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Brexit: A Summary of Recent Key Developments

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ICI Global Members

ICI Global Brexit Task Force SUBJECTS: International/Global RE: Brexit: A Summary of Recent Key Developments

Over the last few months, the UK and EU governments, institutions and regulatory authorities have published further information on their approach to various technical aspects of Brexit. Below is a brief update on the state of play and a summary of selected key recent publications of relevance to regulated funds and their managers at EU and UK level, building on prior general updates we have provided.[\[1\]](#) A further update on markets related developments, including the share and derivative trading obligations and the recognition of UK central clearing counterparties, will be provided in due course.

Political state-of-play

The UK left the EU on 1 February 2020 and entered into a transition period until 31 December 2020.[\[2\]](#) During the transition period, the UK continues to participate in the EU's Single Market and Customs Union. Negotiations between the UK[\[3\]](#) and EU[\[4\]](#) on their future relationship post the transition period are ongoing, in accordance with agreed terms of reference[\[5\]](#) and based on the revised political declaration agreed in November 2019[\[6\]](#) and draft working texts for the future relationship, including a trade agreement.[\[7\]](#) The EU's lead negotiator, Michel Barnier, recently stated[\[8\]](#) that an agreement seems unlikely, but in any case, given the EU's ratification process, that an agreement must be concluded by the end of October if it is to enter force as the UK exits the transition period at the end of 2020.[\[9\]](#)

Technical Aspects

Summarised below are various recent key Brexit technical developments of relevance to regulated funds and their managers.

Memoranda of Understandings between ESMA and the UK FCA

On 17 July 2020, the European Securities and Markets Authority (ESMA)[\[10\]](#) and the UK Financial Conduct Authority (FCA)[\[11\]](#) confirmed that the previously agreed Memoranda of Understandings (MoUs) on cooperation and information exchange that were announced on

1 February 2019[12] remain valid and will come into effect at the end of the transition period. Certain provisions in EU legislation of relevance to funds and asset managers require cooperation arrangements between relevant regulatory authorities to be in place for cross-border activities (subject to additional conditions). These provisions include the delegation of portfolio management by UCITS[13] and AIF[14], the private placement of AIF,[15] and the establishment of an EU branch by a third-country MiFID firm.[16]

UK-EU Financial Services Equivalence Assessment

In the revised political declaration on their future relationship, the UK and EU agreed to “endeavour” to conclude their equivalence assessments of one another’s financial services regulatory frameworks by the end of June 2020.[17] Michel Barnier confirmed in a speech that the EU’s assessment had not been completed, noting various challenges concerned with the process.[18]

European Commission “no-deal” Contingency Action Plan Measures

The European Commission has continued to implement various aspects of its “no deal” Brexit contingency plan. On 9 July 2020, the European Commission issued a communication[19] alongside updates to its sectoral “readiness notices”, including for investment services.[20] The Commission has highlighted various changes for UK financial services firms and funds, including the loss of passporting rights and changes to market access resulting from inward services provided into Member States being subject to relevant third country rules of the Member State concerned.

The Commission has also highlighted the limited scope of equivalence decisions that are in place for third-country firms, including those in the UK, to provide services to EU clients (notably CSDs and CCPs). Furthermore, for MiFID investment firms, the Commission notes that the current equivalence framework[21] will be replaced by the Investment Firm Regulation (IFR) framework in June 2021.[22]

UK Authorities’ Brexit Preparations and Developments

The UK Authorities, including Her Majesties Treasury (HMT) and the Financial Conduct Authority (FCA) have continued to prepare for a range of Brexit outcomes and published policy proposals concerning various aspects of the UK’s legislative and regulatory framework post the transition period. The key UK authorities’ developments of relevance to regulated funds and their managers are summarised below.

UK Overseas Funds Regime

On 11 March 2020, HMT published a consultation[23] on the “Overseas Funds Regime” that would apply to non-UK funds (e.g. EU UCITS) seeking to market to UK investors post the expiry of the Temporary Permissions Regime (TPR).[24] The consultation contained proposals to reform the current “Section 272” marketing regime[25] and discussed how an outcomes-based equivalence process could apply to assessing overseas funds jurisdictions as well as other matters, including powers for the FCA to apply additional requirements to incoming funds. ICI Global submitted a high-level comment letter supporting the open approach that HMT had adopted.[26]

HMT Financial Services Update

On 23 June 2020, Rishi Sunak, the UK Chancellor of the Exchequer, made a written ministerial statement[27] setting out the UK’s approach to implementing international and

European regulatory reforms that need to be addressed before the end of the Transition Period on 31 December 2020. The statement also outlined the areas where HMT will review these reforms to “ensure relevant regulations remain appropriate for the UK financial sector.” Sunak noted the long-term review that is being undertaken by HMT to examine how the UK’s regulatory framework needs to adapt to the future and in particular to the UK’s position outside the EU.[\[28\]](#)

