CLIFFORD

CHANCE

FROM EQUIVALENCE TO RECOGNITION: CHANGING UK APPROACHES TO NON-UK REGULATORY REGIMES

MAY 2025

CONTENTS

FROM EQUIVALENCE TO RECOGNITION: CHANGING UK APPROACHES TO NON-UK REGULATORY REGIMES

Recent UK legislation has adopted a new approach to designating countries and territories outside the UK for more favourable treatment under domestic regulatory regimes. The new approach allows HM Treasury to designate overseas jurisdictions where this is compatible with high-level regulatory objectives, including the objective of facilitating UK competitiveness and economic growth, without requiring the Treasury to determine whether the law and practice in the overseas jurisdiction is equivalent to that in the UK.

Legislating for equivalence in the UK after Brexit

The inherited body of EU financial services legislation 'onshored' into UK law under the European Union (Withdrawal) Act 2018 (EUWA) included more than 40 'third country equivalence regimes'. These regimes had allowed the European Commission to make decisions determining that the laws and supervisory practices in third countries are equivalent to EU laws and practices, resulting in treatment for entities from those third countries or EU entities dealing with them that is more favourable than that accorded in relation to other third counties.

An October 2019 memorandum of understanding between HM Treasury, the Bank of England, the PRA and the FCA stated that HM Treasury would be responsible for determining the equivalence and the application of exemptions to any country or territory outside the UK where such a function is provided for in legislation. This approach was reiterated in HM Treasury's October 2020 Guidance Document for the UK's Equivalence Framework for Financial Services.

Accordingly, the 'exit instruments' made under the EUWA transferred the powers of the Commission to adopt equivalence decisions under onshored EU legislation to HM Treasury and onshored most existing Commission equivalence decisions in relation to other non-EEA states. In addition, HM Treasury used powers under the EUWA to make several new equivalence decisions in relation to EEA states and to create temporary regimes to cover cases where EEA firms and products no longer benefited from passport or similar access to the UK.

There were some exceptions to this approach. HM Treasury revoked the existing Commission equivalence decisions in relation to non-UK CCPs and created a temporary transitional regime for EU and other non-UK CCPs that had previously been authorised or recognised in the EU. HM Treasury also did not make an equivalence decision in relation to EEA trading venues for the purposes of the onshored regime governing the derivatives trading obligation (instead, the FCA used temporary transitional powers to give limited relief allowing UK firms to trade on EEA venues).

The Financial Services and Markets Act 2023 (FSMA 2023) provides for the revocation of onshored EU-derived financial services legislation and its replacement by new secondary legislation or rules made by the UK regulators based on the model established by the Financial Services and Markets Act 2000 (FSMA 2000). Under this model, the UK regulators make detailed rules for financial services within a policy framework set by primary and secondary legislation.

However, the previous government had indicated that, when implementing this new framework, secondary legislation would maintain the approach to equivalence set out in its 2020 guidance document and that onshored equivalence decisions would, if necessary, be repealed and replaced.

FSMA 2023 also established a 'deference accountability mechanism' which requires UK regulators to consider the effect of proposed rules and general supervisory policies and practices on UK equivalence arrangements, when notified by HM Treasury, and to consult with HM Treasury if those changes might result in UK law and practice ceasing to be equivalent to the law or practice of an overseas country or territory which is the subject of a notified equivalence decision (section 409A FSMA 2000). For example, if new firm-facing rules made by the regulators mean that overseas jurisdictions may no longer be regarded as equivalent, HM Treasury might wish to review, and ultimately revoke, a relevant existing equivalence decision. The previous government had also indicated that it would review existing onshored equivalence decisions to ensure that they are in scope of the deference accountability mechanism but would ensure that this process would not reopen or change the practical effects of existing equivalence decisions.

New UK equivalence-based regimes

The legislation creating the first new post-Brexit UK regimes for countries and territories outside the UK broadly followed the EU 'equivalence-based' model:

- **Overseas funds regime.** Amendments to Chapter V of Part 17 FSMA 2000 made by the Financial Services Act 2021 created a new overseas funds regime, under which funds authorised under the laws of a country or territory outside the UK can apply to the FCA for recognition if HM Treasury has made regulations approving the country or territory for these purposes and certain other conditions are met.

