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Brexit: A summary of key political and technical publications

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November 26, 2018 TO: ICI Members
ICI Global Members
ICI Global Exchange Traded Funds Committee
ICI Global Information Security Officer Committee
ICI Global Pacific Chapter
ICI Global Retirement Savings Committee
ICI Global Tax Committee
ICI Global Trading & Markets Committee
ICI Global Transaction Reporting Working Group
International Internal Audit Advisory Committee SUBJECTS: International/Global
MiFID, EMIR, AIFMD, UCITS V RE: Brexit: A summary of key political and technical publications

Over the last few months, the UK and EU governments, institutions and regulatory authorities have published their approach to various political and technical aspects of Brexit. The key publications of relevance to regulated funds and their managers, including the recent Withdrawal Agreement and Political Declaration, are summarised below.

Withdrawal Agreement and Political Declaration

On 25 November 2018, the European Council endorsed:[1] (i) an agreement on the UK's withdrawal from the EU ("the Withdrawal Agreement");[2] and (ii) a political declaration on the future relationship from between the UK and EU ("the Political Declaration").[3] The Withdrawal Agreement and Political Declaration are now subject to the approval of a resolution by the UK's House of Commons[4] and the consent of the European Parliament[5] (by simple majority).[6]

The Withdrawal Agreement covers various overarching aspects of Brexit including a transition/ implementation period running from 30 March 2019[7] until 31 December 2020.[8] During the scope of the transition/ implementation period, the EU acquis will be applicable to and in the UK (with some specific exceptions).[9]

The Withdrawal Agreement envisages that the UK and EU will take all necessary steps to begin formal negotiations of one or several agreements governing their future relationship with a view to ensuring that, to the extent possible, those agreements apply from the end of the transition period (i.e. 31 December 2020). In this vein, the Political Declaration accompanying the Withdrawal Agreement sets out a high-level framework for these negotiations.

Section IV of the Political Declaration contains the following provisions relating to financial services (paragraphs 37-39):

- The Parties are committed to reserving financial stability, market integrity, investor and consumer protection and fair competition, while respecting the Parties' regulatory and decision-making autonomy, and their ability to take equivalence decisions in their own interest. This is without prejudice to the Parties' ability to adopt or maintain any measure where necessary for prudential reasons. The Parties agree to engage in close cooperation on regulatory and supervisory matters in international bodies;
- Noting that both Parties will have equivalence frameworks in place that allow them to declare a third country's regulatory and supervisory regimes equivalent for relevant purposes, the Parties should start assessing equivalence with respect to each other under these frameworks as soon as possible after the United Kingdom's withdrawal from the Union, endeavouring to conclude these agreements before the end of June 2020. The Parties will keep their respective equivalence frameworks under review;
- The Parties agree that close and structured cooperation on regulatory and supervisory matters is in their mutual interest. This cooperation should be grounded in the economic partnership and based on the principles of regulatory autonomy, transparency and stability. It should include transparency and appropriate consultation in the process of adoption, suspension and withdrawal of equivalence decisions, information exchange and consultation on regulatory initiatives and other issues of mutual interest, at both political and technical levels.

UK Technical Preparations

The UK Government and financial regulatory authorities – HM Treasury (HMT), the UK Financial Conduct Authority (FCA)[10] and the Prudential Regulation Authority (PRA)[11] – have set out their approach to various aspects of Brexit over the last few months. These approaches cover the "onshoring" of EU law,[12] the operation of temporary permissions regimes after exit day,[13] Brexit implications for firms[14] and consumers,[15] and general and specific preparations in a no-deal" scenario. The key components of these approaches of relevance to regulated funds and their managers are outlined below.

No-deal scenario preparations

The UK Government's stated preference is to conclude a Brexit deal with the EU. In preparation for a scenario where no deal is concluded, the UK Government has set out various measures it is putting in place to support the provision of services and activities from the EEA into the UK. In doing so, the UK Government is seeking to prioritise stability and make the transition from the current to future state as smooth as possible.[16] Several of the measures being taken by the UK Government that are specific to financial services and funds, including a temporary permissions regime, are outlined in more detail below.[17]

Onshoring of EU Law

To ensure a workable legal regime is in place in the UK following Brexit, HMT has developed statutory instruments (SIs)[18] under the auspices of the EU (Withdrawal) Act to preserve UK laws relating to EU membership (e.g. legislation implementing EU Directives) and address any deficiencies resulting from the “onshoring” of EU law. The development of SIs is not intended to effect policy changes other than those resulting from Brexit.

