



AIMA

BREXIT AND ALTERNATIVE ASSET MANAGERS

MANAGING THE IMPACT

April 2018

Sponsored by **Simmons & Simmons**



CONTENTS

1

EXECUTIVE SUMMARY	4
-------------------	---

2

MANAGING THE IMPACT OF BREXIT ON UK ALTERNATIVE ASSET MANAGERS	6
2.1 AIFMD	6
2.2 UCITS	8
2.3 MiFID2/MiFIR	10
2.4 EMIR	11

3

TRANSPOSING EU LAW TO RETAIN THE STATUS QUO (OR NOT)	12
3.1 AIFMD	12
3.2 EQUIVALENCE UNDER MIFIR AND EMIR	14
3.3 ALIGNMENT OF UK RULES WITH MIFIR AND EMIR PRODUCT SCOPE	14

4

POTENTIAL CHANGE TO UK LAW DEPENDING ON INTENDED LEVEL OF UNILATERAL OPENNESS	15
---	----

ANNEX

TECHNICAL QUESTIONS ARISING FROM DEPARTURE FROM THE SINGLE MARKET	17
--	----

1 / EXECUTIVE SUMMARY

*In 2016, AIMA¹ published *Brexit and Beyond*², a thought-leadership paper that set out our vision for a Brexit deal between the UK and EU that would recognise the needs of the UK's alternative asset management industry – the largest³ such industry in Europe. In that paper we suggested an overarching financial services agreement between the UK and EU based on the principles of equivalence, reciprocity and non-discrimination.*

We are encouraged that the UK government's position regarding financial services is close to AIMA's previous proposals and support the suggestion of addressing financial services in a Free Trade Agreement grounded in the principles of mutual recognition and reciprocal regulatory equivalence⁴.

We also welcome the progress that has been made in respect of the legal text underpinning the UK's withdrawal and, specifically, the commitment to a 21-month transition period. This provides certainty to market participants regarding the timeframe associated with Brexit⁵.

The goal of this paper is to offer a bottom-up assessment of what will need to be addressed during that transition period – regardless of whether there is an agreement on mutual recognition – looking individually at the cross-border provisions in EU legislation that our members use when providing services to clients and investors across the EEA.

The analysis recognises that, based on statements from the UK government, the UK is likely to leave the EU's single market and that many existing cross-border provisions will cease to apply for UK firms. We therefore suggest the steps that can be taken to smooth the path to the new regime and prevent disruption to the UK alternative asset management industry and the investors it serves, as well as to UK

investors whose assets are being managed directly or indirectly by EEA alternative asset managers.

The purpose of this paper is not to speculate about the final shape of a Brexit settlement between the UK and EU when it comes to financial services, but instead to set out technical points that should be addressed – be that as part of an all-encompassing agreement or on a more individual basis as a matter of internal UK policy.

In what follows, we make the following points:

USE OF TRANSITION PERIOD

Assuming that Brexit entails the UK's withdrawal from the single market, the UK will become a "third country" under various EEA rules. This will require UK alternative asset managers to change the way they do business with EU investors and clients. We therefore believe that it would be sensible to deal with the following matters during that transition period:

Equivalence: Various pieces of EU financial services legislation incorporate "equivalence" or similar frameworks which allow third-country firms or clearing or trading infrastructure to provide services to EEA clients on the condition that the rules of their home jurisdiction have been deemed equivalent to those of the EU⁶. The UK should, during the transition period, seek an equivalence determination in respect of UK rules by the European Commission that covers the relevant sectoral legislation in which equivalence determinations exist. The UK will also need to ensure that it has in place its own equivalence assessments – including associated bilateral agreements with various non-EEA jurisdictions – to replace those that have previously been adopted at EU level.

1 The Alternative Investment Management Association (AIMA) is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than \$2 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes and sound practice guides. AIMA works to raise media and public awareness of the value of the industry.

2 AIMA and MFA: 'Developing Alternative Investment Management in the UK - Brexit and Beyond', December 2016.

3 85% of European hedge fund assets are managed from the UK and, globally, the UK is second only to the US in terms of the size of its hedge fund industry. The UK alternative asset management industry contributes significantly to the UK economy, with over 500 hedge fund firms supporting over 56,000 jobs across the UK and contributing over £3.9bn in tax receipts.

4 See <https://www.gov.uk/government/speeches/chancellors-hsbc-speech-financial-services>.

5 See https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf.

6 In this paper we use "equivalence" as an umbrella term for any legal assessment of the rules or requirements of a third-country jurisdiction, noting that EU legislation uses a variety of terms and procedures to codify such assessments.

Cooperation arrangements: In any future relationship, cooperation arrangements between supervisory authorities will be required and are often a pre-requisite for market access. However, under existing EU legislation, those arrangements can only be negotiated between EU competent authorities and third-country competent authorities. It is therefore important that the UK authorities can utilise the transition period to finalise cooperation arrangements that are necessary, for example, to maintain delegation regimes or allow for private placement of funds.

Change of status issues: Depending on the nature of the future relationship with the EU, many UK firms are likely to undergo a change of status under EU law. EU financial services legislation does not contain provisions which regulate the change of a status of an undertaking from an EU entity to a non-EU entity. If, for example, UK managers market their non-EU funds under a private placement regime, they will need to change status for purposes of that regime, which will likely require de-notification under one regime and registration under another. Such changes of status should be possible during the transition period in order to avoid disruption.

GRANDFATHERING

The UK should seek a deal with the EU that ensures that UK firms' relationships with EEA investors and clients that existed prior to Brexit can continue uninterrupted after Brexit by virtue of "grandfathering" provisions.

UNILATERAL OPENNESS

When Brexit occurs, and regardless of whether there will be a transition period, the change of relationship between the UK and the EU will require decisions to be made about, among other things: (i) whether and to what extent entities from EEA member states will continue to enjoy a preferred status for inbound asset management activities (either unilaterally as a matter of UK policy or in exchange for UK entities continuing to enjoy a reciprocal preferred status in relation to their activities in the EEA) (see section 4 below for further discussion); (ii) whether and to what extent EEA firms' relationships with UK investors and clients that existed prior to Brexit can continue uninterrupted after Brexit by virtue of "grandfathering" provisions (see section 4

below for further discussion); and (iii) what the status of UCITS will be in the UK going forward (see section 2.2 below for further discussion). We believe that the UK should generally opt for an approach that prioritises openness over reciprocity.

We believe that covering these points would minimise disruption for the alternative asset management industry and the investors it serves.

The remainder of this paper is divided into the following sections:

Section 2 explores some of the pieces of legislation that are relevant from the perspective of the cross-border activities of the UK's alternative asset management industry, including the AIFMD, the UCITS Directive, MiFID2 and EMIR. We identify the key cross-border provisions in these rules that will be impacted by Brexit and explain why a combination of the policy conditions outlined above would help ensure that firms can move from the existing framework to a new one with minimal disruption to the services they provide to investors.

