



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Regulated Foreign Markets Determination (Amendment) Instrument 2019/324

This is the Explanatory Statement for *ASIC Regulated Foreign Markets Determination (Amendment) Instrument 2019/324 (instrument)*.

The Explanatory Statement is approved by the Australian Securities and Investments Commission (*ASIC*).

Summary

1. The instrument is a determination that certain markets regulated in the United Kingdom (**UK**) are “Regulated Foreign Markets” for the purposes of subrule 1.2.4(2) the *ASIC Derivative Transaction Rules (Reporting) 2013 (Reporting Rules)* and therefore also for the purposes of the *ASIC Derivative Transaction Rules (Clearing) 2015 (Clearing Rules)*.
2. The effect of the determination is that derivatives entered into on those financial markets will continue to be carved out of the reporting requirements in the Reporting Rules and clearing requirements in the Clearing Rules, following the UK’s withdrawal from the European Union (**EU**) (commonly referred to as “Brexit”).

Purpose of the instrument

3. The Reporting Rules and Clearing Rules together form part of Australia’s implementation of the Group of Twenty (**G20**) commitment to substantially reform practices in over-the-counter (**OTC**) derivatives markets following the global financial crisis in 2008.

Reporting Rules

4. The Reporting Rules, made under section 901A of the *Corporations Act 2001 (Act)*, impose requirements (referred to as ‘reporting requirements’) for information about derivative transactions and positions to be reported to a licensed or prescribed derivative trade repository.
5. The Reporting Rules generally apply to transactions and positions in relation to “OTC Derivatives” as defined in the Rule 1.2.4 of the Reporting Rules. Subrule 1.2.4(2) of the Reporting Rules carves out certain exchange-traded derivatives from the definition of “OTC Derivatives”, being derivatives entered into on or

reported to a domestically licensed Australian market (referred to as “Part 7.2A market”) or entered into on a “Regulated Foreign Market” as defined in the Reporting Rules.

6. In February 2015, ASIC made the *ASIC Derivative Transaction Rules (Reporting) Amendment 2015 (No. 1)*, introducing subrule 1.2.4(2A) of the Reporting Rules. Subrule 1.2.4(2A) provides that the following are “Regulated Foreign Markets”:
 - a. a financial market that is registered by the United States Commodity Futures Trading Commission as a "Designated Contract Market" under section 5h of Commodity Exchange Act 1936 (US) (a ***US Regulated Market***);
 - b. a financial market that is a "Regulated market" as defined in Article 4(1)(21) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (the ***Markets in Financial Instruments Directive***) (an ***EU Regulated Market***); and
 - c. a financial market that is a financial market, or is in a class of financial markets, that has been determined by ASIC as a Regulated Foreign Market under subrule 1.2.4(3) of the Reporting Rules.
7. Under subrule 1.2.4(3) of the Reporting Rules, ASIC may determine that a financial market in a foreign jurisdiction is a “Regulated Foreign Market” for the purposes of subrule 1.2.4(2), where, in the opinion of ASIC, the operation of the financial market in the foreign jurisdiction is subject to requirements and supervision that are sufficiently equivalent, in relation to market integrity and market transparency, to the requirements and supervision to which:
 - a. a US Regulated Market is subject to in the United States of America;
 - b. an EU Regulated Market is subject in the EU; or
 - c. a Part 7.2A Market is subject in this jurisdiction.
8. A determination by ASIC for the purposes of subrule 1.2.4(3) of the Reporting Rules will be published on ASIC’s website and takes effect on the day specified in the determination (see subrule 1.2.4(4) of the Reporting Rules).

Clearing Rules

9. The Clearing Rules, also made under section 901A of the Act, impose requirements (referred to as ‘clearing requirements’) for derivative transactions to be cleared through a licensed or prescribed clearing and settlement facility.
10. The Clearing Rules generally apply to transactions in relation to “Clearing Derivatives” as defined in Rule 1.2.3 of the Clearing Rules. Subrule 1.2.3(7) of the Clearing Rules carves out certain exchange-traded derivatives from the definition of “Clearing Derivative” for the purposes of the Clearing Rules, being derivatives entered into on or reported to a “Part 7.2A Market” or entered into on

a “Regulated Foreign Market” or an “Exempt Financial Market”. For this purpose, Rule 1.2.1 defines “Regulated Foreign Market” to mean:

- a. a US Regulated Market;
- b. an EU Regulated Market;
- c. a financial market that is a financial market, or is in a class of financial markets, that has been determined by ASIC as a Regulated Foreign Market under subrule 1.2.4(3) of the Reporting Rules.