HMT has published draft SIs for regulated funds and their managers covering UCITS,[19] AIFs[20] and various other EU fund regimes (EuSEF,[21] EuVECA,[22] ELTIF,[23] MMF[24]). Draft SIs have also been published covering other aspects of EU financial services law,[25] including those of relevance to regulated funds and their managers covering MiFID/MiFIR,[26] SSR,[27] CRD/CRR,[28] EMIR,[29] PRIIPs,[30] MAR[31] and BMR.[32] HMT has also published a SI to introduce a temporary permissions regime for firms to enable EEA firms currently passporting into the UK to continue their activities in the UK for a limited period after Brexit (discussed in further detail below).[33]

FCA preparations

The FCA has set out its role in preparing for Brexit[34] and published three consultations on various Brexit related issues, including two consultations on changes the FCA rules and EU technical standards in October[35] and November,[36] and one consultation on a proposed Temporary Permissions Regime (TPR).[37]

The FCA has also set out its expectations of firms in preparing for Brexit,[38] including through various speeches from senior management covering the FCA’s preparations,[39] authorisations,[40] no-deal considerations[41] and possible future arrangements.[42]

FCA Temporary Permissions Regime

The TPR is designed to enable relevant firms and funds which currently passport into the UK to continue to operate in the UK after Brexit. For instance, enabling EEA-domiciled funds, including UCITS and AIF, to continue to market their units and shares in the UK (e.g. funds currently recognised under Section 264, FSMA).[43] To apply to use the TPR, a regulated fund will need to submit an online notification[44] to the FCA between 7 January – 28 March 2019. After Brexit, the FCA will allocate each fund a “landing slot” – a window of time within which they will need to submit their application for permanent UK authorisation.[45]

Funds and their managers whom have not submitted a notification to use the TPR before Brexit will not be able to automatically continue to market in the UK and, for instance, may need to apply for recognition (e.g. under Section 272 of FSMA).[46]

The FCA is consulting various aspects of the TPR, including how changes to the constitution and activities of funds during the operation of the regime are treated. For instance, the FCA is proposing that while a fund manager can continue to market a fund to the same category of client that it was able to market to before Brexit, the fund manager cannot:[47]

- add any new schemes to the funds in the TPR (stand-alone or umbrellas);
- add new sub-funds to umbrella schemes in the TPR;
- change or extend the category of customer to be marketed to while a fund is in the TPR.

EU Technical Preparations

EU institutions and regulators have published various aspects of their approaches to Brexit, including stakeholder notices[48], no-deal scenario preparations,[49] a contingency action plan,[50] and statements on various issues of relevance for the ongoing provision of certain cross-border services and activities.[51] The key publications of relevance to regulated funds and their managers are outlined below.

European Commission no-deal preparations

The European Commission ("the Commission") has published various aspects of its approach to Brexit, including no-deal preparations. On 19 July 2018, the Commission published a communication[52] on preparations for Brexit, including high-level contingency planning in the event of a no-deal scenario. On 13 November 2018, the Commission published a more detailed contingency action plan,[53] including specific measures related to financial services. Of particular relevance to regulated funds and their managers, is a commitment by the Commission to act, to the extent necessary, to address financial stability risks in the EU arising in a no-deal scenario including work to recognise UK CCPs, which has been welcomed by ESMA.[54]

European Commission's Asset Management Stakeholder Notice

On 8 February 2018, the Commission published a notice to stakeholders concerning the implications of Brexit for EU asset management rules.[55] The notice outlines the potential implications of Brexit for UK and EU asset management activity, including concerning the delegation of activities by EU funds to UK providers, on which ESMA issued general and sector specific opinions in May and July 2017 respectively.[56]

The Commission's notice as recalls the requirement for a cooperation agreement to be in place between the competent authority of the home Member State of the UCITS management company or AIFM and the supervisory authority of the undertaking carrying out the delegated function in the third country. ESMA chair Steven Maijoor noted in a recent speech[57] that "*in the case of a no deal Brexit, NCAs and ESMA should have in place with our UK counterparts the type of MOUs that we have with a large number of third country regulators*." Furthermore, Maijoor stated that "*taking the wider negotiations between the EU and UK into account, we plan to start negotiations with the UK FCA with the objective to have these MOUs in place sufficiently on time before the end of March 2019.*" Chair of the Autorité des marchés financiers, Robert Ophèle also noted in a speech[58] that there is "*a* strong commitment from ESMA and all EU27 NCAs to have an MMOU with the UK FCA in place" and furthermore that "it is upon this assumption that market players should work, when putting their contingency plans in place."

Next Steps

The Withdrawal Agreement and Political Declaration are now subject to the approval of a resolution by the UK's House of Commons and the consent of the European Parliament (by simple majority). The outcome of this ratification process will determine subsequent steps at political and technical level before the UK is due to withdraw from the EU on

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endnotes

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[2] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as

endorsed by leaders at a special meeting of the European Council on 25 November 2018, available from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf and https://www.consilium.europa.eu/media/37099/draft_withdrawal_agreement_incl_art132.pdf

[3] Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom , available from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom__.pdf and https://www.consilium.europa.eu/media/37100/20181121-cover-political-declaration.pdf

[4] Section 13(1), European Union (Withdrawal) Act 2018, available from http://www.legislation.gov.uk/ukpga/2018/16/section/13/enacted

[5] “The consent of the European Parliament” is required for a Withdrawal Agreement to be concluded under Article 50(2), Treaty on the European Union, available from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT

[6] http://www.europarl.europa.eu/unitedkingdom/en/brexitpublic/brexit.html

[7] Immediately following “exit day” which is defined as 29 March 2019 at 11pm in the European Union (Withdrawal) Act 2018, available from http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf

[8] Article 126, Withdrawal Agreement.