Section 3 focuses on the way in which the UK should approach the task of restructuring the domestic regulatory framework as it "on-shores" existing EU regulatory requirements.

Section 4 of the paper examines the possible approaches the UK could take in respect of its own openness to EEA firms and funds.

The **Annex** to the paper sets out a number of technical questions that will need to be addressed, assuming the UK leaves the single market

2 / MANAGING THE IMPACT OF BREXIT ON UK ALTERNATIVE ASSET MANAGERS

2.1 / AIFMD

Cross-border provision of management services by UK alternative investment managers

Current State of Play

The AIFMD contains multiple provisions that govern the management and marketing of alternative investment funds (AIFs) in the EEA. Different provisions apply depending on where the alternative investment fund manager (AIFM) has been established and where the AIF to be marketed has been established.

Article 32 of the AIFMD enables authorised EEA-based alternative investment fund managers (EEA AIFMs) to market across the EEA any AIFs they manage, provided those AIFs were established in the EEA, following a notice to their home member state of their intention to do so (the 'EEA marketing passport').

Article 33 of the AIFMD enables authorised EEA AIFMs to manage AIFs established in other member states either directly or via a branch following a notice to its home member state of its intention to do so (the 'EEA management passport'). Article 6(4) of the AIFMD allows member states to authorise EEA AIFMs to manage segregated client portfolios without the need for a separate MiFID authorisation. This service can be offered on a cross-border basis by virtue of the EEA management passport.

Article 36 of the AIFMD enables authorised EEA AIFMs to market non-EEA AIFs (and certain EEA feeder AIFs) they manage, subject to certain conditions, including the existence of required cooperation agreements between the supervisory authorities of the home member state of the AIFM and the supervisory authorities where the non-EEA AIF was established, and subject to the EEA member state where the marketing is to take place having implemented an Article 36 private placement regime (which not all EEA member states have done). Under this provision, supervision of all requirements related to authorisation, systemic risk and other reporting required by Article 24 of the AIFMD remain with the home member state.

Impact of Brexit on Cross-Border Marketing and Managing Activities

Assuming Brexit entails the withdrawal of the UK from the single market, UK AIFMs will no longer qualify for the management and marketing rights under Articles 32, 33 and 36 described above, and UK AIFMs will most likely be treated as third-country AIFMs (or non-EEA AIFMs in common parlance). Because of the change in status from EEA AIFM to non-EEA AIFM, UK AIFMs will no longer be eligible to manage EEA AIFs pursuant to the EEA management passport or market their AIFs under Articles 32 and 36 and, depending on the position taken by the UK, EEA AIFMs will no longer be eligible to manage UK funds pursuant to the EEA management passport or market their AIFs in the UK under Articles 32 and 36. The AIFMD does not contain any provisions dealing with the orderly withdrawal of notices and registrations filed under Articles 32, 33 and 36 in circumstances such as those brought about by Brexit and, in the absence of any agreement or clarity on a proposed approach, uncertainty will prevail over existing relationships which have developed under these arrangements.

The AIFMD does include provisions relating to non-EEA AIFMs enabling them to manage EEA AIFs and/or to market AIFs under certain conditions. Currently, the right of non-EEA AIFMs to manage EEA AIFs is subject to the national law of each EEA member state and the right of non-EEA AIFMs to market in the EEA any AIFs they manage is subject to (i) the requirements of Article 42 and (ii) the conditions set out in the Article 42 private placement regime of the EEA member state where the marketing is to take place, if the EEA member state has one.

Although the minimum requirements of Article 42 do not require compliance with the full scope of requirements of the AIFMD that apply to EU AIFMs, Article 42 does require, among other things, that appropriate cooperation agreements are in place between the supervisory authorities of the EEA member state where the marketing is to occur and the supervisory authorities of the third country where the non-EEA AIFM is established. With respect to the marketing of an EEA AIF by a non-EEA AIFM, a cooperation agreement between the supervisory

authorities of the home member state of the EEA AIF and the supervisory authorities of the third country where the non-EEA AIFM has been established is also required. In addition, unlike Article 36, Article 42 leaves supervision of systemic risk and other reporting required by Article 24 of the AIFMD with each separate EEA member state where marketing takes place.

For UK AIFMs that would want to use any available Article 42 private placement regimes following Brexit, there will be a timing issue which would need to be resolved in order to allow for a seamless transition upon Brexit. UK AIFMs will not technically be non-EEA AIFMs until after the UK leaves the single market and neither the AIFMD nor EEA current member state private placement regimes under Article 42 currently make provision for an entity that is not a non-EEA AIFM to file the necessary registration paperwork, which can take a minimum of 20 days from filing to process and much longer in some circumstances, e.g., Sweden – 60 days.

Impact of Brexit on Cross-Border Delegations

Brexit may also affect delegations from authorised EEA AIFMs to UK-based asset managers. Article 20 of the AIFMD requires that, where the delegation concerns portfolio management or risk management and is conferred on a third-country entity, a cooperation agreement between the competent authority of the EEA AIFM and the supervisory authority of the delegate is in place.

AIFMD Third-Country Passport

The AIFMD contains provisions in Articles 35 and 37 to 41 that could allow non-EEA AIFMs to access marketing and management rights similar to the EEA marketing passport, provided that ESMA has made a positive assessment regarding the third country where the AIFMs (and, where applicable, AIFs) were established and provided that relevant cooperation agreements are in place.

AIMA fully supports the finalisation of the process of activating the third-country marketing passport, as well as the third-country management passport. In this regard, we would encourage the UK government to seek to have ESMA perform its assessment for this

purpose during the transition period and to get the necessary cooperation agreements in place during the transition period as well.

Cooperation Agreements

Since the UK is currently in the EEA, no cooperation agreements of the type required for the various provisions of the AIFMD discussed above have been signed with other EEA member states. If no such agreements are signed before the formal withdrawal of the UK from the EU, it is likely that any then-existing UK AIFMs will have to immediately cease:

- Marketing their AIFs in the EEA;
- Directly managing any EEA AIFs until they have re-registered with the competent authority of the member state of the EEA AIF under the applicable national law; and
- Any communications with their existing EEA investors outside of information specifically related to the AIF(s) these investors are invested in.

UK entities will also have to cease providing portfolio management or risk management to any AIF via a delegation arrangement from an EEA AIFM in such circumstances and cease marketing any AIFs via a delegation arrangement from an EEA AIFM.

