BREXIT: PLANNING AND PRACTICAL ADVICE

[Last updated 20 December 2020]

The UK left the EU on 31 January 2020 and with the end of the transition period due to end on 31 December 2020, there is continued uncertainty around how future trade negotiations may end. It is imperative that funds industry companies reassess their plans for a hard Brexit and ensure adequate measures have been taken to identify and counteract risks to the extent possible.

With this in mind, the Irish Funds Brexit Steering Group has prepared the following non-exhaustive list as a guide for identifying some of the main issues which may arise during Brexit planning.

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- **Possible increased market volatility and reduced liquidity**
    - There is a possibility of increased market volatility and reduced liquidity around some securities in the run up to and immediately following the end of the transition period. This could lead to increased difficulty in producing fund valuations.
    - Firms should prepare for potential difficulties in pricing and the possibility of requiring fund boards to sign off fund valuations.
    - If there are extreme market volatility and liquidity issues, there are likely to be increased operational issues which firms may want to plan for.
    - In the case of reduced liquidity in underlying securities this also could lead to pricing issues or in extremis, a need to suspend fund dealing.

- **Staff availability**
    - Firms have been identifying particular staff who may be required to be onsite or available in the days leading up to and following the end of the transition period.
    - The Central Bank of Ireland (CBI) contacted firms in advance of previous deadlines requiring any necessary staff to have been identified and available in the period leading up to and after Brexit day.
    - Firms may also want to ensure that fund boards (and ManCos) are contactable at short notice during the period.

- **Interaction with the Central Bank of Ireland (CBI)**
    - Similar to the approach taken in the run up to Brexit day (in Jan 2020), should the risk of a hard Brexit remain in the run up to the end of the transition period it is expected the interaction from the Central Bank of Ireland (CBI) with Firms will increase. Areas of focus for the CBI in advance of previous Brexit deadlines included: enhanced liquidity reporting, customer communications plans, data transfer, availability of key staff and resource contingency planning.

- Firms should consider the additional strain on resources which an increase in queries/reporting to the CBI may create and ensure contingency resourcing plans are in place.
- The CBI have confirmed to Irish Funds that unless further guidance is issued, they will continue to follow the approach outlined in their **notices of intention** as previously published in relation to the UK's exit (including for example investment by UCITS and RIAIFs in UK investment funds).

- **Treatment of UK Managers**
  - Irish Funds received recent notice from the CBI, that UK investment managers currently acting for Irish entities will be required to notify the Central Bank in relation to the change of their regulatory status following the end of the transition period.
  - However, such a notification may be made after the change in the entity's status rather than in advance. For new appointments, UK investment managers will be considered as non-EU investment managers and they will be subject to a full review. It is not anticipated Central Bank will issue a general communication on this matter.

- **Marketing of AIFs in Ireland by UK AIFMs**
  - The CBI have provided a note outlining the treatment of marketing of AIFs in Ireland by UK AIFMs. This note contains multiple Q&As covering different aspects of scenarios of marketing AIFs into Ireland by UK AIFMs following the end of the Brexit transition period.

- **Data**
  - In the case of a hard Brexit on 31 December 2020, data processing and data flows between the UK and the EU may require additional specific contractual requirements.
  - The recent Schrems II ruling has significant implications for the transfers of personal data from the EU to third countries where the data protection regimes have not been assessed by the EU as offering an equivalent level of protection. An assessment of the UK in this regard has not yet been performed.
  - The Schrems II ruling means that businesses planning to rely on Standard Contractual Clauses (SCC) post Brexit to continue to transfer personal data to the UK will have to conduct due diligence and may need to put additional safeguards in place to meet their obligations under GDPR.
  - On 10 November 2020 the European Data Protection Board (EDPB) published recommendations on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data, which maps specific safeguards relevant to the Schrems II terms.
  - On 12 November 2020 the European Commission has issued a consultation which closed on 10 December, in relation to new standard contractual clauses "SCCs" to enable the transfer of data to third countries.

    At the conclusion of the public consultation, the draft SCCs will undergo assessment by the EDPB and the European Data Protection Supervisor (EDPS) before adoption by the Commission through an implementing decision. Organisations will have a **12 month transitional period** from the date the new SCCs come into force (expected in early 2021) to replace contractual provisions based on the old SCCs.

- The Data Protection Commissioner in Ireland has produced guidance on transfer of personal data from Ireland to the UK in the event of a hard Brexit.

- **Staff eligibility to work and travel**
  - The status of EU staff working or travelling in or out of the UK should be considered prior to the end of the transition period. EU citizens should apply to the UK government's EU Settlement Scheme to secure status in the UK and continued right to work, if required.
  - It is important to note, Irish citizens should be able to travel and work freely in the UK (and vice versa) after the end of the transition period, under the terms of the Common Travel Area (CTA) arrangements but there could be increased travel delays at airports. (The CTA was reconfirmed in an MOU between Ireland and the UK.

