

Impact of Brexit on financial services

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IMPACT OF BREXIT ON FINANCIAL SERVICES

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INTRODUCTION

This newsletter will primarily look at the impact of Brexit on the financial services industry and provide practical steps for firms to take to mitigate their Brexit risk. This newsletter will also examine the impact of Brexit on commercial contracts more generally as well as intellectual property.

Brexit is scheduled to happen on 29 March 2019, and the first day of trading post-Brexit is 1 April 2019, the ominous April Fool's Day. The UK and the EU have agreed the terms of an implementation period that will start on 29 March 2019 and last until 31 December 2020.

A recently published explanatory memorandum to the draft Bank of England (Amendment) (EU Exit) Regulations 2018 continues the government's desire to ensure that the constitution, responsibilities and functions of the Bank of England continue to be clearly defined after exit day in a no-deal scenario and addresses deficiencies in UK domestic law arising from the UK's withdrawal from the EU.

The current financial services regime allows a firm authorised in an European Economic Area ("**EEA**") state to carry on activities that it has permission for in its home state, as well as any other EEA state by 1) either establishing a branch or agents in an EEA country or 2) providing cross-border services. This is known as 'passporting'.

The activities that are 'passportable' are set out in the relevant EU single market directives, and in particular the:

- Capital Requirements Directive (2013/36/EU);
- Solvency II Directive (2009/138/EC)
- Insurance Distribution Directive (EU 2016/97);
- Markets in Financial Instruments Directive, "**MiFID**", (2004/39/EC)

If a firm wishes to carry out activities that are not passportable under an EU single market directive, it must contact the relevant competent authority of the host state to determine whether direct authorisation is needed.

Passporting rights only apply within the EEA, so they do not, for example, apply in the Channel Islands or Isle of Man. Switzerland is not an EEA state, but Swiss general insurers have the right to set up an establishment in the EEA under special bilateral treaties between the EU and Switzerland. EEA general insurers also have equivalent rights in Switzerland under these treaties. Special arrangements also apply to Gibraltar.

On the other hand, for non-EU countries the EU may recognise that their regulatory or supervisory regime is equivalent to the corresponding EU regime ("the equivalence status"). This brings benefits to both parties, as:

- it allows authorities in the EU to rely on supervised entities' compliance with equivalent rules in a non-EU country;
- it reduces or even eliminates overlaps in compliance requirements for both EU and foreign market players;
- it makes certain services, products or activities of non-EU companies acceptable for regulatory purposes in the EU; and
- it allows the less burdensome prudential regime to apply to EU banks and other financial institutions with exposures in equivalent non-EU countries.

However, this system falls short of the full potential of the “passporting rights”, as examined further below.

The key provision for the financial services sector is the proposed transitional period, during which the UK would remain inside the Single Market after it leaves the EU. There were some press reports that the final UK/EU negotiations were likely to agree a mechanism in the withdrawal agreement for extending the transitional period beyond 31 December 2020.

On 1 November 2018 it was reported that a tentative agreement has been reached between the UK and the EU to allow UK financial services firms to continue to provide services into Europe post-transition period. It was further reported that this arrangement would be based on ‘equivalence’.

However, as things stand now, there is still no favourable outcome of political negotiations between the EU and the UK for the financial services sector, with particular regard to either passporting rights and/or equivalence status for UK firms.

This is still true as news has recently broke that the UK government and the European Union negotiators have reached an agreement on the draft of the UK Withdrawal Agreement (the “**UK-EU Draft**”). In fact, that draft is still subject to approval and potential amendments or even rejection by the UK and the EU Parliament, and by each EU member state. .

Accordingly, this article is based on the assumptions that there of a no deal for the UK financial services; as such, “Third country” financial services access arrangements will not be immediately available to the UK on leaving the EU.

These assumptions may require revision, as new information emerges from the UK/EU negotiations, on the UK-EU Draft and the regulatory approach to Brexit continues to evolve. We will publish follow ups to this newsletter as substantial updates arise.