An alternative that some UK AIFMs may pursue, in order to ensure that their EEA-facing activities can continue uninterrupted by Brexit, is to establish an entity in the EEA (assuming such an entity does not already exist) to become authorised as an AIFM (the 'New EEA AIFM') and then transfer the UK AIFM's arrangements to the New EEA AIFM. New authorisations can take months to obtain (and the waiting periods are likely to become longer to the extent that the number of applicants grows). Once the New EEA AIFM has been established, any contractual arrangements in respect of each AIF where the UK AIFM is currently a party would need to be amended to remove the UK AIFM as party and substitute the New EEA AIFM in its place or new contracts would need to be agreed. This process could, in some circumstances, require consent of investors in the AIF, which will substantially increase the amount of time that needs to be devoted to the

transition process prior to Brexit. For these reasons, decisions to take this approach will need to be taken, leaving plenty of time for these tasks to be completed in good order before Brexit.

Some UK AIFMs that choose to establish a New EEA AIFM will also consider whether they may need to apply for new UK FCA authorisations in order to complement their Brexit restructuring plans, e.g., to set up a branch in the UK. Depending on the progress of the UK's negotiations with the EU about its withdrawal, authorisations for such UK branches may need to be obtained relatively quickly. While there are numerous legal and regulatory questions arising out of a branch structure such as this, UK AIFMs may need a streamlined authorisation process so as to not create unnecessary disruption.

Policy Solutions

The UK should seek to sign **cooperation agreements** with each of the EEA member states. As noted above, these agreements are at the foundation of many of the third-country provisions in the AIFMD. The European Commission adopted a Delegated Regulation to facilitate the establishment of cooperation arrangements with third countries, as per various articles of the AIFMD, in accordance with Article 56 and subject to Articles 57 and 58 of the AIFMD. ESMA was also directed to develop guidelines to determine the conditions of the application of European measures adopted by the Commission regarding the cooperation arrangements. Further to these obligations, ESMA published its "Guidelines on the model MoU concerning consultation, cooperation and the exchange of information related to the supervision of AIFMD entities", which included the text of a model MoU that EEA member states could use with third countries. In practice, that model MoU was the actual text used for the cooperation agreements put in place with many third countries. In the interests of existing investors in various fund structures, the UK government should try to enter into a cooperation agreement for AIFMD purposes with each of the EEA member states on the agreed ESMA model MoU terms with effect from the moment of Brexit in order to avoid cliff edge effects.

The UK should seek the EU's agreement to a **grandfathering provision** that would allow UK AIFMs to communicate freely with existing, pre-Brexit EEA investors in AIFs they manage and which were marketed in the EEA prior to Brexit, and to allow those EEA investors to retain their investments in those AIFs and add to them without such activities constituting ongoing marketing of those AIFs in the EEA.

The UK should be able to use the **transition period** to enable UK AIFMs to continue to distribute their AIFs (regardless of whether these are EEA or non-EEA domiciled) to existing and new EEA-based investors as well as to manage existing or new EEA AIFs on the basis of their pre-Brexit authorisation status in the UK. This would give UK AIFMs time to decide whether to establish new operations in the EEA and seek and obtain the necessary authorisation(s) within the relevant EEA jurisdictions or to redeem EEA investors in an orderly manner, depending on the circumstances. It would also avoid unnecessary disruptions which would be detrimental for the UK AIFMs but also for the end EEA investors whose returns on assets might suffer from such a potential disruption. During this transition period, UK AIFMs should also be able to apply to withdraw their current notices/registrations under Articles 32, 33 and 36 of the AIFMD and concurrently file the necessary third-country notices/registrations under Article 42 where applicable, which could become effective before the end of the transition period. EEA firms could use this same transition period to change the way they do business with UK investors, although the contours of the post-Brexit regulatory regime for marketing in the UK by EEA firms will also need to be determined (see section 4 below).

2.2 / UCITS

Practical Implications of Brexit

UK UCITS

The situation for UK UCITS and UK UCITS management companies is less complex than that of UK AIFs and UK AIFMs in many ways. The UCITS Directive requires a UCITS and the UCITS management company to be established in the EU. Assuming Brexit entails the

withdrawal of the UK from the single market, current UK UCITS will no longer be eligible to be UCITS unless they redomicile to the EU and UK UCITS management companies will no longer qualify to manage directly any UCITS, UK or otherwise, unless they redomicile to the EU.

UK UCITS management companies that choose to redomicile may also consider whether they may need to apply for new UK FCA authorisations in order to complement their Brexit restructuring plans, e.g., to set up a branch in the UK. While there are numerous legal and regulatory questions arising out of a branch structure such as this, these firms may need a streamlined authorisation process so as to not create unnecessary disruption.

Some UK UCITS offered solely to UK investors may choose not to redomicile. In those instances, the FCA will need to make a determination as to whether those UK UCITS would be treated by the FCA going forward as UK AIFs and need an authorised UK AIFM, or if instead they would be treated by the FCA as UK residual CIS or something else. The questions raised in this regard are discussed further below in section 4 of this paper. Regardless of the outcome of these questions, from an EEA point of view, UK UCITS and UK UCITS management companies which do not redomicile will be considered non-EEA AIFs and non-EEA AIFMs, respectively, which could lead automatically to enforced redemption where investors are obliged to invest only in EEA regulated funds.

Incoming non-UK UCITS

Section 264 FSMA ("section 264") is currently the route through which EEA UCITS seek recognition in the UK utilising the "regulator-to-regulator" procedure introduced by UCITS IV. It is likely that in a no-deal scenario section 264 will become inoperative (even if it is not repealed) as the process relies upon regulators operating the notification regime which will fall away in the absence of the passport enshrined in the UCITS Directive.

Section 272 FSMA

Section 272 FSMA ("section 272") is and always has been a little used route to fund recognition and the

threshold conditions for qualification under this section are currently difficult to meet. We believe there are less than 20 funds currently recognised under section 272. In brief, this route is available for those schemes that do not satisfy the conditions in section 264 but which do satisfy the conditions in section 272 namely that:

- Adequate protection must be afforded to participants in the scheme;
- The arrangements for the scheme's constitution and management must be adequate; and
- The powers and duties of the operator and, if the scheme has a trustee or depositary, of the trustee or depositary must be adequate.

In deciding "adequacy" for these purposes the FCA must have regard to:

- Any rule of law; and
- Any matters which are, or could be, the subject of rules, applicable in relation to comparable authorised schemes.

In effect the FCA has to determine whether the scheme in question provides adequate protection and adequate arrangements for the scheme's constitution, management and depositary powers compared to equivalent authorised schemes.

Seeking and obtaining approval under section 272 is a cumbersome and uncommercial process which does not offer a reliable route to market for non-UK funds.

Policy Solutions

UK UCITS and UK UCITS Management Companies

The UK should seek the EU's agreement to a **grandfathering provision** that would (i) allow UK UCITS managers (whether the FCA regards them as UK AIFMs, residual CIS managers or otherwise post-Brexit) to communicate freely with existing (pre-Brexit) EEA investors in former UK UCITS funds they manage and marketed in the EEA prior to Brexit and (ii) allow those EEA investors to maintain their investments in those former UK UCITS and add to them without such

activities constituting marketing of those former UK UCITS funds in the EEA.

