feeding the FCA FIRDS with live production data from early March to ensure a full database of instruments by 29 March. The FCA FIRDS will contain reference data submitted by the UK trading venues and SIs and will somehow also contain the data from EU FIRDS.

[18] https://www.fca.org.uk/markets/market-data-regimes/fca-firds-and-transaction-reporting

Will there be increased reliance on Trading Venue reporting?

Short answer – yes. Currently under MiFIR, trading venues have a transaction reporting obligation for instruments executed on their platforms by firms that do not have a MiFIR transaction reporting obligation. This is a potential solution to part of the data sharing issue as trading venues have an obligation to transaction report for non-MiFID firms. However, there could be resistance from the trading venues in increasing this burden in such a dramatic way. At the time of MiFIR implementation, many of these venues were deeply concerned about the possibility of losing members by forcing them to disclose additional information on their trades, including private individual identifiers. There may also be some doubt about the ability of the venues to enforce the quality the reports and whether there is truly a level playing field for venues across the member states.

Questions to ask:

If you are a trading venue, are you prepared for the potential increase in transaction reporting obligations?

This could include changes to membership rules and additional resources to liaise with member firms and bolster systems and controls over reporting.

What about the impact on EMIR delegated reporting (including NFCs)?

Even if there is a MoU in place to share data, there is still the thorny issue of delegated reporting to address. We estimate that around 70% of firms with an EMIR reporting obligation delegate EMIR trade reporting to their brokers. This practice of delegation is particularly prevalent for buy-side firms and non-financial counterparties (NFCs). This raises the obvious issue of what happens if one of those entities needs to report to an EU trade repository and the other needs to report to a UK trade repository or vice versa. Technically, this should be a relatively straight forward issue to resolve, but will the brokers wish to extend their reporting to multiple trade repositories and consideration needs to be given to the legal requirement for counterparties and CCPs to report to a trade repository registered under their respective legislation. If a solution cannot be found in time for the withdrawal date, it is very questionable whether impacted firms taking advantage of delegated reporting could find a new reporting solution within the given timeframe. For many non-financial counterparties, it is perhaps unlikely that EMIR trade reporting is even on their Brexit issues log. Reducing the burden for smaller firms and NFCs has been high on the agenda for the EMIR 'Refit', so we certainly hope a solution can be found for delegated reporting, but we are not aware of any public statements addressing this crucial issue.

If the 'newly third-country' firms are prepared to provide delegated reporting on behalf of their counterparties to third country trade repositories, it is highly likely that ESMA, the EU 27 NCAs and the UK FCA will become more concerned by delegated reporting by firms outside their jurisdiction. Whilst there doesn't appear to be anything in the regulation preventing this delegation, it appears probable that they will place additional pressure on the entities with the reporting obligation to verify the accuracy and completeness of the reports submitted on their behalf. Whilst firms should already have these controls in place, we believe it is likely that many firms will have to devote further resources to ensure these reports are accurate and complete.

Questions to ask:

Have you assessed the implications for delegated reporting?

If you are providing delegated reporting, have you contacted ARMs and trade repositories that will provide services within the required jurisdiction?

If you are currently relying on delegated reporting, have you confirmed with your counterparties that they will continue to offer this service post-Brexit?

What will be the impact on firms' 'transmitting orders' under MiFID?

Any firm that transmits an order to another firm for execution (such as an asset manager transmitting an order to an executing broker on behalf of a fund) does not have to transaction report if certain conditions are met (as per Commission Delegate Regulation (EU) 2017/570 Article 4). One of these conditions is that the party receiving the order is subject to MiFID. This potentially impacts transmitting firms who currently do not transaction report if the receiving firm (their broker or other group entity) becomes subject to a different regime post Brexit. Whilst this sounds like a potential issue, we believe it is only likely to cause problems for firms transmitting orders under Article 4 within their group or for a very small number of firms as most firms transmitting orders choose to transaction report themselves.