Key findings

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I. PASSPORTS AND THE UK TEMPORARY PERMISSION REGIME FOR FINANCIAL FIRM

a) Temporary permission regime

The FCA has published a blueprint, highlighting how it would issue temporary authorisations for EU financial firms currently operating in the UK.

In the event of a no-deal Brexit, where an EEA firm or an EEA investment fund exercises a passport or treaty right which covers certain regulated activities, the FCA proposed that that firm or fund would be able to apply for a temporary permission to undertake all those regulated activities for a maximum of three years from exit day. The application window would open in early 2019 and close before exit day.

Each firm or fund within the temporary permission regime ("TPR") would then be assigned a three-month "landing slot" in which to apply for authorisation or submit an application / notification for recognition. The first landing slot is expected to be from October to December 2019. The FCA would apply a tailored set of rules to the firms and funds within this regime

b) A success?

The FCA revealed that around 1,300 EU firms with activities in Britain would be willing to sign up to its proposal.

This is a welcome initiative by the FCA, providing clarity on the regulatory regime in the event of a no-deal Brexit.

In a recent explanatory memorandum published by the UK government, the volume of applications for UK authorisation received by the PRA and the FCA is expected to increase significantly since the EEA firms that currently carry out business in the UK via an EEA financial services passport will have to submit applications for domestic authorisation if they wish to continue operating in the UK. The volume of applications, some of which are expected from firms that already have a substantial and complex UK presence, will be unprecedented, and there is a significant risk that applications cannot be processed ahead of the date the UK will leave the EU. Additionally, many EEA firms that wish to continue operating in the UK will require more time beyond exit day in which to prepare for and submit applications for UK authorisation, and to complete any required restructuring as part of that authorisation process. Therefore, EEA firms and funds which passport into the UK and wish to enter the TPR need to prepare now to notify the FCA.

The recently published EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 (SI/2018/1149) ("**Regulations**") state that a firm's temporary permissions will end as soon as it becomes fully UK authorised or it receives a negative determination on its application. Firms that do not submit an application by the allotted deadline or firms that withdraw their application without submitting another may have their temporary

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What is unclear is why fewer than 20% of the 8,000 EU entities which hold a passport are currently willing to enter the temporary regime. Whilst many EU entities may have multiple passports, the FCA does not know what impact this may have on the number of EU firms and funds which apply for temporary permission.

c) A closer look at equivalence

The implementation of MiFID II means that financial institutions in non-EEA states have the right to use a modified version of the MiFID passport to offer their services in the EEA, provided that their home jurisdiction is deemed MiFID equivalent. This equivalence approach for financial services has been used widely for third-countries outside of the Single Market (in particular Japan, the USA and Canada). However, there are a number of limitations that make it a less than perfect alternative to passporting rights.

For example, rather than cover all types of financial services, equivalence is available only in the 15 EU acts that contain “third-country provisions”. It is in these instances that the EU can decide on equivalence. Importantly, there is no equivalence regime for a number of important financial services (as mentioned above). Further, the conditions for equivalency depend on the particular EU act. This means there is no uniform process of assessment and what constitutes equivalence varies. Thirdly, the process for designation can be a slow, one-sided system so there is no guarantee as to how quickly the equivalence decision will be granted to the UK.

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permissions cancelled by the PRA or the FCA. Provision will be made for them to wind down their UK regulated activities, including any outstanding contractual obligations, in an orderly manner in a separate statutory instrument, to be laid before parliament at a later date.

However, the EU has not offered a similar system of temporary permits for the 5,500 UK firms which currently use passports to do business in the EU. These UK firms and fund managers must continue to prepare for a hard Brexit in March 2019.

The EU has, in the past, imposed conditions for equivalence, for example the on-going equivalence recognition of the Swiss stock market will be conditional on progress towards a new institutional framework, so this is something to be aware of.