  HM Treasury can make regulations approving a country or territory in relation to specified kinds of fund where it is satisfied that the 'equivalent protection test' is met, i.e., that the protection afforded to participants or potential participants in the fund by the law and practice of the country or territory is at least equivalent to that afforded to participants or potential participants in comparable authorised funds by UK law and practice (but only if also satisfied that there will be adequate arrangements for cooperation between the FCA and the relevant overseas regulator).

  HM Treasury has already made regulations under this regime approving each EEA state for these purposes in relation to UCITS funds, other than money market funds (MMFs).

- **Overseas STS securitisation regime.** Part 4 of the Securitisation Regulations 2024 allow an originator, sponsor or securitisation special purpose entity to use the designation 'STS' or 'simple, transparent and standardised' (or similar terms) in relation to 'overseas STS securitisations', i.e., securitisations of a description in relation to which a country or territory outside the UK is designated by regulations made by HM Treasury.

  HM Treasury can make those regulations where it is satisfied that the law and practice which applies in the country or territory, in relation to securitisations of the descriptions specified, has 'equivalent effect (taken as a whole)' to UK law and practice, having regard to the effect of that law and practice with respect to criteria as to simplicity, transparency and comparability, the supervision and enforcement framework, and whether the FCA – and where relevant the PRA – have established effective cooperation arrangements with the competent authorities of the country or territory. The 2024 Regulations also allow 'qualifying EU securitisations' notified to the European Securities Markets Authority before 30 June 2026 to continue to use the STS designation in the UK.

From equivalence to recognition

However, some recent adopted and proposed legislation has adopted a different approach, allowing HM Treasury to make regulations designating a country or territory outside the UK for the purposes of a new regime if HM Treasury considers that the regulations are compatible with the high-level regulatory objectives specified by the legislation, including the objective of facilitating UK competitiveness and growth. In making those regulations, the legislation permits HM Treasury to have regard to a non-exhaustive list of specified factors relating to the law and practice in the overseas jurisdiction, but does not require it to determine whether that law and practice is equivalent to UK law and practice.

See the table below which summarises the regulatory objectives and factors specified for the purposes of the following new regimes:

- The **overseas insurance regime**, which requires the PRA to treat reinsurance contracts with reinsurers from designated overseas jurisdictions in the same way as domestic contracts; to permit insurance groups including an insurer in a designated jurisdiction to take account of the law in that jurisdiction when calculating group capital requirements; and to rely on the prudential supervision of an insurance group in the designated jurisdiction (replacing the previous equivalence-based regime under the onshored Solvency II legislation);

- The **overseas trading venue short selling regime**, which allows the FCA's designated activity rules governing short selling to exempt transactions performed due to market-making activities by entities that are members of trading venues in designated overseas jurisdictions (replacing the previous equivalence-based regime under the onshored Short Selling Regulation); and

- The **proposed overseas money market funds regime**, which would allow approved overseas MMFs from designated overseas jurisdictions to be established, marketed, promoted or managed, and to be described, as MMFs in the UK.

The new approach does not change the practical outcome for firms. Designation using the new approach has the same outcome for firms as designation under an equivalence-based approach.

However, the new approach gives HM Treasury more flexibility when recognising overseas jurisdictions than an equivalence-based approach. HM Treasury does not need to undertake an examination of the equivalence of the law and practice in the overseas jurisdiction and can take into account the objective of facilitating UK competitiveness and growth in a similar way to that required by the new secondary objectives of the UK regulators. As a result, HM Treasury's decisions to designate (or not designate), or to maintain or remove a designation of, an overseas jurisdiction are likely to be less susceptible to challenge via judicial review.

On the other hand, the deference accountability mechanism established by FSMA 2023 may not apply to the designation of overseas jurisdictions under these regimes, because the designations are not determinations that "the law and practice of another country or territory is … equivalent to the law and practice of the United Kingdom". Therefore, that mechanism may not constrain the UK regulators when making rules or developing their supervisory policies and practices even where changes to their rules, policies or practices might result in HM Treasury withdrawing a designation of an overseas jurisdiction as its law and practice is no longer sufficiently aligned with that in the UK.