Questions to ask:

If you are currently relying on Article 4, are you prepared to start transaction reporting if your broker is no longer caught by the reporting requirements in your area?

What is the future of EMIR dual-sided reporting and 'pairing and matching'?

EMIR is unusual amongst the G20 trade reporting regimes for being dual-sided. The inevitable fragmentation of reporting following Brexit appears to question the practicality of dual-sided reporting as potentially far fewer firms will be reporting the same trade under a single regime. Potentially, the pairing and matching could still be performed if there were information sharing arrangements in place between the EU and the UK, but the onus for performing the pairing and matching currently falls on the trade repositories. As these repositories will be discrete entities between the separate reporting regimes, the practicalities of pairing and matching becomes increasingly stretched and the value of dual-sided reporting becomes increasingly questionable. Quite simply, if there are far fewer trades that can pair, the argument for dual sided reporting is significantly weakened. These factors do not appear to have been incorporated into the Refit proposals or the Commission's Fitness Check on supervisory reporting and it might seem logical that the regulatory authorities reconsider these proposals, if at all possible at this late stage.

For background on pairing and matching, read our blog: *EMIR trade reporting: Lifting the lid on pairing and matching*

New developments

In its public statement on issues affecting reporting[19] ESMA clarified that only reports between EU counterparties[20] will continue to be paired and matched in EMIR trade repositories. We have not seen a corresponding statement from the FCA on the future of pairing and matching, but we assume that they will impose a similar requirement where both firms report to a UK trade repository.

We have seen no indication that dual-sided reporting will be dropped as part of EMIR Refit.

[19] ESMA70-151-1997, 1 February 2019

[20] Presumably, this will apply to all **EEA** counterparties.

Will there be harmonisation or divergence in the reporting regimes?

Whilst important, it is unlikely that EMIR and MiFIR reporting are at the very top of the UK authorities' priorities in the run up to Brexit, so there is therefore little chance that there will be radically different reporting regimes on the immediate withdrawal date. As the FCA and Treasury have been careful to explain, their main priority is the avoidance of disruption. In its Consultation Paper on "Brexit: proposed changes to the Handbook and Binding Technical Standards – first consultation"[21] the FCA has stated that it is not seeking to introduce policy changes unrelated to Brexit but merely to make the minimum of changes to *"…ensure that there is a functioning regime in place on exit day to enable firms and regulators to be ready for exit, to protect the existing rights of UK consumers or to ensure financial stability."*

However, this does raise the question on whether the UK and EU reporting regimes will continue to be synchronised longer term. With the move to global harmonization in reporting regimes encouraged by CPMI-IOSCO and the FSB, it might seem logical that they should. However, the FCA may believe there are elements that require changes, particularly to EMIR, and it may not feel that the UK needs to go at the same speed as ESMA. Quite clearly, political relations between the UK and the EU may be the main contributing factor determining how far the reporting regimes will be aligned. Still, it is not difficult to find areas of reporting that could be improved for all market participants now the opportunity presents itself. For example, the FCA may consider why it needs trade repositories at all when it is capable of being the repository for the trades itself and it might appear preferable to move to the ARM model for EMIR trade reporting. Similarly, it might address quality issues by using reference data associated with ISINs where it is able to do so; rather than relying on the firms' population of these data elements. Additionally, the FCA cannot currently offer independent guidance on trade and transaction reporting issues, which is tremendously frustrating for firms who want to meet their reporting obligation but are foiled by the lack of clarity in the requirements. There are also issues in some of the finer detail of the transaction reporting validation scheme and quite clearly it would be easier for a single country regulator to determine improvements than a regional regulator taking the views of 27 member states into consideration.

Questions to ask:

Is your change management sufficiently resourced to monitor the potential changes to the reporting regimes Brexit might initiate?