The EU may grant and, more importantly, withdraw equivalence in some financial services autonomously, so firms should be aware of this and should think about having a ‘Plan B’ in place in the event that the EU withdraws its equivalence decision further down the line.

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II. DERIVATIVES

d) Risks for the market

Brexit could potentially impact £29tn of existing cross-border derivatives contracts. The Bank of England has issued a warning that “Material risks remain”.

The loss of EU financial passporting rights in the eventuality of a hard Brexit will have implications for cross-border OTC derivatives contracts between UK and EU-27 firms and their EU-27 and UK clients and counterparties respectively, where those firms currently rely on an EU passport to trade cross-border in the EU-27 or the UK. Similar issues may also arise in relation to OTC derivatives contracts between some EU-27 firms operating through a branch in the UK and their EU-27 clients and counterparties to the extent that the EU passport is no longer available in relation to continuing activities of the UK branches after Brexit.

In the context of Brexit, contractual continuity relates to existing transactions and refers to both:

- the ability to perform contractual obligations agreed under existing transactions; and
- the ability to perform other important lifecycle events (including risk management activities) for such transactions, which are important both to regulators (EMIR RTS mandate market participants to seek to engage in portfolio compression exercises, for example) and market participants.

Firms which have significant derivatives trades have to make decisions on how they want to deal with past transactions, as well as with new transactions to be entered into.

If firms have not yet planned a re-papering strategy or haven't started, it is time to start, as any of the suggested options will take time, so there is the need to plan accordingly:

- a Part VII Scheme application will take time, so it is time to start planning it, if it is the preferred choice;
- bilateral novations could trigger a new repapering exercise, and as such, it will be time consuming. There is a need to plan accordingly.
- a transition period may alleviate some of the urgency; however, at this stage it is not been agreed upon;
- the eventuality of a second referendum is still very remote and the outcome uncertain, so no prospect of it in the short term.

	Key findings	Considerations
e) How to deal with existing obligations	Can we then leave pre-existing contracts as they are? ISDA, the trade association that writes the templates for derivatives contracts, expects legal obligations on existing contracts to continue after Brexit; they should not necessarily be subject to local authorisation requirements (for more information, see the ISDA Brexit FAQs)¹. The main answer to the issue of continuity of derivatives contract may lay into “Grandfathering”/Continuity of Contracts: a grandfather clause (or grandfather policy) is a provision in which an old rule continues to apply to some existing situations while a new rule will apply to all future cases. Those exempt from the new rule are said to have grandfather rights or acquired rights, or to have been grandfathered in. However, a problem on whether there is a need to transfer a pre-existing contract can depend on the activity or the jurisdiction. In a hard Brexit scenario, which is our assumption so far, transactions must be entered into with an entity who is licensed to operate in the EU (subject to any local exemptions).	
f) How to deal with new transactions	The issue of EU licenses will be critical in cross-border wholesale business, i.e. from Japan, South Africa, USA, etc. where firms currently rely on an EU passport to trade cross-border in the EU-27 or the UK. Also, cases such as upsizes or restructuring, are activities which are essentially a new trade, and will likely require a novation to an EU regulated entity. In such scenarios, the possible available options are:	

¹ Please see here for the [ISDA Brexit FAQs page](#).

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- Part VII Scheme (UK regime): a statutory banking business transfer scheme, pursuant to Part VII of Financial Services and Markets Act 2000 (“**FSMA**”). It provides a court-approved mechanism to transfer existing clients and move the related business, client relationships and associated contracts from one deposit taking counterparty to another via court order rather than by requiring individual contract novations. Customer protection is ensured through regulatory and court scrutiny. However, this process does not come without challenges, such as lack of familiarity, as a Part VII process isn’t typical for many counterparties, how to revert a Part VII if a hard Brexit doesn’t occur; the fact that decisions to undertake a Part VII must be taken months before the Brexit date- therefore, it may be already too late for some entities.
- European cross-border merger regime (not available in the UK): in many European jurisdictions (e.g., Germany, Italy, Spain, France and Portugal), businesses or parts of businesses can be transferred by a spin off/merger mechanism which has the effect of a universal succession: in this case all assets, liabilities, employees, etc. related to the business or to the relevant part of the business are transferred as one to the new owner. However, the UK does not have a general legal right to effect a transfer of all of a business in this manner; instead, assets and contracts require individual transfers (e.g., by novation) or a court sanctioned transfer scheme such as a Part VII transfer, to a similar effect to universal succession, although limited to