The UK should be able to use the **transition period** to enable UK UCITS management companies to continue to distribute their UCITS (regardless of where these are domiciled) to existing and new investors as well as to manage existing or new UCITS on the basis of their pre-Brexit authorisation status in the UK. This would give the FCA time to determine and set out the regulatory scheme that would apply to UCITS and UCITS management companies choosing to remain in the UK post-Brexit while giving UK UCITS and UK UCITS management companies time to decide whether to establish new operations in the EU and seek and obtain the necessary authorisation(s) within the relevant EU jurisdictions. It would also avoid unnecessary disruptions which would be detrimental for the UK UCITS and UK UCITS management companies but also for the end investors whose returns on assets might suffer from such a potential disruption.

Incoming non-UK UCITS

As any incoming non-UK UCITS will continue to qualify as UCITS for EEA purposes, one might expect section 264 to continue to be relevant for post-Brexit distribution.

It is of course impossible to predict what measures might be enacted post-Brexit to effectively cut the ties implicit in the passporting regime that currently operates under the UCITS Directive (which include section 264), but if one assumes for these purposes that no such measures are enacted, it is then possible to conclude that the non-UK UCITS will continue to satisfy the conditions for qualification under section 264 in respect of then existing (and passported) sub-funds of then existing (and passported) non-UK UCITS.

If provisions are enacted which would restrict unilateral access to the UK market with the effect of switching off section 264, the UK, as a matter of unilateral openness, should look to create a unilateral regime of recognition for incoming UCITS based upon section 272 as an alternative route to promoting UCITS to the general public in the UK (assuming again for these purposes no deal on reciprocal access under an equivalent to section 264).

The UK should accept the adequacy of the UCITS regime for the purposes of recognition of incoming non-UK UCITS under section 272 (or its post-Brexit enactment) and we would not expect the FCA to require a case-by-case comparison with what currently qualifies as a UK UCITS. Instead some form of generic acceptance of the level of “adequacy” inherent in the UCITS regime should be adopted, allowing easier, more reliable (and therefore commercially viable) access to the UK market.

2.3 / MiFID2 / MiFIR

Cross-border provision of services by UK alternative asset managers

Practical Implications of Brexit

MiFID2, like the prior MiFID framework, enables authorised investment firms to provide investment services across the EU, subject to making a notification under Article 34 of MiFID2. Many UK alternative asset managers rely on this provision to provide portfolio management services to clients across the EU.

Assuming Brexit entails the withdrawal of the UK from the single market, this intra-EU passporting right will be lost. While the implications of this are not entirely clear from the point of view of relationships with EU clients that pre-date Brexit, it is likely that UK investment firms would, in the absence of a specific agreement addressing this point, have to cease providing services to those clients or establish an authorised MiFID investment firm within the EU in order to provide services to those clients. Whether firms would choose to do this would depend on the feasibility and cost of establishing a new legal entity in the EU and the ease, or lack of it, of obtaining local authorisation.

Policy Solutions

The UK should seek the EU’s agreement to a **grandfathering provision** that enables UK investment firms to continue to provide services to any EU clients with whom they had a relationship prior to Brexit. This would mean that alternative asset managers that do not expect to establish new EU client relationships would be able to avoid establishing a new entity in the EU.

As part of the agreed **transition period**, we assume that UK firms will be able to continue to provide services to existing and new EU clients on the basis of their pre-Brexit authorisation status in the UK. This would give firms time to decide whether to establish new operations in the EU and seek and obtain the necessary authorisation within the relevant EU jurisdiction.

According to Article 46 of MiFIR, a third-country firm may provide investment services to *per se* professional clients and eligible counterparties without the establishment of a branch, subject to registration with ESMA, which itself is contingent on the existence of a positive equivalence determination in respect of the third-country jurisdiction. In the absence of a positive equivalence determination, existing national regimes remain unchanged. The adoption of an equivalence determination triggers the transitional provision of Article 54 of MiFIR according to which firms may continue to provide cross-border services under a national regime without seeking registration with ESMA for a period of three years.

In advance of Brexit, during the transition period, the UK should therefore seek a positive **equivalence determination** by the European Commission in respect of UK rules that derive from the existing MiFID2 framework, enabling UK alternative asset managers to benefit from the third-country registration regime of Article 46 of MiFIR.

The UK should also map the existing equivalence determinations that have been adopted at EU level in respect of non-EU jurisdictions, putting in place necessary UK-level determinations and cooperation agreements in respect of those non-EU jurisdictions to replicate what presently exists at EU level.

At the same time, the UK should apply the principle of unilateral openness in such a way that EU investment firms can continue to provide cross-border investment services into the UK in a manner consistent with their existing rights under MiFIR.

2.4 / EMIR

Practical Implications of Brexit

In its paper 'The Impact of a No-Deal Brexit on the Cleared Derivatives Industry'⁷, the FIA helpfully highlights the important role of equivalence and recognition in the context of the status of UK clearing infrastructure for EEA firms.

Similarly, Article 13 of EMIR provides a mechanism to avoid duplicative or conflicting rules, whereby counterparties entering into a transaction subject to EMIR shall be deemed to have fulfilled their EMIR obligations where at least one of the counterparties is established in an equivalent third country.

We have previously highlighted the fact that the application of this provision is not clear in a fund management context. Take, for example, the common example of an offshore (i.e. non-EU/EEA) fund with a UK investment manager. After Brexit, the investment manager will presumably be subject to UK rules replicating EMIR. However, given that EMIR's definitions of financial and non-financial counterparty attach to the investment fund, rather than to the investment manager, it is not clear that the offshore fund managed by the UK manager would be able to benefit from an equivalence determination in respect of UK rules, given that it is not "established" there (following the wording of Article 13 of EMIR).

In the extreme, this could lead to a situation where UK rules have been deemed equivalent by the European Commission, but UK investment managers are nonetheless unable to enter into OTC derivatives transactions with European brokers on behalf of the funds they manage without those funds being subjected to competing EU and UK rules. This reflects the fact that the funds themselves might not be established in the UK.

⁷ https://fia.org/sites/default/files/FIA_WP_Brexit_NoDeal.pdf.

Policy Solutions

The UK should therefore seek a positive **equivalence determination** in respect of UK rules that parallel EMIR, whilst also ensuring that the benefits of such an equivalence determination extend to entities “established in or subject to the rules of” the UK. This should occur during the **transition period**.

The UK should also map the existing equivalence determinations that have been adopted at EU level in respect of non-EU jurisdictions, putting in place necessary UK-level determinations and cooperation agreements in respect of those non-EU jurisdictions to replicate what presently exists at EU level.