The written ministerial statement outlined the UK’s approach in the following areas:

- Updating prudential requirements for investment firms[\[29\]](#) – the UK Government intends to introduce updated prudential standards in a flexible and proportionate manner through a new Investment Firms Prudential Regime (IFPR) in line with the intended outcomes of the EU’s Investment Firms Regulation and Directive. The FCA has published a discussion paper on these proposals;[\[30\]](#)
- Maintaining the existing industry-led framework for CSD settlement – the UK will not implement the settlement discipline regime under the Central Securities Depositories Regulation (CSDR) and instead continue to apply the existing industry-led framework. Any future legislative changes will be developed through dialogue with the financial services industry, and sufficient time will be provided to prepare for the implementation of any new future regime;
- Non-financial Counterparty reporting of securities financing transactions – the UK will not implement the reporting obligations under the Securities Financing Transactions Regulation (SFTR) for non-financial counterparties (NFCs).

HMT published a further written ministerial statement[\[31\]](#) on legislative steps that could help deal with ‘tough legacy’ contracts that cannot transition from LIBOR before end-2021, including amendments to the UK’s implementation of the EU’s Benchmarks Regulation, to ensure that FCA powers are sufficient to manage an orderly transition from LIBOR.

HMT will also set out its plans for implementing upcoming EU legislation in the following areas:

- Amendments to the Benchmarks Regulation to ensure continued market access to third country benchmarks until end-2025. HMT will publish a policy statement in July 2020;
- Amendments to the Market Abuse Regulation to confirm and clarify that both issuers and those acting on their behalf must maintain their own insider lists and to change the timeline issuers have to comply with when disclosing certain transaction undertaken by their senior managers (‘Persons Discharging Managerial Responsibilities’);
- Legislation to improve the functioning of the PRIIPs regime in the UK and address potential risks of consumer harm in response to industry and regulator feedback.
- Legislation to complete the implementation of the European Market Infrastructure Regulation (EMIR) to improve trade repository data and ensure that smaller firms are able to access clearing on fair and reasonable terms.

FCA Temporary Permissions Regime

The FCA established the temporary permissions regime (TPR) to enable firms and funds which currently passport into the UK to register to be able to continue to do so post the

transition period. The FCA initially closed the notification window on 30 January (the day before the UK left the EU)[32] but intends to reopen this on 30 September 2020 to allow firms and funds that have not yet notified the FCA to do so before the end of the transition period and to enable firms and funds that have already submitted notifications to update those if necessary.[33]

Amendments to the PRIIPs Regulation

On 30 July 2020, HMT set out proposals[34] for amendments to the PRIIPs Regulation, including:

- enabling the FCA to clarify the scope of the PRIIPs Regulation through its rules;
- replacing the ‘performance scenario’ with ‘appropriate information on performance’ in the PRIIPs Regulation;
- enabling HM Treasury to further extend the exemption currently in place for UCITS.

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endnotes

[1] See Memorandum No. 31649, RE: Brexit: A Summary of Key Technical Publications, dated 13 March 2019, *available from* <https://www.iciglobal.org/iciglobal/pubs/memos/ci.memo31649.global> and see Memorandum No. 31495, RE: Brexit: A summary of key political and technical publications, dated 26 November 2018, *available from* <https://www.iciglobal.org/iciglobal/pubs/memos/memo31495>

[2] https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/brexit-brief/transition-period_en

[3] The Future Relationship with the EU: The UK’s Approach to Negotiations, February 2020, *available from* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf

[4] See Guide to the negotiations, European Commission, *available from* https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/future-partnership/guide-negotiations_en

[5] Terms of reference on the UK-EU future relationship negotiations, *available from* <https://ec.europa.eu/info/sites/info/files/terms-of-reference-eu-uk-future-relationship.pdf>

[6] Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, (“Revised Political Declaration”) *available from* <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1592316528275&uri=CELEX%3A12019W/DCL%2801%29>

[7] See (i) draft working text for a comprehensive free trade agreement between the UK and EU, published by the UK Government and *available from* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886010/DRAFT_UK-EU_Comprehensive_Free_Trade_Agreement.pdf and (ii) draft text of the agreement on the new partnership with the UK, published by the European Commission's Task Force on relations with the UK, *available from* <https://ec.europa.eu/info/sites/info/files/200318-draft-agreement-gen.pdf>

[8] Remarques de Michel Barnier suite au septième round de négociations sur un futur partenariat entre l'Union européenne et le Royaume-Uni, 21 August 2020, *available from* https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1511>

[9] Press statement by Michel Barnier following Round 6 of the negotiations for a new partnership between the European Union and the United Kingdom, 23 July 2020, *available from* https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1400