[21] Brexit: proposed changes to the Handbook and Binding Technical Standards – first consultation, Consultation paper CP18/28, October 2018 https://www.fca.org.uk/publication/consultation/cp18-28.pdf

What about identification codes for individuals?

For MiFIR transaction reporting, individuals need to be identified with a meaningful identifier. For example, a British person would need to be identified with a code starting with the 'GB' two character ISO country code appended with their National Insurance Number. These national identifiers are assigned to individuals when they are the buyer or seller in a transaction, an individual that has power of representation over an account, the individual decision maker within the reporting firm and the individual trader within the reporting firm. This additional level of granularity under MiFIR is extremely valuable for NCAs in their effort to detect market abuse. Unfortunately, this value is set to diminish as these identifiers change following Brexit. For example, the British individual will retain the same code for the UK equivalent MiFIR reporting regime, but a brand new code would be used in an EU-27 MiFIR report. This is because the standard for identifying non-EEA individuals is the two-character country code appended with the passport number. The same problem could impact the UK authorities if they adopt the same standard for non-UK nationals. For example, an Italian trader employed by a UK firm would no longer be identified with a Fiscal Code appended to the country code; instead, it will be the passport number appended to the ISO country code.

Even 'discovering' the national taxonomy to use is going to be an issue post-Brexit. For example, a person with joint British and Irish nationality is currently identified using the British taxonomy (simply because 'GB' comes before 'IE' when sorted alphabetically!). Post Brexit, the Irish taxonomy will be used to identify the individual as the EEA taxonomies always take precedence over non-EEA taxonomies for joint-nationals.

Whilst this might seem like minor detail, it is absolutely crucial to the integrity of transaction reporting and how the regulators use the data to detect market abuse. Restructuring personal identifiers within their reference data should be a priority for firms as part of the Brexit preparations.

New Developments

We now understand that ESMA might keep the current UK standard for identifying individuals. We await clarification from ESMA (and the FCA) on any changes to the identification of individuals post-Brexit.

Questions to ask:

Are you prepared for these potential changes to identification codes?

Have you monitored any additions to persons with dual nationality as we approach Brexit?

Do you have any plans to identify and resolve the new identification data in time for the withdrawal date?

***For background, read our blog on identifiers**: Camels are horses: the problem with identifiers under MiFID II*

How might the MiFIR fields be impacted?

Although neither the UK nor the EU is expected to change the number of fields that comprise a transaction report or their definitions, we expect that there will inevitably be an impact in the immediate aftermath of Brexit. The table below describes some of the potential impact:

No.	Field Name		Impact	Recommended Action
3	Trading venue transaction identification code			Update system logic to ensure that this value is only populated for trading venues in the EU for EU firms and branches and for UK and EU venues for UK firms.
5	Investment Firm covered by Directive 2014/65/EU		Currently no expected impact as UK firms will for the purposes be classed as MiFID investment firms if they would be classed as such were they to be based within the EU.	
6	Submitting entity identification code			Update the submitting entity LEI where the ARM is being changed (if the ARM does not automatically provide this service)
7 & 16	Buyer/Seller ID Codes		The taxonomy used to identify any individual may change	Review and refresh natural person identifiers.
12 & 21	Buyer/Seller decision maker ID codes		The taxonomy used to identify any individual may change	Review and refresh natural person identifiers.
36	Venue		Post Brexit, trading on UK derivative exchanges by EU firms (and trading on EU derivative venues by UK firms) will be deemed OTC as it won't be carried out on a 'trading venue' (unless it is recognised as being equivalent). Any off market trading of these instruments should be reported with a Venue identifier of 'XXXX' (rather than the more logical 'XOFF').	Update reporting logic to correctly identify where XXXX or XOFF is to be used. Update reporting logic to correctly identify when an SI value should be reported.