3 / TRANSPOSING EU LAW TO RETAIN THE STATUS QUO (OR NOT)

3.1 / AIFMD

When the AIFMD was transposed in the UK, the transposition was split between the Alternative Investment Fund Managers Regulations 2013 (adopted by Parliament) (the ‘UK Regulations’) and the FCA handbook (split among FUND, SYSC, IPRU-INV, SUP and COBS), with some gaps in the direct transposition of the text where incorporation by reference was chosen instead. Several questions arise from this situation which will need to be addressed in order to maintain the pre-Brexit status quo.

- The UK Regulations contain references to AIFMD articles which have not been transposed in UK law. For example, see regulation 30(1) of the UK Regulations which discusses financial instruments “deemed to have been lost under Article 100 of the Commission Delegated Regulation [i.e., the Level 2 regulations under AIFMD].” This incorporation of Article 100 of the Commission Delegated Regulation by reference and other similar incorporations by reference would need to be rectified by fully transposing the relevant parts of the AIFMD and the related Commission Delegated Regulation in order to retain the pre-Brexit status quo.
- It is noteworthy that some of the articles at issue in the paragraph above are actually transposed in the FCA handbook. For example, in that same regulation 30(1) of the UK Regulations there is a reference to Article 21.8(a) of the AIFMD, which has been transposed into FUND 3.11.21 although the UK Regulations do not point to the FUND provision choosing to incorporate by reference instead. Even though these provisions have been fully transposed, it is potentially problematic when those provisions are referenced in the UK Regulations, which are in the form of legislation, as legislation should generally not reference an FCA handbook provision that may be changed in lieu of the primary legislation setting out the principal requirement itself. In the end, it may be advisable from a legal and good order perspective to spell out the full text of the provisions in the UK Regulations that have thus far only been transposed in the FCA handbook.

- Similarly, there are some portions of the Commission Delegated Regulation which were transposed in full text in the FCA handbook (see, e.g., FUND 3.10.9EU), while other parts were incorporated by reference only (see, e.g., FUND 3.10.13G). In order to retain the pre-Brexit status quo, those missing portions of the Commission Delegated Regulation may need to be transposed in full text in the FCA handbook or the UK Regulations.
- The UK Regulations also reference requirements of other EU Directives in various places. For example, the definition of professional investor in the UK Regulations which refers to Annex II of MiFID2. Those references potentially need to be replaced with the relevant equivalent UK provision, even if such provisions themselves need to be transposed to supply the relevant references, if the pre-Brexit status quo is to be maintained.
- The various EU level regulatory technical standards and guidelines may also need to be transposed as well.
- The references to AIFMD provisions within FUND should be changed to relevant references to the UK Regulations (as amended if necessary).
- Will the FCA be enforcing the requirements of AIFMD Articles 22-24, which are related to transparency reporting and are currently transposed at FUND 3.2-3.4, for AIFs marketed by UK AIFMs in the EEA? Presumably this would be up to the host member state not the FCA.
- Will the AIFMD Articles 26-30 provisions (currently transposed at Sections 35-43 of the UK Regulations) related to acquiring control of non-listed issuers in future apply only in respect of UK targets or also in respect of EEA targets?
- A decision will need to be made about fully transposing provisions in relation to ELTIF, EuSEF and EuVECA or simply deleting these references as one may question their relevance for UK firms going forward as they require an EEA entity.
- FUND contains conflicts of law/auto-modification provisions linked to EU law (FUND 1.1.2 and 1.1.3) which will need to be revised as the UK will no longer be subject to EU law.
- Systemic risk reporting requirements imposed by AIFMD Article 24(5) (and transposed at FUND 3.4.6) are made subject to ESMA's opinion related to this reporting (see FUND 3.4.6BR). Since the FCA will no longer be subject to ESMA requirements, serious consideration should be given to whether different positions should be taken.
- Following Brexit, will the FUND's Schedule 4 rule against waivers contradicting EU law be removed?
- Will the FCA take a different position on the need for cooperation agreements with non-EEA competent authorities than has been the case thus far?

A decision will also need to be made regarding AIFMD provisions applying to UK AIFMs managing UK AIFs to define the extent to which the full AIFMD requirements in the UK Regulations and the FCA Handbook will continue to apply to these entities, or whether the UK should adopt a possibly more flexible framework. For example, a non-exhaustive list of such questions and issues includes:

- Will the UK regime still require a depositary for UK AIFs managed by a UK AIFM?
- Even if the depositary is not required, would segregation provisions continue to be required in the same way?
- Will the UK still require a depositary for EEA AIFs managed by a UK AIFM? Presumably this would be for the EEA member state to require going forward.

Although the above focuses on the AIFMD, a similar exercise will also need to be carried out for each of the other asset management related directives and their respective Level 2 and Level 3 measures. Although changes to some or all of these requirements may provide post-Brexit flexibility for some UK firms, the further the requirements applicable to UK AIFMs seeking to access the EEA stray from the requirements applicable in the EEA, the more likely it is that those changes will lead to a negative assessment from ESMA which would foreclose the use of the third-country

passport for UK AIFMs, assuming such an option becomes potentially available in the future.

3.2 / EQUIVALENCE UNDER MIFIR AND EMIR

The legislative frameworks that underpin MiFIR and EMIR include Commission Implementing Decisions that address the equivalence of third-country jurisdictions. As a practical matter, the UK authorities will need to decide how to enact these decisions in UK law and how to address a potential future misalignment between the UK and EU's assessment of other jurisdictions.

- Will the UK authorities grandfather existing equivalence decisions made by the European Commission by incorporating them into UK legislation?
- Do the UK authorities anticipate developing a distinct equivalence process for future assessments of third-country jurisdictions?
- Do the UK authorities anticipate adopting a positive equivalence determination in respect of EU rules that would be effective from the date of withdrawal from the EU? Would the UK authorities adopt such a determination in the absence of a reciprocal determination by the European Commission?
- Do the UK authorities anticipate that they would maintain consistency with the EU when it comes to the list of jurisdictions that have been deemed equivalent? What process would be established to ensure that the UK adds or removes jurisdictions at the same time as the European Commission adopts or rescinds an equivalence determination?

3.3 / ALIGNMENT OF UK RULES WITH MIFIR AND EMIR PRODUCT SCOPE

Assuming the UK incorporates into UK law the delegated regulations that define which contracts are subject to the EMIR clearing obligation of Article 4 and MiFIR derivatives trading obligation of Article 28, the UK and EU will have a consistent approach to which products must be cleared and, where applicable, traded on a trading venue after the UK's withdrawal from the EU. However, divergence could arise over time in respect of the contracts that are subject to the mandatory clearing and trading obligations, potentially leading to dislocation of liquidity in certain products.

- Do the UK authorities anticipate that they would maintain consistency with the EU when it comes to the products subject to the mandatory clearing and trading obligations? What process would be established to ensure that the UK adds or removes products at the same time as the EU?