11. Accordingly any determination of a Regulated Foreign Market for the purposes of subrule 1.2.4(3) of the Reporting Rules also has effect for the purposes of the Clearing Rules.

12. On 20 September 2013, ASIC made the *ASIC Regulated Foreign Markets Determination* [OTC DET 13/1145] (the *ASIC Determination*) under Rule 1.2.4(3) of the Reporting Rules, determining 51 specific financial markets as Regulated Foreign Markets.

EU Regulated Markets

13. As noted above, the Reporting Rules and Clearing Rules do not apply to transactions executed on EU Regulated Markets, being “regulated markets” as defined in Article 4(1)(21) of the Markets in Financial Instruments Directive. Article 4(1)(21) provides:

“‘regulated market’ means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with Title III of this Directive;”

14. The Markets in Financial Instruments Directive, together with Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (*MiFIR*) (collectively referred to as *MIFID II*), are the key pieces of EU legislation that govern the buying, selling and organised trading of financial instruments (e.g. shares, bonds, derivatives and interests in collective investment schemes).

15. MiFIR applies directly in the UK under the UK European Communities Act 1972 (*ECA*), while the Markets in Financial Instruments Directive was transposed into UK domestic law via a number of instruments.¹ In the UK, a recognised investment exchange under section 285 of the United Kingdom Financial Services and Markets Act 2000, other than an overseas investment exchange within the meaning of section 313(1) of that Act, is a ‘regulated market’ within the meaning

¹ See <https://www.fca.org.uk/markets/mifid-ii>

of the Markets in Financial Instruments Directive and therefore an EU Regulated Market for the purposes of the ASIC Determination.

Brexit

16. On 29 March 2017, the UK informed the European Council of the UK's intention to leave the EU, triggering the formal procedure under Article 50 of the Treaty on European Union. As a result, the UK will cease to be a member of the EU on the "exit date". The exit date was originally 29 March 2019. On 22 March 2019, the European Council formally decided that the earliest date the UK will now leave the EU is 12 April 2019.
17. EU law will cease to have supremacy in the UK on the exit date, or if a withdrawal agreement is agreed between the UK and the EU, at the end of any transitional period provided for under that withdrawal agreement. At that time, UK financial markets will cease to be EU Regulated Markets for the purposes of the ASIC Determination.
18. However, under the UK *EU (Withdrawal) Act 2018 (Withdrawal Act)*, directly applicable EU law will be converted into UK domestic law, and existing UK domestic laws made to implement EU law in the UK will be preserved. Further, the *Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018* will make amendments to the converted and preserved laws to ensure the continuing effectiveness of the UK implementation of MiFID II once the UK has left the EU.
19. The Withdrawal Act does not aim to make major changes to policy or establish new legal frameworks in the UK beyond those which are appropriate to ensure the law continues to function properly from exit day².
20. Having regard to the above arrangements, ASIC is of the opinion that following Brexit the operation of UK financial markets that are currently EU Regulated Markets for the purposes of the Reporting Rules and Clearing Rules will continue to be subject to requirements and supervision that are sufficiently equivalent, in relation to market integrity and market transparency, to the requirements and supervision to which EU Regulated Markets are subject in the EU.
21. ASIC has therefore decided to amend the ASIC Determination to determine that UK financial markets that are currently EU Regulated Markets are "Regulated Foreign Markets" for the purposes of the Reporting Rules (and therefore also the Clearing Rules). The determination will have effect regardless of when the UK leaves the EU and regardless of whether a withdrawal agreement is in place.

Consultation

22. On 28 March 2013, ASIC released Consultation Paper 205 *Derivative transaction reporting (CP 205)* proposing draft rules imposing reporting requirements for OTC Derivatives. To address feedback received in response to CP 205, ASIC

² See paragraph 14 of the Explanatory Notes to the Withdrawal Act, available at legislation.gov.uk.

included subrule 1.3.4(3) of the Reporting Rules to ensure that ASIC could carve out from the reporting requirements, derivative transactions entered into on certain foreign exchanges.