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transferring a complete banking business.

- Novation: it has the effect, among others, of replacing a party to an agreement with a new party, transferring all duties and obligations from the original obligor to the new obligor. If it is true that this way of transferring a contract has many advantages, such as the fact that individual counterparties are given the opportunity to consent to transfer; and more legal certainty, given that the parties have to agree to transfer, it comes however with potential challenges as well, among which the fact that it could result in a huge repapering exercise, depending on the number of counterparties and therefore, it is likely to be costly.

g) Clearing houses: what they are and do

A very sensitive issue in the derivative world of Brexit is clearing, as this is one of the key risks to financial stability if there is no deal between the UK and EU.

Clearing houses, largely run by exchanges, sit between parties in a deal and manage the impact to the market if one side defaults. London and its three clearing houses — LCH, ICE Clear Europe and LME Clear — are at the heart of the clearing business, and process more than \$450tn in interest-rate, credit, forex and metals-related swaps from around the world.

EU law states that members such as banks must use authorised central counterparties to clear derivatives and interest-rate swaps.

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The Bank of England has said that ultimately, EU banks will bear the cost of the disruption. It cited industry estimates that suggest that for every single basis point increase in the cost of clearing interest rate swaps alone could cost EU businesses about €22bn a year.

The UK government has said that it will authorise European clearing houses, and give temporary permissions for three years from 2019; this will allow financial companies to continue with their current regulatory authorisations.

Concern was mounting that no parallel announcement has been forthcoming from the EU. However, on 30 October the EU commission has pledged that European traders will temporarily be able to use crucial UK clearing services even if Britain crashes out without a deal. The EU commission has stressed out that the relief, allowing EU banks and companies to continue using UK-based clearing houses to process derivatives trades in case of a no deal Brexit, would be strictly short-term, as well as linked to the UK's

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willingness to stick closely to EU regulatory and supervisory standards.

h) Risks for clearing

Without access, participants face a hefty rise in trading costs — or an inability to hedge their market exposures. It is estimated that as much as £41tn of derivatives contracts maturing after Brexit are at risk unless European officials address regulatory uncertainty.

Concern has been growing among industry experts and operators that some of the contracts, such as steel or some types of foreign exchange contracts, cannot easily be moved because EU clearing houses do not have the licences to accept the contracts. Other contracts, such as Brent futures at ICE, are typically traded and cleared only in London. Also, institutions elsewhere in the EU lack the scale of LCH, the clearing house majority controlled by London Stock Exchange, and other venues in the City. European banks and non-financial companies account for 14 per cent of LCH's interest-rate derivatives business.

The European Central Bank estimates EU-based groups clear 90 per cent of their interest-rate swaps in the UK, with EU-based companies having over-the-counter derivative contracts with a notional value of £69tn at UK clearing houses.

III. FUND MANAGERS

As a general overview, the UK will continue to provide a level of access to the UK market for products or managers from the EU 27, including alternative investment funds or “AIFs” within the meaning of the alternative investment fund managers directive (2011/61/EU) (“**AIFMD**”) and undertakings for collective investments in transferrable securities or “UCITS” with the meaning of Directive (2009/65/EC) (the “**UCITS Directive**”), and management entities including AIFMs and UCITS ManCos. We will focus here on management and marketing, two of the main regulated activities for funds.

i) **AIFs and AIFMs** and **Management**

The easiest case is obviously that of non-EEA AIF/UK AIFM. Generally speaking, a UK investment manager operating as an UK AIFM under its “managing an unauthorised AIF” permission should be able to continue to manage a non-EEA AIF from the UK in the same manner as before Brexit.

