

## STANDARD FORM OF EXPLANATORY MEMORANDUM FOR EUROPEAN UNION LEGISLATION AND DOCUMENTS

12111/18  
COM (2018) 646

**Amended proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Regulation (EU) No 345/2013 on European venture capital funds; Regulation (EU) No 346/2013 on European social entrepreneurship funds; Regulation (EU) No 600/2014 on markets in financial instruments; Regulation (EU) 2015/760 on European long-term investment funds; Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds; Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market; and (EU) Directive 2015/849 on the prevention of the use of the financial system for the purposes of money-laundering or terrorist financing**

Submitted by HMT on

2<sup>nd</sup> October 2018

### SUBJECT MATTER

1. On 12 September the Commission published an amendment to the European System of Financial Services (ESFS) proposal which reviews the European Supervisory Authorities (ESAs) founding Regulations<sup>1</sup>.
2. The original ESFS proposal published on 20 September 2017 sought to create a more convergent and integrated supervisory framework by:
  - Increasing the mandate and overall powers of the ESAs;
  - Introducing new powers for the European Securities and Markets Authority (ESMA); and
  - Changing the governance and funding structure of the ESAs.
3. The amended regulation builds upon the original ESFS proposal and seeks to extend the powers of the European Banking Authority (EBA) to play a greater role in enhancing the quality of anti-money laundering (AML) supervision by national supervisory authorities within the financial services sector. It envisages giving the EBA:

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<sup>1</sup> Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European insurance and Occupational Pensions Authority); Regulation (EU) NO 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Regulation).

- A coordinating role to centralise work on money laundering and terrorist financing across the three European Supervisory Authorities. The Commission believes that this will allow the EBA's expertise to be optimised, and allow better tracking of the ESAs' resource dedicated to combatting money laundering.
  - The power to collect information about weaknesses identified in the processes and procedures; governance; business models; and activities of EU financial institutions to prevent money laundering and terrorist financing.
  - The ability to request national competent authorities (NCAs) to investigate possible breaches of the relevant rules and to oversee national procedures in the area money laundering and terrorist financing.
  - Under specific circumstances, the ability to address decisions directly to individual financial operators with regards to money laundering matters and engage in binding mediation between NCAs on such matters.
4. The regulation also proposes setting up an integrated AML Committee within the EBA, made up of heads of NCAs that are competent for ensuring compliance with the requirements of Directive 2015/849/EU<sup>2</sup>. This will build upon the existing Anti-Money Laundering Committee of the ESAs, which is currently attended by the Financial Conduct Authority. The proposal envisages that representatives from the European Securities and Markets Authority (ESMA), European Insurance and Occupational Pensions Authority (EIOPA), the European Systemic Risk Board, the European Commission and the Supervisory Board of the European Central Bank, will be able to attend the committee in the capacity of observers.
  5. The proposal also includes a number of small technical changes to Directive 2015/849 to ensure coherence with the proposed new role of the EBA, and removes Directive 2015/849 from the scope of activities overseen by EIOPA and ESMA,
  6. Under the proposal, EIOPA and ESMA's input into combating and preventing money laundering and terrorist financing will be via the ESAs Joint Committee, which will serve as a forum of cooperation among the three Authorities on matters related to the interaction between prudential and anti-money laundering aspects.

## **SCRUTINY HISTORY**

7. EM 12420/17 on the omnibus proposal on the European System of Financial Supervision was submitted on 25 October 2017. It is currently under scrutiny in both Houses.

## **MINISTERIAL RESPONSIBILITY**

8. The Chancellor of the Exchequer has responsibility for United Kingdom policy on European Union monetary and economic issues. The Foreign and Commonwealth Secretary and the Secretary of State for Exiting the EU are responsible for overall United Kingdom policy towards the European Union.

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<sup>2</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015

## INTEREST OF THE DEVOLVED ADMINISTRATIONS

9. The regulation of financial services is a reserved matter under the UK's devolution settlements and no devolved administration interests arise. The devolved administrations have therefore not been consulted in the preparation of this EM.

## LEGAL AND PROCEDURAL ISSUES

- i. Legal basis:

10. The proposed amendments have their legal basis on Article 114 of the Treaty on the Functioning of the European Union (TFEU). The proposals are within the boundaries of the articles.