4 / POTENTIAL CHANGE TO UK LAW DEPENDING ON INTENDED LEVEL OF UNILATERAL OPENNESS

APPLICABILITY OF CERTAIN AIFMD REQUIREMENTS POST-BREXIT

When Brexit occurs, and regardless of whether there will be a transition period, the change of relationship between the UK and EEA member states will require decisions to be made in relation to AIFMD provisions for operations conducted on a cross-border basis (including marketing). These decisions will need to take into account whether or not reciprocity is achieved with other EEA member states. These decisions will then potentially result in further changes in the UK Regulations and the FCA Handbook. Some noteworthy policy issues and questions to be answered as part of that process include:

- Will EEA member states be third countries for purposes of the UK Regulations going forward, or will they continue to be treated as a separate category? If the answer is the former, all references to EEA member states, EEA AIFMs, EEA AIFs, etc. would simply be removed and could be substituted by “third-country” entities, where and if needed. If the latter, then serious thought will need to be given to the scope of what that special status will encompass and whether that special status will be granted even in the absence of full reciprocity from one or more EEA member states.
- There are a number of provisions of the UK Regulations that require the FCA to inform other EEA member state competent authorities about non-compliance by UK AIFMs in relation to EEA AIFs they manage (see, e.g., regulation 6(3)(c) of the UK Regulations). A decision will need to be taken about whether the FCA retains this responsibility as a matter of law as part of the UK Regulations or via bilateral cooperation agreements or at all.
- Will the UK still treat marketing in EEA member states as a “marketing” for purposes of the UK Regulations? Currently the UK Regulations regulate marketing undertaken by UK entities and the AIFMD requires this to facilitate enforcement of certain provisions regarding the marketing of AIFs in EEA member states.
- Many EEA AIFMs currently utilise the process under Article 32 of the AIFMD, as transposed into the FCA Handbook at FUND 3.12.5G, to market EEA AIFs they manage via the AIFMD passport in the UK. Depending on how the UK will consider these entities post-Brexit, will an EEA AIFM continue to be able to market EEA AIFs in the UK simply by making the notification to its own home member state competent authority following the existing passporting arrangements? If so, will this happen even without reciprocity? If not, under what conditions would EEA AIFMs be able to market EEA AIFs in the UK? Will this be different from the basis on which non-EEA AIFMs can market EEA AIFs in the UK? (See also Annex 1 for further questions on this topic in relation to technical matters).
- EEA AIFMs currently utilise the process under Article 36 of the AIFMD, as transposed into the UK Regulations in the form of a national private placement regime (‘NPPR’), to market in the UK (i) non-EEA AIFs and (ii) EEA feeder AIFs with non-EEA master funds that they manage. Unlike the NPPR that relates to non-EEA AIFMs, the Article 36 NPPR does not require a cooperation agreement and does not automatically give the FCA the ability to receive directly the disclosures required by Articles 22-24 of the AIFMD as those disclosures would be given to the EEA AIFM’s home member state competent authority in the normal course under those articles. Will EEA AIFMs continue to be able to market these types of funds in the UK by making the Article 36 type notification and without requiring the same types of reporting and cooperation currently in place for non-EEA AIFMs? If so, will this happen even without reciprocity? If not, under what conditions would EEA AIFMs be able to market EEA AIFs in the UK? Will this be different than the basis on which non-EEA AIFMs can market non-EEA AIFs in the UK? (see further questions on this topic in Annex 1 in relation to technical matters).
- Will the UK continue to require specific depositary functions for non-EEA AIFs managed by EEA AIFMs being marketed in the UK (as per FUND 3.11.33R)?

- Will the FCA share systemic risk information with the EEA member state competent authorities, ESMA and the ESRB (as, for example, called for in regulation 68(3) of the UK Regulations,) going forward either as a matter of course or pursuant to the terms of cooperation agreements? If so, will this happen even without reciprocity?
- Will the transposition of Articles 35 and 37-41 of the AIFMD, related to the EEA marketing and/or managing passport for non-EEA AIFMs, remain part of the UK Regulations? If so, will this happen even without reciprocity?
- Will the provisions under Articles 26-30 of the AIFMD related to acquiring control of non-listed issuers continue to be imposed by the UK on non-EEA AIFMs marketing under the UK NPPR?
- Will the FCA Handbook's FUND 10 provisions, related to cross-border management and/or marketing, continue to apply to incoming EEA AIFMs, or will they have to be amended according to the decisions that will be taken regarding the use of the passport by EEA AIFMs coming into the UK?
- FCA rule COBS 18.5.10A R requires a full-scope UK AIFM to provide certain additional disclosures when marketing to a retail client. Will this rule apply in future if a UK firm markets to an EEA retail client?
- At present, when an EEA firm exercises its cross-border marketing passport, the market view is that this covers not only its securities marketing activity (i.e., it exempts it from the financial promotion regime) but also any incidental transaction arrangement activity conducted on UK territory. Will an EEA firm in these circumstances require an authorisation in future?

ANNEX / TECHNICAL QUESTIONS ARISING FROM DEPARTURE FROM THE SINGLE MARKET

INBOUND AIFMD MARKETING

In the absence of an agreement for the UK to remain part of the single market, the UK is likely to become a third country for purposes of AIFMD either immediately upon Brexit or following a period of transition agreed between the UK and the EU. This will have a direct impact on EEA AIFMs marketing in the UK under current passporting and NPPR arrangements and on the UK investors already invested in these products. We have set out a non-exhaustive selection of technical questions that will arise in relation to EEA AIFMs needing to transition from one status to another and it would be helpful to have clarification on these matters from the FCA well in advance of Brexit to avoid confusion and additional costs or undesirable impacts for UK investors.

STATUS OF CURRENT ARTICLE 32 PASSPORTING NOTIFICATIONS FROM EEA AIFMS FOR EEA AIFS

If no agreement is reached between the UK and the EU, EEA AIFMs currently marketing in the UK via an Article 32 passporting notification will become third-country entities in UK law, or belong to a specific EEA entity category (depending on how the UK decides to consider them as discussed above). Assuming they do not get special categorisation, EEA AIFMs would no longer be able to use the Article 32 passporting notification process transposed at regulations 54-56 of the UK Regulations (the "Article 32 Regime"). Below are some technical questions arising in relation to such a scenario:

Deregistration from the relevant Article 32 Regime for EEA AIFMs in the UK

1. Will a formal deregistration notification be required for EEA AIFs no longer eligible to be marketed under the Article 32 Regime in the UK due to Brexit?
2. Assuming a formal deregistration notification is required:
 - 2.1. Is advance notice required?
 - 2.2. In what format should the deregistration notification be presented?
 - 2.3. What information should the deregistration notification contain?
 - 2.4. Should the deregistration notification be submitted via the FCA or directly to the home member state competent authority?
 - 2.5. When is the deadline for submission of the deregistration notification?
 - 2.6. What happens if an EEA AIFM with a registration under the Article 32 Regime does not file a deregistration notification?
3. Will a deregistration fee be payable?
 - 3.1. If a deregistration fee is payable, how much will it be?
 - 3.2. Where and by when must it be paid?
 - 3.3. What happens if the fee is not paid on time?
4. When will deregistration become effective?
5. If an EEA AIFM has paid an annual fee for the year of the deregistration, will it receive a pro rata refund? If so, will the refund be automatic or must a refund be applied for? If the latter, how should such application be made?
6. Does a local agent need to be appointed for a specific period post-deregistration?
 - 6.1. How long would such an agent need to be appointed for?
 - 6.2. What functions would the agent need to perform or stand ready to perform?
 - 6.3. Does the agreement with such agent need to be submitted to the FCA?
7. Will a final financial report and/or audited financial statements need to be filed with the FCA?
 - 7.1. If so, by when and covering what period?
 - 7.2. Where and how should these be submitted?
 - 7.3. Do the answers differ if:
 - 7.3.1. No investors from the UK ever invested in the AIF;
 - 7.3.2. Investors from the UK did invest in the AIF but all such investments were either (i) made pre-11 July 2013 or (ii) genuine reverse solicitations; or

- 7.3.3. No investments from investors from the UK were made following marketing in the UK after 11 July 2013?
8. Will any financial regulatory and/or systemic risk reports need to be filed with the FCA?
- 8.1. If so, by when and covering what period?
- 8.2. Where and how should these be submitted?
- 8.3. Do the answers differ if:
- 8.3.1. No investors from the UK ever invested in the AIF;
- 8.3.2. Investors from the UK did invest in the AIF but all such investments were either (i) made pre-11 July 2013 or (ii) genuine reverse solicitations; or
- 8.3.3. No investments from investors from the UK were made following marketing in the UK after 11 July 2013?
9. What records must be kept and for how long?
10. Do the answers to any of the questions above differ if:
- 10.1. The EEA AIFM concurrently registers under the private placement process envisioned in regulations 59-64 of the UK Regulations (the "UK NPPR process");
- 10.2. The EEA AIFM chooses not to register under the UK NPPR process; or
- 10.3. The UK NPPR process is not available due to a failure to have cooperation agreements in place with the EEA AIFM and its marketed AIF's home member states (unless the UK chooses to forgo the cooperation agreement requirements for use of the UK NPPR process in relation to EEA AIFMs)?
11. Assuming a formal registration will be required as part of the UK NPPR process:
- 12.1. Will there be any items from the NPPR registration process that EEA firms will not need to fulfil if they were previously passporting under Article 32 Regime?
- 12.2. What is the deadline for NPPR registration for firms transitioning from the Article 32 Regime?
- 12.3. Will it be possible for a registration application to be submitted in advance of the effective date of the deregistration from the Article 32 Regime becoming effective if the only deficiency in the application is that the cooperation agreement between the FCA and the EEA AIFM/AIF home member states are not yet in place (see the discussion of cooperation agreements below)?
- 12.4. Will the usual time periods for consideration of applications under the UK NPPR process apply with respect to EEA AIFMs and EEA AIFs previously notified under the Article 32 Regime?
- 12.5. Will NPPR registrations be allowed to be approved subject to the cooperation agreements between the FCA and the EEA AIFM/AIF home member states coming into effect?
- 12.6. Will an NPPR registration fee be payable? If so, will transitioning firms have the benefit of any annual fees paid previously under the Article 32 Regime which are not being refunded to them following Article 32 Regime deregistrations?
13. In respect of financial, regulatory and systemic risk reporting which would have been submitted via the EEA AIFM's home member state under the Article 32 regime, where reports cover a period that straddles the Article 32 Regime and the UK NPPR process, where and how should such reports be submitted?

Concurrent registration under an available UK NPPR process

11. If the EEA AIFM previously had a notification under the Article 32 Regime in place, is a formal registration required as part of the UK NPPR process?

No registration under the UK NPPR framework

14. If NPPR registration is not possible for EEA AIFMs as an alternative to the Article 32 Regime (due to lack of cooperation agreements or otherwise) for a limited period of time or at all, what is the position of UK investors in the EEA AIF during the period when the EEA AIFM was relying on the Article 32 Regime?
 - 14.1. Can such investors from the UK remain in the EEA AIF?
 - 14.2. If they can remain in the EEA AIF, can they make “top up” investments without that being considered marketing by the EEA AIFM?
 - 14.3. In such circumstances would financial, regulatory and systemic risk reporting obligations continue?
 - 14.3.1. Which reports would have to be filed?
 - 14.3.2. For how long?
 - 14.3.3. Where should such reports be submitted?
15. What records must be kept and for how long?
16. Would the answers to the above be different if the EEA AIFM instead chose not to register under the UK NPPR process because it does not intend to market in the UK following Brexit even though registration is technically possible? If so, in what ways?

STATUS OF CURRENT ARTICLE 36 NATIONAL PRIVATE PLACEMENT REGIME NOTIFICATIONS FROM EEA AIFMS REGARDING NON-EEA AIFS AND CERTAIN EEA FEEDER AIFS

If no agreement is reached between the UK and the EU, EEA AIFMs currently marketing in the UK via the NPPR notification process envisioned in Article 36 of the AIFMD and transposed in regulation 57 of the UK Regulations (the “Article 36 Regime”) might become third-country entities in UK law, or belong to a specific EEA entity category (depending on how the UK decides to consider them). These entities might therefore not be able any longer to use the notification process under the Article 36 Regime.

EEA AIFMs that today utilise the process under the Article 36 Regime to market (i) non-EEA AIFs and (ii) EEA feeder AIFs with non-EEA master funds that they manage in the UK will no longer be eligible to do so upon Brexit. Assuming the EEA AIFM becomes a third-country AIFM rather than having a special status in the UK going forward, the most obvious alternative would be the UK NPPR process. However, transitioning from the Article 36 Regime to the UK NPPR process will raise a number of questions for EEA AIFMs.

Deregistration from the relevant Article 36 NPPR by EEA AIFMs marketing in the UK

17. Will a formal deregistration notification be required for firms no longer eligible under the UK’s Article 36 Regime due to Brexit?
18. Assuming a formal deregistration notification is required:
 - 18.1. Is advance notice required?
 - 18.2. In what format should the deregistration notification be presented?
 - 18.3. What information should the deregistration notification contain?
 - 18.4. Where should the deregistration notice be submitted?
 - 18.5. When is deadline for submission of the deregistration notifications?
 - 18.6. What happens if an EEA AIFM with a registration under the Article 36 Regime does not file a deregistration notification?
19. Will a deregistration fee be payable?
 - 19.1. If a deregistration fee is payable, how much will it be?
 - 19.2. Where and by when must it be paid?
 - 19.3. What happens if the fee is not paid on time?
20. When will deregistration become effective?
21. If an EEA AIFM has paid an annual fee for the year of the deregistration, will it receive a pro rata refund? If so, will the refund be automatic or must it be applied for? If the latter, how should such application be made?