As per EEA AIFs and UK AIFMs, in principle, a UK AIFM should also be able to continue to manage an EEA AIF to the same degree that, for example, a US investment adviser is currently permitted to manage an EEA AIF. As the AIFMD third country passport provisions have not been activated, the management of EEA AIFs by non-EEA AIFMs is outside the scope of the current AIFMD rules. Accordingly, whether such an arrangement is permitted will be determined on a jurisdiction by jurisdiction basis and the position is very unclear in some jurisdictions given the lacuna in AIFMD. Currently Ireland

While one would hope that the relevant member states will take a pragmatic view on the management of AIFs, this cannot be guaranteed.

Moreover, even assuming that UK AIFMs will be able to continue to manage EEA AIFs generally, there will be certain categories for which this will not work, for example, if the AIF in question is a Luxembourg AIF (which requires an EEA AIFM) or where it may cause difficulties in pursuing the strategy of the AIF (for example, an AIF engaged in direct lending in Germany must be managed by an EEA AIFM to take advantage of exemptions from broader banking regulations).

In practice, for access to the Article 42 of AIFMD regime to work, a cooperation agreement would be required to be in place between both (i) the competent authority of the relevant EU 27 member state and the UK FCA as the supervisory authority of the now third-

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permits such arrangements, for example, for US investment advisers at least on a grandfathered basis for Irish AIFs established prior to the implementation of AIFMD, however the Central Bank of Ireland would need to approve any such arrangements in the Brexit context on a case by case basis, and other jurisdictions may not permit it at all.

Marketing

With regard to non-EEA AIF/UK AIFM, a UK AIFM should not need to change its approach to marketing outside of the EU 27 (e.g. the UK and the rest of the world) after Brexit.

Currently, the marketing of non-EEA AIFs in the UK and the wider EU by a UK AIFM must be conducted on the basis of each country's national private placement regime under Article 36 of AIFMD, where available. Following Brexit, UK marketing would continue on the basis of Article 36, however, in the EU 27, both the AIF and the AIFM would be considered non-EEA and therefore any marketing of the AIF in the EU 27 would need to be undertaken pursuant to Article 42 of AIFMD, assuming private placement of this kind is permitted in the relevant EU member state.

As per EEA AIFs and UK AIFMs, there should be no change in marketing an EEA AIF outside of the EU 27 or the UK.

However, a red flag is that a UK AIFM will no longer be able to market an EEA AIF pursuant to Article 31 under the AIFMD marketing passport in the UK because for the purposes of the UK implementation of AIFMD, the EEA AIF will be treated as a non-EEA AIF. As such, it would

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country UK AIFM and (ii) the competent authority of the EU 27 member state and the competent authority of the non-EEA AIF's jurisdiction of establishment. There are indications that key fund jurisdictions, such as Ireland, have considered putting in place a cooperation agreement with the UK, although practically speaking these cannot be effective until the time that the UK exits the EU.

There is no guarantee that one will be in place with any of the EU 27 members states that do permit Article 42 marketing, as the conclusion of such agreements ultimately depends on the political environment.

In its role as distributor, a UK AIFM may also need to comply with any relevant private placement restrictions and exemptions for the provision of investment services from non-EU countries into the member states of the EU 27 in which the AIF is being marketed. There is currently no EU regulatory harmonisation of these requirements (e.g. via an EU directive or regulation) and the positions of individual member states therefore differ. If the EU Commission were to grant "equivalence" status to the UK post Brexit under MiFID's third country regime, this would offer a harmonised process, akin to a MiFID passport, for a UK manager to continue to provide investment services to professional clients throughout the EU 27.