23. On 25 July 2014, ASIC released Consultation Paper 221 *OTC derivatives reform: Proposed amendments to the ASIC Derivative Transaction Rules (Reporting) 2013 (CP 221)* outlining proposed amendments to the Rules in response to a number of implementation issues raised by industry. This included ASIC’s proposal, carried into effect in 2015, to:
- a. expressly include EU Regulated Markets in the definition of “Regulated Foreign Market” without the need for further determination by ASIC; and
 - b. enable ASIC to determine that a market subject to sufficiently equivalent requirements and supervision as an EU Regulated Market is also a “Regulated Foreign Market”.
24. The instrument amends the ASIC Determination in a manner that directly carries out ASIC’s policy proposals as consulted in CP 205 and CP 221. Accordingly ASIC has not engaged in a separate consultation on the instrument.

Operation of the instrument

25. The instrument, named the *ASIC Regulated Foreign Markets Determination (Amendment) Instrument 2019/324*, will commence on the day after it is registered on the Federal Register of Legislation and will amend the ASIC Determination as set out in Schedule 1 to the instrument (see paragraphs 1 to 4 in Part 1 of the instrument).
26. The instrument amends the ASIC Determination to determine that a “UK Regulated Market” is a “Regulated Foreign Market” for the purposes of the Reporting Rules (paragraph 2 of Schedule 1 to the instrument).
27. For this purpose, the instrument introduces into the ASIC Determination new definitions for “regulated market” and “UK Regulated Market” (paragraph 1 of Schedule 1 to the instrument). The new definition of “UK Regulated Market” is intended to capture UK financial markets that are currently EU Regulated Markets referred to in paragraph 1.2.4(2A)(b) of the Reporting Rules.
28. As for current paragraph 1.2.4(2A)(b) of the Reporting Rules, the new definition of “UK Regulated Market” is not intended to capture facilities that are a “multilateral trading facility” or “organised trading facility” as defined in the Markets in Financial Instruments Directive³.

Incorporation by reference

³ See ASIC Regulatory Guide 251: *Derivative transaction reporting* at RG 251.13, available at: <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-251-derivative-transaction-reporting/>

29. The UK Financial Services and Markets Act 2000, while mentioned in the instrument, is not incorporated by reference for the purposes of s14 of the *Legislation Act 2003*.

Legislative authority

30. Subrule 1.2.4(3) of the Reporting Rules provides the legislative authority for the instrument.

31. As noted in paragraph 7 above, the pre-condition to the making of a determination under subrule 1.2.4(3) of the Reporting Rules is that ASIC is of the opinion that the operation of the financial market in the foreign jurisdiction is subject to requirements and supervision that are sufficiently equivalent, in relation to market integrity and market transparency, to the requirements and supervision to which (relevantly for present purposes) an EU Regulated Market is subject in the EU. As noted in paragraph 20 above, ASIC is of the opinion that this pre-condition is satisfied in relation to the UK Regulated Markets determined by the instrument.

32. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument. Under subsection 13(1) of the *Legislation Act 2003*, subsection 33(3) of the *Acts Interpretation Act 1901* applies to a legislative instrument made under enabling legislation as if each provision of the legislative instrument were a section of an Act.

33. The instrument is a disallowable legislative instrument.

Statement of Compatibility with Human Rights

34. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the [Attachment](#).

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

ASIC Regulated Foreign Markets Determination (Amendment) Instrument 2019/324

Overview

1. The instrument determines that certain financial markets regulated in the United Kingdom (**UK**) are “Regulated Foreign Markets” for the purposes of the *ASIC Derivative Transaction Rules (Reporting) 2013 (Reporting Rules)* and therefore also for the purposes of the *ASIC Derivative Transaction Rules (Clearing) 2015 (Clearing Rules)*.
2. The effect of the determination is that derivatives entered into on those financial markets will continue to be carved out of the reporting requirements in the Reporting Rules and clearing requirements in the Clearing Rules, following the UK’s withdrawal from the European Union (commonly referred to as “Brexit”).

Assessment of human rights implications

3. This instrument does not engage any of the applicable rights or freedoms.

Conclusion

4. This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.