			Potential changes to the SI regime	
	Transmission of order			Review reporting logic to ensure this remains accurate post Brexit
	Transmitting firm identification code for the buyer/seller			Review the use of Article 4 by group entities and clients.
41	Instrument Identification		Population of this key field is optional for instruments that do not exist on FIRDS (for EU firms) or, presumably, 'UK-FIRDS' (for UK firms) that are traded off-market or on a third country platform.	No impact as ISIN should always be populated where an ISIN has been issued (even if 'optional' under the validation scheme).
42-46	Reference data associated with the ISIN		If the instrument identifier is not on FIRDS/UK FIRDS (as applicable) these fields need to be populated by the reporting firm. This will result in an increased burden on firms' reporting (mainly for derivatives) and a reduced level of quality as the population of FIRDS will decrease.	Review the reference data to ensure that the relevant fields are being captured and maintained.
48	Underlying index name		UK may implement additional naming conventions: SONIA for example.	Update to reflect EU and UK index naming conventions.
57	Investment decision within firm		The taxonomy used to identify any individual may change	Review and refresh natural person identifiers.
59	Execution within firm		The taxonomy used to identify any individual may change	Review and refresh natural person identifiers.

How might the EMIR fields be impacted?

Similarly, neither the UK nor the EU is expected to change the number of fields that comprise an EMIR trade report, or their definitions, but we expect that there will inevitably be an impact in the immediate aftermath of Brexit. The table below describes some of the potential impact:

No.	Field Name	Impact	Recommended Action
2.12	Trade ID (UTI)	Whilst trade ID will remain a mandatory field for most report types, there could be a reduced requirement to match the UTI provided by the counterparty if that counterparty reports under a different regime (if cross-jurisdictional matching is no longer required).	Potentially relax system logic ingesting or disseminating UTIs from/to counterparties reporting under a separate reporting regime.
2.15	Venue of execution	Post Brexit, trading on UK derivative exchanges by EU firms (and trading on EU derivative venues by UK firms) will be deemed OTC as it won't by carried out on a 'trading venue' (unless it is recognised as being equivalent). Any off market trading of these instruments should be reported with a Venue identifier of 'XXXX' (rather than the more logical 'XOFF'). Potentially different Venue identifiers for the same transaction could be reported under the two regimes.	Update reporting logic to correctly identify where XXXX or XOFF is to be used.
2.55 & 2.58	Floating Rate of leg 1 and Floating rate of leg 2	UK may implement additional naming conventions: Sonia for example.	Update to reflect EU and UK index naming conventions.
2.67	Delivery Point or zone	Under current EU requirements, this field is only populated if the delivery point is within the EU (otherwise populated with XXXXXXXXXXXXXXXX) It would be logical to change this (under both regimes) to delivery points in the UK or EU, but this might not be the outcome.	Update system logic if validation is not amended and a change is required.
2.68	Interconnection point	Under current EU requirements, this field is only populated if the interconnection point is within the EU (otherwise populated with XXXXXXXXXXXXXXXX) It would be logical to change this (under both regimes) to interconnection points in the UK or EU, but this might not be the outcome.	Update system logic if validation is not amended and a change is required.

2.69 – 2.77	Load Type, Load delivery details, Delivery start date and time, Delivery end date and time, Days of the week, Delivery capacity, Quantity unit, Price/time interval quantities	Population of all nine of these energy specific fields is dependent upon the population of fields 2.67 and 2.68 with an EU EIC code.	Update system logic if validation is not amended and a change is required.

What happens next?

There may be many negative implications of Brexit, both to Britain and to the EU-27, and understandably EMIR trade reporting and MiFIR transaction reporting are not at the top of the negotiators' concerns. Unfortunately, is extremely difficult to attest to the completeness of this report when the implications of a hard Brexit are profound for the reasons detailed in this paper. Firms are in an impossible position as they cannot prepare for a hard Brexit without a substantial investment in project resource and this investment might not happen whilst there is still doubt of the outcome of negotiations. Even if it was clear today that there would be a hard Brexit on 29 March, there is little chance that many firms would be able to make the necessary adjustments to report correctly – this is particularly true of the smaller firms and NFCs that rely on delegated reporting to meet their EMIR trade reporting obligations.