When marketing in the EU 27, the EEA marketing passport under Article 32 of AIFMD will cease to be available because the UK AIFM from the EU 27 perspective will be considered a non-EEA AIFM and the UK AIFM will need to rely on private placement pursuant to Article 42 of AIFMD to market the AIF in the EU 27 (note the need

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instead need to be marketed into the UK pursuant to Regulation 57 of the UK Alternative Investment Fund Managers Regulations 2013 (the “**Regulations**”) implementing Article 36 of AIFMD. Any new arrangements to market in the UK should, therefore, require the making of an Article 36 national private placement regime (“**NPPR**”) notification with the FCA. The FCA has indicated that if there is no transitional “implementation” period it may provide grandfathering arrangements for EEA AIFs marketing in the UK pursuant to an AIFMD marketing passport, provided that they provide notice to the FCA prior to the effective date of the UK’s exit from the EU (expected to be before midnight on 29 March 2019). Please see above Section I a) for detail on this process. Where such registration is not made in a timely manner, the Regulation 57 requirements are expected to apply. However, it is possible that the government will change its position for political reasons should similar concessions not be forthcoming from the EU 27.

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for cooperation agreements discussed at Section B.1(b) above). A number of member states either do not permit or make it prohibitively complicated or costly to market under Article 42 and there is no reason at this time to expect this approach to change. In order to retain the AIFMD marketing passport, a replacement EU 27 AIFM would need to be appointed.

j) UCITS

Management

For UK UCITS / UK ManCo, there should be no change in the manner in which management is carried out.

As per UK UCITS / EU 27 ManCo / UK delegate MiFID manager, the UK implementation of the UCITS Directive does not envisage a UCITS scheme being managed by a third country ManCo (as an EU 27 ManCo post Brexit would be).

With regard to EU 27 UCITS / UK ManCo, the UCITS Directive does not envisage an EU 27 UCITS being managed by a third country ManCo (as such the UK ManCo will be post Brexit).

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Marketing

As per UK UCITS/UK Man co, there should be no change in the manner in which marketing is conducted outside of the UK and the EU 27.

There should also be no change in the manner in which marketing is carried out within the UK.

Marketing of the UK UCITS by a UK ManCo in the EU 27 on the basis of the UCITS marketing passport will no longer be possible as the UCITS would “default” to being a non-EEA AIF with a non-EEA AIFM from an EU 27 perspective, meaning that marketing in the EU 27 would be subject to Article 42 of AIFMD and, accordingly, the private placement rules of each member state. See above for marketing of EEA AIF/UK AIFM.

As per UK UCITS / EU 27 ManCo / UK delegate MiFID manager, assuming the UK UCITS would be managed by a new UK ManCo, see paragraph above with regard to management of UK UCITS / EU 27 ManCo / UK delegate MiFID. See also paragraph below regarding marketing in the EU 27 by the UK MiFID manager.

Similarly, for EU 27 UCITS / UK ManCo, save for the change of ManCo noted at above, there should be no change to marketing the EU 27 UCITS outside of the UK or EU 27.

Assuming an EU 27 ManCo is appointed as the management company of the EU 27 UCITS, the EU 27 ManCo can market the EU 27 UCITS in the EEA on the basis of its UCITS marketing passport.

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Given the fact that a UCITS scheme cannot be managed by a third country ManCo, a new UK ManCo would need to be appointed to act as the management company of the UK UCITS, which might be the MiFID manager if it varied its permissions (provided that it can do so within its current business profile). If the MiFID manager does not vary its permissions a new UK ManCo would be appointed, which then could delegate to the UK MiFID manager.

Similarly to the above, given the fact that an EU 27 UCITS scheme cannot be managed by a third country ManCo, a new EU 27 ManCo would need to be appointed to act as the management company of the EU 27 UCITS or the EU 27 UCITS could be converted to self-managed status (where possible – this is increasingly difficult).

As regards delegation by the EU 27 ManCo back to the UK manager, please see Section 4 below.

