



AIMA Brexit Update

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1 AIMA Updates

AIMA Paper “Brexit and Alternative Investment Managers – Managing the impact in the EEA” (July 2018):

AIMA has published an EU specific Brexit paper: [Brexit and Alternative Asset Managers – Managing the impact in the EEA](#). The paper is complementary to the UK focused paper AIMA published in April and is intended to highlight AIMA’s practical questions, concerns and recommendations for the EU and its supervisory authorities to ensure a smooth path to any eventual future arrangement. The paper includes recommendations to: prioritise cooperation agreements with the UK and EEA member states prior to the UK’s withdrawal next March, with a standardised process led by ESMA; ensure any transition period agreed is used to adopt equivalence determinations in relation to the UK’s financial services rulebook and to ensure status changes of regulated firms are completed smoothly; and ensure that EEA investors’ existing relationships with UK firms can continue uninterrupted by Brexit. The paper also sets out a series of examples from pieces of EU secondary legislation where cross-border issues may exist, and a set of technical questions that need to be addressed for firms which may require re-registration post-Brexit, presuming the UK leaves the single market.

AIMA Briefing on “UK legislative approach to Brexit implementation” (July 2018):

AIMA has published a short [briefing](#) on the current stage and future intentions of the UK government and HM Treasury to making the requisite legislative changes necessary to give effect to Brexit and ensure financial services rules function post-March 2019. Now that the European Union (Withdrawal) Act 2018 has been given royal assent, a significant amount of secondary legislation will be published and finalised by the end of the year. The UK is targeting an “implementation period” ending 30 December 2020, with UK inbound firms able to plan on the assumption that they will not require an authorisation before this date.

2 UK Updates

Draft Temporary Permissions Regime for financial firms and CCPs (July 2018):

The FCA and Bank of England have published more detail how the Temporary Permissions Regime (TPR) will work for EEA inbound firms and CCPs following the UK’s departure from the EU. The TPR for FCA jurisdiction firms will allow inbound financial firms to continue operating in the UK within the scope of their current permissions and to be given a permission under Part 4A of FSMA 2000 for a limited period after exit day, while seeking full UK authorisation. It will also allow funds with a passport to continue temporarily marketing in the UK. The details, among other things, cover how FCA rules are proposed to be applied, and also a draft Statutory Instrument for the [amendment of EEA Passport Rights](#). The FCA’s starting point is to apply FCA Handbook rules and guidance which currently apply to the EEA firm, all FCA Handbook rules which implement a requirement that is currently reserved to the home state, and certain additional FCA rules for consumer protection. The notification process is anticipated to work in a similar way for investment funds, with fund managers notifying which funds they want to continue to market in the UK. The FCA will consult in earnest in the Autumn on its rules and fees during the TPR, which is anticipated to be in place for a maximum of three years. Final rules and a Policy Statement will be published early next year.

DExEU White Paper on Legislating for the Withdrawal Agreement (July 2018):

The UK Department for Exiting the EU has published a White Paper on [Legislating for the Withdrawal Agreement between the United Kingdom and the EU](#). This White Paper is separate to the White Paper published following the Chequers agreement for the UK's future relationship with the EU, and sets out the UK Government's early expectations for the EU (Withdrawal Agreement) Bill. It confirms the approach that the new legal order will be account for the future relationship, although states that it is responsible to step up preparations for a range of potential outcomes, including the possibility of no-deal. In particular, the Government will continue to bring forward legislation to account for a no-deal outcome. Key areas covered by the White Paper include:

- **citizens' rights** – confirms the agreement for the current status of citizens to remain unchanged in the UK before the end of the implementation period. This will be independently monitored. The White Paper sets out the legislative approach required to implement the agreement, including: rights related to residence; equal treatment; mutual recognition of qualifications; coordination of social security systems; and protections for rights and monitoring authority. A primary, rather than secondary, legislative approach is envisaged here. It notes that these rights do not prejudice the British and Irish Common Travel Area which pre-date the UK's membership of the EU. Arrangements are also due to be concluded regarding Norwegian, Icelandic, Liechtensteiner and Swiss nationals.
- **the implementation period** – confirming the preservation of the status quo until 31 December 2020. The White Paper provides legislative details relating to: the duration and scope of the implementation period; UK's relationship to EU law; governance, enforcement and safeguards; institutional arrangements, including participation in EU institutions; external action and international agreements; fishing opportunities; and justice, home affairs and foreign and security cooperation arrangements. The White Paper stresses that both UK and EU have agreed an obligation of Good Faith through the application of the Withdrawal Agreement.
- **the negotiated financial settlement** – confirming that the financial settlement has been agreed in the context of agreeing an implementation period and the framework for a future relationship, to be published and finalised contemporaneously with the Withdrawal Agreement. The White paper covers: the scope of the settlement; its underlying principles; its components; the process for making payments; and provisions in the Withdrawal Agreement Bill. Among other things, it states that the settlement excludes any costs associated with the UK's future relationship with the EU, indirect costs of the UK's withdrawal or the relocation of EU bodies.
- **procedures for approval and implementation of the Withdrawal Agreement and future relationship framework** – setting out the government's intention to give domestic legal effect to the agreement and the process by which Parliament will be asked to approve it. It covers: sequencing; approval of the final deal; EU (Withdrawal Agreement) Bill; Constitutional Reform and Governance Act; and ratification process. It calls for an explicit commitment by both parties to finalise the agreements for the future relationship as soon as possible once the UK has left the EU in March 2019, bearing in mind the inability for the EU to conclude legal agreements on the future relationship until then.

DExEU welcome feedback on the white paper.

FCA speech and statement on "Preparing your firm for Brexit" (July 2018):

On 19 July Nausicaa Delfas, FCA Executive Director of International, gave a [speech](#) on the FCA's current preparations for Brexit, its expectations from firms, and its future vision going forward.

The FCA's starting assumption is that a transition period will be agreed to last until December 2020, however it is also preparing for a no-deal Brexit to ensure that business on day one is able to function. It identifies that cliff edge risks exist in contract continuity in insurance and derivatives (although see Commission communication below) and that unilateral approaches are being prepared by the UK to ensure legal and regulatory continuity post-Brexit. The FCA has been considering changes to its rulebook to remove deficiencies as per the Withdrawal Act and will consult in the Autumn. The FCA is also working on the UK Temporary Permissions Regime which would enable inbound EEA firms to continue without a UK authorisation at this stage.

The FCA would nonetheless prefer a bilateral solution with the EU – noting that it is participating in a technical group set up by Bank of England and the ECB, taking account of Brexit risks.

FCA expectations for firms creating EU entities include that any new EU structures must ensure that the FCA can supervise the UK business effectively and that, if relocating senior management, appropriate senior oversight remains in the UK. The FCA has also updated its statement on [Preparing your firm for Brexit](#), which is intended to help UK and EEA financial firms understand whether they will be affected by Brexit and to: (i) work out what changes might be required, including additional regulatory permissions; (ii) think about information that may need to be provided to customers; (iii) consider the implications of the range of potential scenarios; and (iv) discuss the implications with the relevant EEA regulator, trade association and/or external counsel. The statement also sets out various additional issues of which firms should be aware, such as the [implementation period](#), [changes to legislation](#) in the UK and next steps in the Brexit process.

The FCA's future vision recognises short term challenges, however it considers that fundamentals are there to enable a close relationship with EU counterparts over the long term. These fundamentals include day-one equivalence of the rule sets (in the literal sense, even if not the political sense). The FCA considers that financial services arrangements are possible, based on the five principles of: (i) cross border market access; (ii) consistent global standards; (iii) cooperation; (iv) influence over standards; (v) and, maintaining a skilled workforce. Even if EU and UK rulebooks diverge, the FCA notes the real goal should be for common outcomes to be achieved – the “destination” and not the “road” taken – which should determine respective levels of market access. The FCA also intends to retain its global involvement and outlook.