If the regulators believe this is unacceptable, they need to examine their own positions. They are obliged to monitor their markets for potential abuse and for systemic risk. It is entirely feasible that the FCA/Treasury and ESMA/EC are already talking behind closed doors about data sharing agreements, but, if they are not, there will be a substantial impact on their abilities to meet these obligations.

To discuss the issues raised in this report, please contact your Kaizen Client Engagement Manager or contact us on:

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New Developments

The statements on the data sharing MoUs show that the regulators are trying to address their concerns about their ongoing ability to monitor the markets for potential market abuse and systemic risk.

It is noticeable that the recent statements from ESMA and the FCA relate to changes in the event of a hard Brexit. It is entirely possible that there will be some form of an agreement reached before the withdrawal date and we are yet to have the same level of clarification of changes in event of a soft Brexit. We expect that there will be a further flurry of announcements in the next few weeks as we approach the exit date.

Glossary

ARMS	Approved Reporting Mechanisms are authorised under MiFID to provide the service of reporting details of transactions to competent authorities on behalf of investment firms
Data Reporting Service Providers (DRSPs)	Authorised entities for the operation of Approved Reporting Mechanisms, Approved Publication Arrangements and Consolidated Tape Providers
EC	European Commission
ESMA	European Securities and Markets Authority
CCP	Central Counterparty
CSD	Central Securities Depository
CPMI - IOSCO	CPMI is the Committee on Payments and Market Infrastructure. IOSCO is the International Organization of Securities Commissions. CPMI and IOSCO work together to enhance coordination of standard and policy development and implementation, regarding clearing, settlement and reporting arrangements including financial market infrastructures (FMIs) worldwide
FCA	The UK Financial Conduct Authority
FIRDS	ESMA's Financial Instrument Reference Database
FSB	Financial Stability Board
EEA	European Economic Area, currently comprised of the 28 EU member states plus Norway, Iceland and Liechtenstein. Allows the EU's single market to be extended to non-EU countries.
ISIN	International Securities Identifier Number – the unique identifier to identify financial instruments
ISO	International Organisation for Standardisation
NFCs	Non-Financial Counterparties (EU NFCs have an EMIR trade reporting obligation)
Passporting	Term given to the ability of an entity authorised for an activity in one EU country to offer its services for that activity across all EU member states
Reference data	Descriptive data relating to the attributes of a financial instrument; for example, the 'strike price', 'style', 'underlying' and 'exercise date' are all reference data items relating to options
Systematic internaliser	An investment firm which, on an organised, frequent, systematic and substantial basis deals on own account when executing client orders outside a regulated market, an MTF or an OTF without operating a multilateral system
Trade Repositories	Entities authorised to centrally collect and maintain the records of traded derivatives
Venue identifier	The 'Market Identification Code' (ISO standard 10383) used to identify trading venues'

About the author

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David is a leading expert on MiFIR transaction reporting and EMIR trade reporting. He has over 30 years' financial services experience on both sides of the regulatory fence, having worked previously for the FSA, Reuters, Credit Suisse and the London Stock Exchange. David was a Technical Specialist within the Transaction Monitoring Unit at the FSA, where he was responsible for shaping the transaction reporting rules and providing guidance to UK firms. David was the FSA's representative on transaction reporting in Europe for a number of years and later became a member of ESMA's Market Data Standing Committee Consultative Working Group. After ten years at the FSA, David became Head of Transaction Reporting at Credit Suisse. David also spent over six years at the London Stock Exchange where he was Head of Compliance for UnaVista, principally working as Compliance Officer for the EMIR Trade Repository and compliance for the MiFID Approved Reporting Mechanism. David also introduced an industry accredited diploma training course on MiFID and EMIR reporting.

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