If there is no transition period, the FCA has indicated that if the EU 27 ManCo notifies the FCA of the intention to continue to market the EU 27 UCITS in the UK prior to the effective date of exit from the EU, marketing can continue in the UK. Please see paragraph 1 a) above.

For new EU 27 UCITS, UK retail marketing may be permitted under

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Section 272 of the UK Financial Services and Markets Act 2000 through the FCA approving the EU 27 UCITS as a “recognised scheme” (although, unless the FCA makes a blanket determination in this regard for EU 27 UCITS, the process could be time consuming). In the absence of a Section 272 approval, the EU 27 UCITS will likely be treated as an AIF and subject to private placement under Regulation 59 (Article 42 of AIFMD) and require an NPPR notification to the FCA. The scope to market the EU 27 UCITS to retail investors in the UK accordingly, would become limited.

IV. COMMERCIAL CONTRACTS

Businesses need to consider how their contracts will be affected by the commercial implications of Brexit as it could have a significant effect on the commercial substance of some arrangements.

In respect of governing law and jurisdiction clauses, English contract law is largely unaffected by Brexit, save in respect of consumer contracts and other specialist contracts. Following Brexit, English courts can generally be expected to uphold the parties’ choice.

Steps firms can take to Brexit proof their commercial contracts:

- expressly providing for the commercial impact of Brexit; for example, changes to tariffs, exchange rates or customs procedures;
- expressly stating whether references to “the EU” will include the UK after Brexit;
- making it clear if references to “EU law” include legislation succeeding that law in the UK.
- assessing if Brexit could make enforcement of an English judgment more difficult and, if so, whether arbitration is a suitable alternative; and

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- considering if there should be an express right to terminate on Brexit. This could either be general, such as where Brexit causes a material adverse effect, or tied to particular events, such as the UK exiting from the customs union or losing passporting rights (as the case may be). Similarly, it is important to be clear if the clause will operate on a unilateral basis in favour of one party or bilaterally, giving both parties the right to terminate.

In respect of contracts that give English courts jurisdiction, in some cases it might be harder to enforce an English judgment in some other EU member states. Therefore, firms may wish to consider taking local law advice on enforcing in that member state or use arbitration.

V. GDPR

On Brexit, GDPR will remain the core UK data protection law by incorporation of the EU Withdrawal Act 2018. The UK will become a "third country" for the purposes of the GDPR. Under the GDPR, subject to certain limited exceptions, personal data can only be transferred out of the EU where:

- the European Commission has determined that the country to which the personal data is being transferred "ensures an adequate level of protection" (an "adequacy decision");
- prescribed "appropriate safeguards" have been put in place, or
- the individual to whom the personal data relates has given their explicit consent to the transfer (having been informed of the possible risks).

If an adequacy decision is not taken by the European commission, there are a number of existing transfer mechanisms that may be put in place:

- standard Contractual Clauses (model clauses): the clauses adopted by the EU commission should be used in the precise form approved, although they can be supplemented by additional commercial terms. They include contractual obligations between the data exporter and data importer and enforceable rights by data subjects;
- binding Corporate Rules: governing rules for the transfer of data between entities within a multinational group of companies must be agreed with appropriate data protection authorities through an application process;
- consent: personal data can be transferred out of the EU where the data subject has given their informed consent. It is not a reliable mechanism for transfers and unlikely to be appropriate

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The process around the UK transferring data to the EU will not change after Brexit.

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in respect of any personal data of employees.

Other concerns under the GDPR post Brexit- UK to be aware of:

- lawful basis: all processing of personal data must be covered by a "lawful basis". A legal obligation under UK law will not constitute a lawful basis for processing under the EU version of the GDPR. Alternative lawful basis: processing is necessary "for the purposes of legitimate interests.";
- processors' rights to derogate from controllers' instructions: the GDPR permits data processors to deviate from the data controller's instructions only where required by EU or EU member state law. Processors may therefore face a difficult choice of complying with UK law, or complying with their obligations under the EU version of the GDPR and to the data controller;
- UK/EU GDPR overlap discrepancies may arise post-Brexit between their UK and EU data protection obligations, which may both apply in respect of the same processing.