UK Government White Paper on the Future Relationship (July 2018):

On 12 July, following its Cabinet meeting in Chequers, the UK Government published its White Paper [“The Future Relationship Between the UK and the EU”](#) setting out the UK's negotiating position for the future economic, social and security relationship between the UK and EU. Its contents have proved controversial amongst leave supporters, with the high-profile resignations of cabinet members David Davis and Boris Johnson.

The White Paper represents a material step down from the previous UK negotiating position, for example there is no longer any request for mutual recognition for financial services. It is clear that this pragmatism was intended to facilitate a faster deal – intended to be struck by the Autumn – thus demonstrating that the Government does not wish negotiations to end with a “no-deal” Brexit. However, following its publication, four amendments were accepted in Parliament to the Customs Bill intended by leave supporting MPs which could prove fatal to elements of the White Paper, including the facilitated customs arrangement. This is in addition to the rejection of many elements articulated by Michel Barnier (detailed below) which could render the White Paper officially dead.

The White Paper confirms the UK will depart from the Single Market and Customs Union, as well as the Common Agricultural Policy and the Common Fisheries Policy. It also confirms the end of free movement of persons, EU budget contributions and the jurisdiction of the European Court of Justice in the UK. It will nonetheless seek to preserve cooperation in science and international development and meet the commitments made to Northern Ireland.

Key areas covered by the White Paper include:

- **Free trade in goods and Facilitated Customs Agreement** - including a free trade area and common rulebook to preserve frictionless trade in goods although The White Paper justifies this by highlighting the greater regulatory flexibility necessary in the space of services and digital. It discounts the idea that a tailored approach is impossible. The White Paper seeks the phased introduction of a “Facilitated Customs Arrangement” where the UK collects tariffs on behalf of the EU for third-country goods destined for the EU, and also a set of binding provisions relating to open and fair competition and non-regression in employment and environmental standards.
- **Services relationship based on enhanced equivalence** – In a controversial move among many in the City, the White Paper accepts that “the UK and the EU will not have current levels of access to each other's markets in the future” in services and digital, and seeks to use a bilateral framework of treaty-based commitments to

underpin the operation of the services relationship. The White Paper notes that the decision on whether and on what terms the UK should have access to the EU's markets will be a matter for the EU, and vice versa. However, it states that a coordinated approach leading to compatible regulation is also essential for promoting financial stability and avoiding regulatory arbitrage.

The White Paper drops the UK request for mutual recognition and instead pursues an enhanced equivalence model. Consistent with the concerns elaborated by the UK financial services sector, the White Paper indicates that the current equivalence provisions in existing EU legislation are not sufficient due to the lack of any legal consistency in the granting/ withdrawal of equivalence. It notes the need for common principles for governance, extensive supervisory cooperation/dialogue and predictable, transparent and robust processes; the UK believes at the start of the new relationship there should be reciprocal UK/EU equivalence under all existing third country regimes.

Regarding services more generally, the White Paper also recommends general principles to minimise the introduction of discriminatory and non-discriminatory barriers to establishment, investment and the cross-border provision of services – with barriers only permitted where agreed up-front. The White Paper also recommends the mutual recognition of professional qualifications and beneficial arrangements for professional and business services.

- a **partnership covering the breadth of security interests**, including foreign policy, defence, development, law enforcement and criminal justice.
- cross-cutting provisions to **support ongoing cooperation in data protection**, classified information, cooperative accords and fishing opportunities.
- **institutional cooperation arrangements** to ensure that the relationship is practical and flexible, managed effectively, and has robust dispute resolution and accountability.