11. The Justice and Home Affairs (JHA) opt-in is not relevant.

- ii. European Parliament Procedure

12. Ordinary legislative procedure

- iii. Voting procedure

13. Qualified majority voting.

- iv. Impact on United Kingdom Law

14. The proposed regulations within 12111/18 COM(2018) 646 final will enter into force 20 days after publication in the Official Journal. Most of those Regulations will then be directly applicable in EU Member States 24 months after their entry into force, with certain provisions entering into force 36 months after publication in the official journal. Minor changes to UK legislation, notably FSMA 2000 would be necessary to implement these proposals.

15. The transposition deadline for Directive 2015/849(EU) was 26 June 2017. This Directive was transposed into UK law through several statutory instruments, with most transposing provisions contained in the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017. Amendments to that Directive, contained in Directive 2018/843(EU) entered into force in July 2018, with a transposition deadline of January 2020.

- v. Application to Gibraltar

16. These measures will apply to Gibraltar.

- vi. Fundamental rights analysis

17. The proposals within 12111/18 COM (2018) 646 final do not appear to engage any of the rights laid down in the European Convention on Human Rights or in the First or Thirteenth Protocol.

## **APPLICATION TO THE EUROPEAN ECONOMIC AREA**

18. The proposals apply to the European Economic Area.

## **SUBSIDIARITY**

19. Due to high-profile recent failings of AML systems and controls in certain EU financial institutions, a joint working group of the ESAs, European Central Bank and European Commission has concluded that enhancing the current monitoring of the implementation of EU-level AML and counter-terrorist financing (CTF) measures is needed.

20. The Commission considers that increasing the powers of the EBA will foster cooperation among NCAs and optimise the use of EU-level AML/CTF experience and resources. The Commission further considers that these proposals will improve the effectiveness of AML/CTF supervision and ensure that financial institutions are being regulated and supervised consistently across all Member States.

## **POLICY IMPLICATIONS (including Exit implications where appropriate)**

21. On 23 June, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in the future once the UK has left the EU.

22. AML/CTF supervision currently takes place at a national level. This proposal would represent a significant shift in responsibility and power for supervision within the financial services sector away from NCAs and to the ESAs, particularly the EBA.

23. In ESFS Council Working Group discussions so far, Member States and the European Parliament have been polarised by proposals to centralise more financial services supervision at the expense of NCAs. The increased mandate of the EBA in this new amended proposal is likely to add to the contentious nature of these discussions.

24. These amendments were also put forward on little notice, as part of the wider 'State of the Union' address made by the Commission President on 12 September 2018. The manner in which the amendments were put forward caused a lot of contention in Council, and resulted in virtually all Member States criticising the Commission for the manner in which the proposal was developed, which did not involve Member States.

25. The Government believe that at a broad level, any proposals to reduce inconsistencies in regulatory and supervisory practice between EU Member States should be proportionate to the risks posed.

26. Further technical analysis of this amended proposal will be required in the context of negotiations on EU withdrawal.

## CONSULTATION

27. The Commission conducted a public consultation on the operations of the European Supervisory Authorities from 21 March 2017 to 16 May 2017.

## IMPACT ASSESSMENT

28. This proposal is not accompanied by an impact assessment. This is because the Commission regard it as an urgent issue that needs to be resolved imminently, hence they did not have time to conduct one.

## FINANCIAL IMPLICATIONS

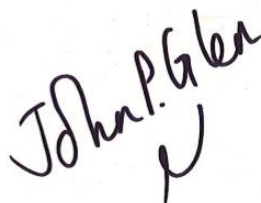
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## TIMETABLE

29. The most recent Council Working Group on the ESFS proposal took place on 26 September 2018.

30. The proposal will be discussed at the Economic and Financial Committee on 20-21 September 2018, and will be presented by the Commission at the Economic and Financial Affairs Council in October.

## OTHER OBSERVATIONS



**JOHN GLEN**  
**ECONOMIC SECRETARY TO THE TREASURY**

- \* For an unnumbered Explanatory Memorandum substitute "Official text not yet received, or "Official text not available" as appropriate.
- \*\* For Explanatory Memoranda on documents not containing proposals for legislation substitute the word 'DOCUMENT' for 'LEGISLATION'. Separate titles are used for CFSP and JHA business.
- \*\*\* Reference should be made to whether the assent, co-decision, consultation or co-operation procedure applies.
- \*\*\*\* Reference need not be made to consultation within Government as this will be implied by the information under Ministerial responsibility. This section should be used to describe consultation with external organisations.