VI. INTELLECTUAL PROPERTY

Patents

Patents will not be affected by Brexit as they are granted by non-EU body. All existing EU legislation pertaining to patents and other IP rights will be retained within the UK's domestic legal system as part of the EU Withdrawal Act 2018. The current system will therefore continue and operate without reference to the EU.

Trademarks

In a no deal scenario, the UK government have said that the holders of existing European Union Trade Marks (EUTMs) or registered community designs will be automatically granted a new UK-equivalent right upon Brexit. Therefore, existing EUTMs and registered community designs will continue to have force within the UK with equivalent rights. Pending EU applicants will have 9 months from the date of Brexit in which they can apply for a UK equivalent right. Applicants for UK equivalent rights will be able to retain the

Key findings

Trademarks will be affected as they are underpinned by EU legislation. What this means is that EU trademarks may no longer be recognised in the UK.

Copyright

The UK Government 24 September 2014 Brexit copyright guidance is similarly broadly in line with stakeholders' expectations. The UK's continued membership of the main international treaties on copyright will ensure that the scope of protection for copyright works in the UK and for UK works abroad will remain largely unchanged.

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priority date of their original EU application but must bear the cost of the new UK application.

Therefore, if they haven't already, firms should review their intellectual property portfolio in light of the above and firms need to alive to the inevitable likely future regulatory and legal divergence between the two jurisdictions.

VII. POLITICAL CONSIDERATIONS

Once the final Brexit position has been agreed between the UK and EU, it will need to be approved by parliament. As things currently stand the Cabinet is divided on Brexit generally and therefore it is difficult to say with any certainty whether any Brexit deal will be approved.

If the Brexit deal is not approved by parliament there a few different things that could happen which could lead to more uncertainty and delays:

- the motion could be put back through Parliament for a second vote;
- if voted down again then the options could be: (i) a no deal, or (ii) a 'people's vote' or second referendum;
- a general election could happen (provided that the Conservative MPs also back this); and/or
- a move to the Norway model in the short term until another arrangement is agreed. The Norway model includes two key European organisations: The European Free Trade Association (EFTA) and European Economic Area (EEA). Norway, along with Lichtenstein and Iceland, is a member of both. This means that under a Norway-style arrangement, Britain would leave the EU, join EFTA, and then become the 31st full member of the EEA. From a practical perspective this means Britain will have full access to the single market, and very limited barriers to trade with the EU. In return it will make substantial contributions to the

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EU budget, and has to follow most EU rules and laws, including the 'four freedoms'.

VIII. STEPS FINANCIAL SERVICES FIRMS HAVE BEEN TAKING

From our research, and having spoken to a number of people and firms in the industry, a number of different steps have been taken, with no one approach that has been taken by firms in the industry across the board.

The following are steps that firms have taken to mitigate the impact of Brexit on their business:

- establish new offices in the EU, e.g. in Ireland;
- internal reorganisation and making use of existing footprints;
- strategic mergers and acquisitions;
- transferring contracts of customers over to new entities and entering into new arrangements;
- repapering projects;
- review of key existing contracts and references therein to the EU – asking 'does this refer to the UK when entered into before Brexit?'; and
- governing law and jurisdiction clauses need to be looked at (as above).

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WHY WE'RE DIFFERENT

Cleveland & Co are specialists in financial services, investment management and commercial contracts and related courses. Our team's in-house experience means we understand client challenges and we work alongside you to create solutions. We can provide insight on real vs hypothetical risks and help your team evolve.

WE OFFER

Cleveland & Co offer you fixed fees and retainer structures that provide you with certainty of cost and we offer industry experience that cuts through common legal complexity.

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