The UK Brexit negotiating team will now proceed on the basis of this White Paper to attempt to conclude negotiations this Autumn on both the Withdrawal Agreement and future relationship – the UK reassert that both form part of a package and that nothing is agreed until everything is agreed. The agreement would then pass to both the UK and EU parliaments for debate and approval. It is noteworthy that the Prime Minister's office has acted to remove powers from the Department for Exiting the EU, and to essentially take responsibility for the negotiations – which will be placed largely into the hands of her chief Europe adviser, Oly Robbins. Whether this will change the outcome of negotiations remains to be seen.

HM Treasury paper on its approach to Brexit (July 2018):

HM Treasury has set out its approach to the grandfathering of EU27 businesses on Brexit and how existing EU financial services directives and regulations are to be adopted into U.K. law at the moment of Brexit (“onshoring”). The [report](#) covers: the implementation period; the EU (Withdrawal Act) and financial services contingency preparations; HM Treasury's approach to fixing deficiencies; split of responsibilities between HM Treasury and other regulators; and relevant next steps. Please see also the [AIMA briefing](#) on the UK legislative approach to implementing Brexit.

3 EU Updates

Michel Barnier response to UK White Paper on the future relationship:

On 20 July, Michel Barnier, the EU's chief Brexit negotiator issued a [statement](#) in response to the UK's White Paper for the future UK/EU relationship. Despite the material shift in the UK position from the perspective of UK MPs, it is clear that the European Commission will still seek further material concessions. The statement is highly critical of the majority of the White Paper's proposals. Mr Barnier's statement, in addition to his subsequent dismissal of the Facilitated Customs Arrangement, introduces EU red lines requiring the full UK alignment of rules and zero

tolerance of additional customs processes that, in practice, will require the UK to either pursue a full EEA Single Market/Customs Union model or accept no deal.

Bearing in mind the controversial nature of the UK White Paper amongst UK MPs, it is increasingly unlikely that an acceptable deal will be reached on the future relationship, thus the withdrawal agreement and transitional measures, by the October Council. A no-deal scenario is becoming the most likely outcome on 29 March 2019.

European Commission Communication on Brexit (July 2018):

On 19 July, the European Commission published a [Communication](#) on the ongoing preparedness work undertaken so far and notes challenges going forward – using the examples of deal or no-deal scenarios. It is clear that the possibility of a no-deal scenario is looming, thus the Commission notes that preparation must be stepped up immediately at all levels and taking into account all possible outcomes – ensuring both “preparedness measures” and “contingency planning”. Private business operators must take responsibility for their individual situations. In particular, the Communication recommends that firms which may need to exchange a UK certificate for an EU27 issued one should take the necessary action.

On financial services preparedness and contractual continuity, the Commission notes that “there does not appear to be an issue of general nature linked to contract continuity as in principle, even after withdrawal, the performance of existing obligations can continue. However, every type of contract needs to be looked at separately”. This appears to follow the logic that contractual property rights will not be influenced unless specific bespoke clauses are included.

ESMA Public statement on requests for authorisation (July 2018):

On 12 July, ESMA issued a [public statement](#) to raise awareness of market participants of a no-deal scenario upon Brexit and pushing UK firms to submit requests for authorisations from NCAs in the EU27 and ESMA for regulated entities that intend to relocate. It is suggested that some NCAs have been clear that unless an application is received by June/July 2018, there is no guarantee that authorisation will be achievable before 29 March 2019.

European Council adopt conclusions on Art.50 (June 2018):

The European Council adopted conclusions on the Brexit negotiations at its meeting on 29 June 2018. The [conclusions](#) welcomed further progress made on parts of the Withdrawal Agreement, but noted that other important aspects still need to be agreed. Among other things, the conclusions express the European Council's views on: agreeing a backstop solution for Northern Ireland; and preparing a political declaration on the framework for the future relationship. It is intended that the next Council in October will need to solve all outstanding problems to avoid no deal being reached, including Northern Ireland, governance and the future relationship.

If you have any follow-up questions or comments, please do let me know (orobinson@aima.org).