



CLEVELAND & COTM
External in-house counsel

BREXIT UPDATES

February 2019

With less than two months to go until the UK leaves the EU, there has been a lot of recent Brexit related developments in the financial services industry, some of which we look at below.

THE TEMPORARY PERMISSIONS REGIME

UK Financial Conduct Authority (“**FCA**”) has pushed ahead with its “no deal” planning and has opened its Temporary Permissions Regime (“**TPR**”) notification window to EEA asset management firms and to investment funds marketing in the UK. The TPR will allow firms currently passporting into the UK to continue new and existing regulated business within the scope of their current permissions in the UK for a limited period, while they seek full FCA authorisation, if the UK leaves the EU on “exit day” (11pm on 29 March 2019) without an implementation period in place. It will also allow certain funds to continue temporarily marketing in the UK on the basis of current European marketing passports and rights, with no need for a hiatus before they are able to comply with UK marketing regimes.

The FCA has said that firms should not wait for confirmation of whether there will be an implementation period before they submit their TPR notification, as firms and investment funds that have not submitted a notification within the notification window will not be able to use the regime.

All notifications must be made by the FCA’s Connect online system. The FCA has published a guide for the Connect online system available [here](#).

The notification window remains open until 28 March 2019. There will not be a fee for making a notification under the TPR.

THE FINANCIAL SERVICES CONTRACTS REGIME REGULATIONS

On 8 January 2019, the FCA published a consultation paper, CP19/2, which sets out details of the financial services contracts regime (“**FSCR**”) and the rules the FCA proposes should apply to firms during the regime. The consultation closed on 29 January 2019.

The FSCR Regulations aim to further reduce the risk of harm associated with an abrupt loss of permission on exit day. This ensures that EEA passporting firms can still fulfil their existing contractual obligations in the UK for a limited period of time, even if they are outside the TPR following the UK’s withdrawal from the EU, provided that firms must satisfy the conditions of the FSCR. This legislation will be relevant for those EEA firms which passport into the UK to carry on a regulated activity who fail to notify the FCA that they wish to enter the TPR or are unsuccessful in securing authorisation at the end of it, but still have regulated business in the UK to run off.

Firms will fall into one of two categories under the FSCR: being supervised run-off (“**SRO**”) for EEA firms with UK branches or top-up permissions in the UK, and firms who entered the temporary permissions regime but did not secure a UK authorisation at the end, and contractual run-off (“**CRO**”) for remaining incoming services firms.

The SRO will apply to the following firms:

- firms currently operating in the UK via a branch;
- firms who enter the TPR but exit without securing full UK authorisation; and
- firms that currently hold top-up permissions.

As it is the case for firms in the TPR, SRO firms will be deemed to have Part 4A permission for carrying out activities within the scope of their passport as at exit day, to the extent necessary to continue to service pre-existing contracts in the UK. Unlike the TPR, no notification is required for this deemed permission to arise; it will apply automatically. Details of SRO firms will be shown on the Financial Services Register.

The FCA's powers over SRO firms under FSMA will continue to apply; however, the FCA will also cover certain matters which were previously handled by the firms' home state. In addition, SRO firms will be required to maintain their home-state authorisation in order to benefit from the regime.

The CRO will apply to firms operating in the UK solely on a services basis (i.e. without a UK branch) that do not enter the TPR and have pre-existing contracts in the UK which would otherwise require a permission in order to service.

CRO firms will be treated as exempt persons and will not be UK authorised. Similarly to the SRO, this exempt status will allow firms to perform regulated activities within the scope of their passport as at exit day to the extent necessary to continue to service pre-existing contracts in the UK after exit day.

The FSCR will apply for a maximum of 5 years for all contracts, except for insurance contracts which will have a maximum of 15 years. The Treasury may extend these periods, if necessary, based on a joint assessment by the FCA and the PRA.

THE FINANCIAL SERVICES AND MARKETS ACT 2000 (AMENDMENT EU EXIT) REGULATIONS

At the end of 2018, HM Treasury has published a draft version of the Financial Services and Markets Act 2000 (Amendment EU Exit) Regulations 2019 (the “**SI**”). The SI makes a number of amendments to the Financial Services and Markets Act 2000 (“**FSMA**”) to ensure that the financial services framework continues to operate effectively once the UK leaves the EU, in any scenario. However, the SI is not intended to make substantive policy changes. The amendments to FSMA are set out in part 2 of the Regulations; with regard to FSMA, HM Treasury has highlighted particularly that amendments are being made to:

- regulated and prohibited activities (Part 2);
- permission to carry on regulated activities (Part 4A);
- performance of regulated activities (Part 5);
- control of business transfers (Part 7);
- control over authorised persons (Part 12); and
- provision of financial services by members of the professions (Part 20).

Please click [here](#) to view the explanatory information and the draft instrument.

TEMPORARY PERMISSION REGIME PUBLISHED IN THE NETHERLANDS

An amendment to current Dutch legislation was published on 4 February 2019 which allows investment firms from the United Kingdom to continue to provide investment services to professional clients in the Netherlands in a no-deal Brexit scenario.

Under an existing third country exemption regime (following from article 10 Exemption Regulation FSA) investment firms based in Australia, the United States of America and Switzerland are exempted from the MiFID licence obligation if they (i) exclusively

provide investment services to per se professional clients or deal on own account; and (ii) are subject to regulatory supervision in their home state.

This regime is amended to temporarily expand the exemption to investment firms based in the UK. The Dutch temporary permission regime ("**Dutch TPR**") will enter into effect if and when the UK leaves the European Union without a deal and it is expected to last until 01 January 2021.

The Dutch TPR is relevant for investment firms with their registered office in the UK that wish to continue providing investment services to per se professional clients or dealing on their own account in the Netherlands post-Brexit. The Dutch TPR is also of interest to Dutch firms being serviced by UK investment firms as it avoids disruption of current servicing.

If firms wish to pursue this option, they should submit a notification form to the Netherlands Authority for the Financial Markets.

NEXT STEPS

To view our previous article on the impact of Brexit on financial services, please click [here](#). To view our previous article on the FCA's temporary permission regime, please click [here](#).

For more information on or any guidance or advice on Brexit or in drafting your commercial contracts for Brexit, Cleveland & Co external in-house counsel, your specialist outsourced legal team are here to help.



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