The new approach may still be consistent with the UK's 'most-favoured nation' obligations under the General Agreement on Trade in Services (GATS) and free trade agreements (FTAs). These generally require the UK to accord services and service suppliers from World Trade Organization (WTO) members and FTA partner countries no less favourable treatment than the treatment accorded to other countries, but allow the UK to 'recognise' prudential measures of another country in determining how the UK's financial services regime is applied – without any explicit constraints on the criteria that should be applied when granting recognition. However, if the UK does recognise another country's prudential measures it will generally be required to afford other countries that are WTO members or FTA partners an adequate opportunity to show that they have regulation, oversight, implementation of that regulation, and, if appropriate, procedures concerning the sharing of information equivalent to that in the recognised country.

New recognition regimes

Specified regulatory objectives	Specified factors
Overseas insurance regime	
• The protection of policyholders; • The safety and soundness of (re)insurance undertakings; and • One or both of (i) promoting effective competition, or (ii) facilitating the international competitiveness of the UK economy and its growth in the medium to long term.	The law and practice in the overseas jurisdiction with respect to: • the authorisation of insurance undertakings; • the supervision, and enforcement of prudential requirements applying to, insurance undertakings (including at group level); • insurance undertakings' holding of financial resources for their safety and soundness (including at group level) and for the protection of policyholders; • the assessment, and disclosure, of insurance undertakings' financial position, including at group level; • the sound and prudent management, including at group level, of insurance undertakings; and • the handling and sharing of confidential information by supervisory authorities.
Overseas trading venue short selling regime	
• Protecting the integrity of the UK financial system; and • Facilitating the international competitiveness of the UK economy and its growth in the medium to long term.	The law and practice in the overseas jurisdiction with respect to: • the authorisation, supervision and enforcement in relation to markets; • the rules regarding admission of securities to trading; • market transparency and integrity; and • the prevention of market abuse in the form of insider dealing and market manipulation.
Overseas money market funds regime (proposed)	
• Protecting the financial integrity or stability of UK financial markets; and • Promoting effective market competition for consumers and facilitating the competitiveness of the UK economy and its growth in the medium to long term.	The law and practice in the overseas jurisdiction with respect to: • the types of MMFs that are permitted; • the eligible assets of MMFs; • the authorisation requirements for MMFs; • requirements as to who can act as manager or operator of MMFs; and • requirements on diversification and concentration; internal credit quality assessments; liquidity; stress testing; valuation and NAV calculation; external support; supervision and enforcement; and reporting. Any requirements under FSMA 2000 for comparable authorised schemes.
See: • Part 4 Insurance and Reinsurance Undertakings (Prudential Requirements) Regulations 2023 added by regulation 4 of the Insurance and Reinsurance Undertakings (Overseas Insurance Regime, Transitional Provisions, etc.) Regulations 2024. The 2023 regulations treat the overseas jurisdictions which benefited from existing equivalence decisions under onshored Solvency II as designated jurisdictions for the purposes of the new regime. • Part 3 Short Selling Regulations 2025. The Regulations treat each EEA state as a designated jurisdiction for the purposes of the new regime, replacing the previous equivalence decision for those states. • Part 2 draft Money Market Funds Regulations 2024 published by HM Treasury on 6 December 2023 with accompanying policy note.	

CONTACTS

Caroline Dawson
Partner
London
T: +44 7949 443 527
E: caroline.dawson@cliffordchance.com

Chris Bates
Special Counsel
London
T: +44 7785 700 236
E: chris.bates@cliffordchance.com

Simon Crown
Partner
London
T: +44 7900 167 265
E: simon.crown@cliffordchance.com

Paul Lenihan
Senior Associate
London
T: +44 7432 551 129
E: paul.lenihan@cliffordchance.com

Stephanie Peacock
Senior Associate
London
T: +44 7908 223 827
E: stephanie.peacock@cliffordchance.com

Sara Evans
Senior Associate
Knowledge Lawyer
London
T: +44 7977 096 280
E: sara.evans@cliffordchance.com

CLIFFORD

CHANCE

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Houston • Istanbul • London • Luxembourg • Madrid • Milan • Munich • Newcastle • New York • Paris • Perth • Prague • Riyadh* • Rome • São Paulo • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

*AS&H Clifford Chance, a joint venture entered into by Clifford Chance LLP.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

JOB0000069109