[10] ESMA Press Release: ESMA tells market participants to continue preparations for the end of the UK transition period, 17 July 2020, *available from* <https://www.esma.europa.eu/press-news/esma-news/esma-tells-market-participants-continue-preparations-end-uk-transition-period>

[11] FCA Press Release: FCA confirms MoUs with ESMA and EU securities regulators, 17 July 2020, *available from* <https://www.fca.org.uk/news/statements/fca-confirms-mous-esma-and-eu-securities-regulators>

[12] FCA Press Release: FCA agrees MoUs with ESMA and EU regulators to allow cooperation and exchange of information, 1 February 2019, *available from* <https://www.fca.org.uk/news/press-releases/fca-agrees-mous-esma-and-eu-regulators-allow-cooperation-and-exchange-information>

[13] For instance, Article 13(1)(d) of the UCITS Directive requires “cooperation between the supervisory authorities concerned (to) be ensured” as a condition of the delegation by a UCITS ManCo of investment management to a third-country delegate, Directive 2009/65/EC *available from* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009L0065>

[14] For instance, Article 20(1)(d) of the AIFM Directive requires “cooperation between the competent authorities of the home Member State of the AIFM and the supervisory authority of the undertaking (to) be ensured” as a condition of delegation by an AIFM of portfolio management or risk management to a third-country delegate, Directive 2011/61/EU, *available from* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0061>

[15] For instance, Article 42(1)(b) of the AIFM Directive requires appropriate cooperation arrangements to be in place between relevant regulatory authorities for the marketing of an AIF without a passport to EU investors where this AIF is managed by a non-EU AIFM.

[16] For instance, Article 39(2)(b) of MiFID II requires cooperation arrangements to be in place between relevant regulatory authorities for a third-country MiFID firm to establish an EU branch, *available from* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0065>

[17] paragraph 36, Revised Political Declaration

[18] EuroFi General Assembly: Remarks by Michel Barnier, 30 June 2020, *available from* https://ec.europa.eu/info/sites/info/files/speech-barnier-eurofi-30062020_en.pdf

[19] European Commission Communication: Getting ready for changes - Communication on readiness at the end of the transition period between the European Union and the United Kingdom, 9 July 2020, *available from* <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1594383487124&uri=COM%3A2020%3A324%3AFIN>

[20] Notice to stakeholders
https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/financial_instruments_en.pdf.

[21] See Article 47 of MIFIR (Regulation 600/2014) and MiFIR Delegated Regulation 2016/222, *available from* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0600> and <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R2022&from=MT> respectively

[22] See Article 63(5) of the Investment Firm Regulation 2019/2033 which amends Article 47 of MiFIR, *available from* <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R2033&from=DE>

[23] Overseas Funds Regime: A Consultation, HM Treasury, *available from* <https://www.gov.uk/government/consultations/overseas-funds-regime-a-consultation>

[24] <https://www.fca.org.uk/brexit/temporary-permissions-regime>

[25] Section 272, Individually Recognised Overseas Schemes, Financial Services and Markets Act 2000, *available from* <https://www.legislation.gov.uk/ukpga/2000/8/section/272>

[26] See Memorandum No. 32451, RE: ICI Global High-Level Comment Letter on UK's Overseas Funds Regime, dated 11 May 2020, *available from* <https://www.iciglobal.org/iciglobal/pubs/memos/memo32451>

[27] Financial Services Update: Written statement - HCWS309, Made by: Rishi Sunak (The Chancellor of the Exchequer), 23 June 2020, *available from* <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-06-23/HCWS309/>

[28] Her Majesty's Treasury: Financial Services Future Regulatory Framework Review, *available from* <https://www.gov.uk/government/consultations/financial-services-future-regulatory-framework-review>

[29] See also Prudential standards in the Financial Services Bill: June Update, HMT Treasury, 23 June 2020 *available from* <https://www.gov.uk/government/publications/prudential-standards-in-the-financial-services-bill-june-update>

[30] DP20/2: Prudential requirements for MiFID investment firms, 23 June 2020, *available from* <https://www.fca.org.uk/publications/discussion-papers/dp20-2-prudential-requirements-mifid-investment-firms>

[31] Financial Services Update: Written statement - HCWS307, Made by: [Rishi Sunak](#) (The Chancellor of the Exchequer), 23 June 2020, *available from* <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-06-23/HCWS307/>

[32] <https://www.fca.org.uk/news/press-releases/information-firms-during-brex-it-implementation-period>

[33] <https://www.fca.org.uk/brex-it/temporary-permissions-regime>

[34] Amendments to the Packaged Retail Investment and Insurance-based Products Regulation, 30 July 2020, *available from* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/905542/Policy_Statement_-_PRIIPs_July_2020_HMT_Template.pdf

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