[9] Article 127, Withdrawal Agreement.

[10] https://www.fca.org.uk/brexit

[11] https://www.bankofengland.co.uk/eu-withdrawal

[12] HM Treasury’s approach to financial services legislation under the European Union (Withdrawal) Act, available from 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

[13] The temporary permissions regimes for inbound passporting EEA firms and funds – our approach, FCA, available from https://www.fca.org.uk/brexit/temporary-permissions-regime

[14] https://www.fca.org.uk/firms/preparing-for-brexit

[15] https://www.fca.org.uk/consumers/how-brexit-could-affect-you

[16] https://www.gov.uk/government/publications/uk-governments-preparations-for-a-no-deal-scenario/uk-governments-preparations-for-a-no-deal-scenario

[17] https://www.gov.uk/government/publications/banking-insurance-and-other-financial-ser

vices-if-theres-no-brexit-deal/banking-insurance-and-other-financial-services-if-theres-no-brexit-deal

[18] 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

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[22] The Venture Capital Funds (Amendment) (EU Exit) Regulations 2018, available from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752800/EuVECA_Draft_SI_text.pdf

[23] The Long-term Investment Funds (Amendment) (EU Exit) Regulations 2018, available from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/757164/Long-term_Investment_Funds_SI_Draft_Text.pdf

[24] Money Market Funds (Amendment) (EU Exit) Regulations 2018, available from https://www.gov.uk/government/publications/draft-eu-exit-sis-for-investment-funds-and-their-managers/money-market-funds-amendment-eu-exit-regulations-2018-explanatory-information

[25] https://www.gov.uk/government/collections/financial-services-legislation-under-the-eu-withdrawal-act

[26] Draft Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018, available from https://www.gov.uk/government/publications/draft-markets-in-financial-instruments-amendment-eu-exit-regulations-2018

[27] Draft Short Selling (Amendment) (EU Exit) Regulations 2018, available from https://www.gov.uk/government/publications/draft-short-selling-amendment-eu-exit-regulations-2018

[28] Draft Capital Requirements (Amendment) (EU Exit) Regulations 2018, available from https://www.gov.uk/government/publications/draft-capital-requirements-amendment-eu-exit-regulations-2018

[29] Draft Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision (EU Exit) Regulations 2018, available from https://www.gov.uk/government/publications/draft-financial-markets-and-insolvency-amendment-and-transitional-provision-eu-exit-regulations-2018

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[34] https://www.fca.org.uk/news/statements/fca-role-preparing-for-brexit

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[38] https://www.fca.org.uk/firms/preparing-for-brexit

[39] The FCA’s approach to Brexit: our preparations and our vision for the future, Speech by Nausicaa Delfas, Executive Director of International, FCA, available from https://www.fca.org.uk/news/speeches/fca-approach-brexit-our-preparations-and-our-vision-future

[40] An update on our approach to authorisation and our Brexit preparations, Speech by Sarah Rapson, Director, Authorisations, available from https://www.fca.org.uk/news/speeches/update-our-approach-authorisation-and-our-brexit-preparations

[41] Maintaining market confidence: an update on Brexit, Speech by Nausicaa Delfas, Executive Director of International, FCA, available from

https://www.fca.org.uk/news/speeches/maintaining-market-confidence-update-brexit

[42] Brexit and financial services: Where have we got to?, Speech by Andrew Bailey, CEO, FCA, available from https://www.fca.org.uk/news/speeches/brexit-and-financial-services-where-have-we-got-to

[43] https://www.fca.org.uk/firms/authorised-recognised-funds/apply-fund-recognition

[44] https://www.fca.org.uk/firms/connect

[45] The FCA has stated that it expects the first landing slot will be October to December 2019 and the last to be January to March 2021

[46] https://www.fca.org.uk/firms/authorised-recognised-funds/apply-fund-recognition

[47] Paragraph 6.1, CP 18/29

[48] https://ec.europa.eu/info/brexit/brexit-preparedness/preparedness-notices_en

[49] http://europa.eu/rapid/press-release_IP-18-6403_en.htm

[50] https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1542793594757&uri=CELEX%3A52018DC0880

[51] The state of implementation of MIFID II and preparing for Brexit, Speech by Steven Maijoor, Chair, ESMA, available from https://www.esma.europa.eu/sites/default/files/library/esma70-156-787_wfe_speech_steven_maijoor.pdf

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[58] https://www.amf-france.org/en_US/Actualites/Prises-de-paroles/Archives/Annee-2016?docId=workspace%3A%2F%2FSpacesStore%2Fac5c4822-fd35-4764-8e22-2e940d86266d