22. Does a local agent need to be appointed for a specific period post-deregistration?

22.1. How long would such an agent need to be appointed for?

22.2. What functions would the agent need to perform or stand ready to perform?

22.3. Does the agreement with such agent need to be submitted to the FCA?

23. Will a final financial report and/or audited financial statements need to be filed with the FCA?

23.1. If so, by when? And covering what period?

23.2. Where and how should these be submitted?

23.3. Do the answers differ if:

23.3.1. No investors from the UK ever invested in the AIF;

23.3.2. Investors from the UK did invest in the AIF but all such investments were either (i) made pre-11 July 2013 or (ii) genuine reverse solicitations; or

23.3.3. No investments from investors from the UK were made following marketing in the UK after 11 July 2013?

24. Will any financial regulatory and/or systemic risk reports need to be filed with the FCA?

24.1. If so, by when? And covering what period?

24.2. Where and how should these be submitted?

24.3. Do the answers differ if:

24.3.1. No investors from the UK ever invested in the AIF;

24.3.2. Investors from the UK did invest in the AIF but all such investments were either (i) made pre-11 July 2013 or (ii) genuine reverse solicitations; or

24.3.3. No investments from investors from the UK were made following marketing in the UK after 11 July 2013?

25. What records must be kept and for how long?

26. Do the answers to any of the questions above differ if:

26.1. The EEA AIFM concurrently registers under the UK NPPR process;

26.2. The EEA AIFM chooses not to register under the UK NPPR process; or

26.3. There is no available UK NPPR process available for the EEA AIFM due to a failure to have cooperation agreements in place?

Concurrent registration under an available Article 42 NPPR

27. If the EEA AIFM previously had a notification under the Article 36 Regime in place, is a formal NPPR registration required?

28. Assuming a formal registration under the UK NPPR process is required:

28.1. Will there be any items from the registration process that EEA firms will not need to do if they were previously registered under the Article 36 Regime?

28.2. What is the deadline for registration under the UK NPPR process for firms transitioning from the Article 36 Regime?

28.3. Will it be possible for a registration application to be submitted in advance of the effective date of the Article 36 Regime deregistration becoming effective if the only deficiency in the application is that the cooperation agreement between the FCA and the EEA AIFM/AIF's home member states is not yet in place (see the discussion of cooperation agreements below)?

28.4. Will the usual time periods for consideration of applications apply with respect to EEA AIFMs and non-EEA AIFs/EEA feeder AIFs previously registered under the Article 36 Regime?

28.5. Will registrations under the UK NPPR process be allowed to be approved subject to the cooperation agreements with the EEA AIFM/AIF's home member states coming into effect?

28.6. Will a registration fee under the UK NPPR process be payable? If so, will transitioning firms have the benefit of any annual fees paid previously under the Article 36 Regime which are not being refunded to them following Article 36 Regime deregistrations?

29. In respect of financial, regulatory and systemic risk reporting that would have been submitted via the EEA AIFM home member state's competent authority under the Article 36 Regime, where reports cover a period that straddles the Article 36 Regime and the UK NPPR process, where and how should such reports be submitted?

No registration under the UK NPPR framework

30. If a registration under the UK NPPR process is not possible (due to lack of cooperation agreements or otherwise) for a limited period of time or at all, what happens if there were UK investors in the non-EEA AIF/EU feeder AIF during the period when the EEA AIFM was relying on the Article 36 Regime?

30.1. Can such UK investors remain in the non-EEA AIF/EU feeder AIF?

30.2. If they can remain in the fund, can they make "top up" investments without that being considered marketing by the EEA AIFM?

30.3. In such circumstances would financial, regulatory and systemic risk reporting obligations continue?

30.3.1. Which reports would have to be filed?

30.3.2. For how long?

30.3.3. Where should such reports be submitted?

31. What records must be kept and for how long?

32. Would the answers to the above be different if the EEA AIFM instead chose not to register under the UK NPPR process because it does not intend to market in that host member state following Brexit even though registration is technically possible? If so, in what ways?

Outbound delegation arrangements

33. Will any outbound delegation arrangements a UK AIFM currently has in place with EEA entities be allowed to survive Brexit if the applicable cooperation agreements are not in place at time of Brexit and:

33.1. It will be just a matter of time before new cooperation agreements are in place; or

33.2. Cooperation agreements are not put in place?

Status of UK firms and EEA firms as either Financial Counterparties or Non-Financial Counterparties

34. Will the status of UK firms and EEA firms as either Financial Counterparties or Non-Financial Counterparties and similar scope classifications which would arise under EMIR and SFTR continue to depend on the status of an AIFM and/or an AIF as either an EEA or non-EEA AIFM and/or AIF?

APPLICABILITY OF CERTAIN UCITS REQUIREMENTS POST-BREXIT

A UK review of the current application of AIFMD would not cover UCITS and would leave the following questions unanswered:

- Will a UK UCITS become a residual CIS, an AIF or another type of entity? Adequate transition periods will need to apply if they will become AIFs or residual CIS. If UK UCITS will become neither AIFs nor residual CIS, any third option will need to be defined and relevant cross references and subsidiary provisions in the FUND handbook subsequently updated.
- Will a UK UCITS management company become a residual CIS operator or an AIFM or another type of entity? Adequate transition periods will need to apply if it becomes an AIFM or residual CIS operator. If a UK UCITS management company becomes neither an AIFM nor a residual CIS operator, any third option will need to be defined and relevant cross references and subsidiary provisions in the FUND Sourcebook subsequently updated.

- Will EU UCITS be permitted to market to UK investors (retail and professional) post-Brexit and if so on what terms, as the rights and obligations under the UCITS Directive will no longer include the FCA? The continued ability to sell UCITS to retail investors in the UK with limited FCA intervention will likely be a condition to the UK being accepted into the third-country passporting regime under AIFMD if past decisions of ESMA in this regard are a guide to future thinking from ESMA.
- It will be necessary to consider the impact of the UCITS guidelines on the exposures of credit institutions to credit funds/non-bank lenders. The exposures of an EEA credit institution to a UK retail fund (formerly categorised as a UCITS) might need to be treated as an exposure to a shadow banking entity. What about an exposure of a UK bank to such a fund?

OTHER

Will the Multilateral Memorandum of Understanding (ESMA/2014/608) between the UK FCA and the other EEA competent authorities (the MMOU) automatically fall away upon Brexit? Article 12 contains a termination provision but there is no express provision about the MMOU terminating when a member state leaves the EU.