- **Fund documentation and compliance**
  - The Central Bank issued a reminder to funds in August 2019 to ensure that entities are appropriately prepared for the impact of Brexit. This included any amendments to fund documentation which may be required.
  - Updates may include amendments to a fund's list of regulated markets reflecting that the UK will cease to be an EU market post Brexit, or policy updates clarifying the geographical focus of a UCITS or Retail Investor AIF (RIAIF).
  - The Central Bank recently issued a Brexit Questionnaire to firms for completion by 16 October 2020. The questionnaire is similar in form to that circulated in advance of previous deadlines and covers the areas of operational readiness, risks and cyber security.

- **Segregated account Investment Management Agreement ("IMA") requirements**
  - Some firms have been updating and engaging with segregated account clients regarding certain Brexit related investment restrictions which may be contained in their IMAs, for example around trading non-EU securities.

- **Share Trading Obligation (STO)**
  - In October 2020, ESMA published a final position on the Share Trading Obligation (STO) to supplement their previous statement in May 2019. The latest position provides an exemption for any EEA ISIN being traded on a UK trading venue, but only where it is being traded in GBP.
  - At the beginning of December, the FCA also issued a statement on their approach to the application of the Share Trading Obligation (STO) following the end of the Brexit transition period. The FCA will allow UK firms to continue trading all shares on EU trading venues.

- **Derivatives Trading Obligation (DTO)**
  - In the absence of the required equivalence decisions, EU counterparties subject to the DTO and UK counterparties wishing to trade derivatives with each other after the end of the transition period will face conflicting requirements where the derivatives fall within the scope of the EU and UK DTOs (in-scope derivatives).
  - On the 25 November ESMA published a public statement clarifying that the DTO will apply, unchanged, following the end of the transition period on 31 December 2020.

- **Euroclear UK & Ireland temporary recognition**
  - ESMA recently announced that Euroclear UK & Ireland will be recognised as a 3rd Country securities depositary from 1 Jan 2021 – 30 June 2021.

- **UK Temporary Permissions Regime (TPR)**
  - The UK has now left the EU and entered a transition period. During the transition period, EU law will continue to apply in the UK and passporting will continue. The TPR will now take effect at the end of the transition period. The window for firms and fund managers to notify the FCA to use the TPR has now reopened and will remain open until 30 December 2020. This will allow additional notifications to be made by firms and fund managers before the end of the transition period and is an opportunity for fund managers to update their previously submitted notifications, if required.
  - In October the UK published the financial services bill which contains provisions for the TPR period to be extended to 5 years. During this time, new sub-funds of umbrella funds which are already registered can also avail of the TPR, but new fund structures which haven't registered cannot.
  - Further information on the TPR can be found on the FCA website.
- **UK Overseas Funds Regime**
  - The FCA released a consultation on the proposed UK overseas funds regime in March 2020 which proposes a more streamlined regime for overseas funds. The proposed regime intends to establish a more appropriate basis for recognising overseas retail funds, including EU UCITS. The consultation closed on 11 May 2020. One of the key issues in relation to this regime is whether additional requirements will be placed on EU funds being marketed in the UK to align with those applicable to UK UCITS (i.e. value assessments).
  - The financial services bill also provides additional information about the Overseas Funds Regime, which will eventually replace the TPR as the permanent structure for overseas funds to access UK retail investors.
- **Counterparties**
  - Firms should make an assessment if there are possible impacts trading with UK counterparts.
- **System updates**
  - Firms should identify and plan for any system changes that may be required to deal with Brexit.
  - Furthermore, it may be prudent to **not** put in place other systems changes in the lead up to 31 December 2020. (It is understood this was also included in a CBI Brexit questionnaire issued to firms.)
- **Regulatory environment in the UK**
  - Attention should be paid to the applicable regulatory regime in the UK in the run up to and following the end of the transition period. The UK Chancellor stated that the UK will not be implementing a number of EU regulations including the Central Securities Depositories Regulation (CSDR) and Securities Financing Transactions Regulation for non-financial counterparties (NFCs).

Useful Brexit information:

Irish Funds – Brexit information page:
https://www.irishfunds.ie/getting-started-in-ireland/brexit-resources

Central Bank of Ireland:
https://www.centralbank.ie/regulation/how-we-regulate/brexit-faq
https://www.centralbank.ie/regulation/brexit
https://www.centralbank.ie/regulation/markets-update

UK Government:
https://www.gov.uk/government/publications/banking-insurance-and-other-financial-services-if-theres-no-brexit-deal/banking-insurance-and-other-financial-services-if-theres-no-brexit-deal-information-for-financial-services-institutions

FCA – Brexit considerations for UK firms:
https://www.fca.org.uk/brexit
https://www.fca.org.uk/brexit/temporary-permissions-regime