



Asset Management Brexit Update

8th February, 2019

Guest Speakers



Imogen Garner

Imogen is a leading practitioner in the field of UK and EU financial services law and regulation.

Head of Norton Rose Fulbright's buy-side regulatory practice.

Has also worked with a number of asset management industry trade bodies and the FSA.



**Brian Hayes
MEP**

Member of both houses of the Irish Parliament from 1996 to 2014. Elected MEP in May 2014.

Appointed to the European Parliaments Economic & Monetary Affairs (ECON) Committee, Development Committee and Budgetary Control Committee.

European Parliament's rapporteur for the IORPS II Directive and shadow rapporteur for the Money Market Funds regulation.

Currently European People's Party rapporteur for the Pan European Pension Proposal (PEPP).

Has also worked on the European Parliament's report on Fintech and on Third Country Equivalence.

Incoming CEO of Banking & Payments Federation Ireland (BPFI) with effect from April 2019.

Topics

- ▣ **Donnacha O'Connor, Partner, Dillon Eustace:**
- ▣ Irish asset management and investment funds Brexit regulatory update
- ▣ **Imogen Garner, Partner, Norton Rose Fulbright LLP:**
- ▣ UK asset management and financial services Brexit update
- ▣ **Brian Hayes, MEP:**
- ▣ Brexit and the financial services landscape post Brexit
- ▣ **Q&A**

Where we stand on the key regulatory issues

▣ Delegation to UK

➤ AIFMD;

- Regulation 21(1)(d) of AIFMD Regulations – authorised Irish AIFM cannot delegate portfolio management/risk management to a third country firm unless, inter alia, “*co-operation between the [Central] Bank and the supervisory authority of the undertaking shall be ensured*”.

➤ UCITS;

- Regulation 23(1)(d) of UCITS Regulations – Irish UCITS management company / SMIC cannot delegate investment management to a third country firm unless “*co-operation between the [Central] Bank and the supervisory authorities of the third country concerned is ensured*”.

➤ **ESMA Multilateral MOU** between EEA regulators and the FCA announced by ESMA on February 1st, 2019 satisfies both requirements;

➤ **UK AIFMs acting as AIFMs to Irish AIFs** (of which there are over 280 currently), will become third country AIFMs – the Irish fund will have to contractually impose the Central Bank’s registered AIFM requirements set out in Part III of Chapter 2 of the AIF Rulebook. No passport under AIFMD. Procedurally, we expect no prior Central Bank approval required. Re-papering of the AIFM Agreement, prospectus, other agreements to which the AIFM is party. Existing passporting notifications?

Where we stand on the key regulatory issues

▣ Legal capacity of UK firms to service Irish funds;

- **Regulation 5(5)(b) of MiFID II Regulations** full exemption for a third country firm that does not establish a branch in Ireland that provides one or more investment services/investment activities (for which it is required to be authorised in its home jurisdiction) exclusively to per se professional investors/eligible counterparties in Ireland [which includes regulated funds and fund management companies, excludes individuals, small corporates, personal pension plans, etc] requires, inter alia, that there are “*co-operation arrangements that include provisions regulating the exchange of information for the purpose of preserving the integrity of the market and protecting investors are in place between the [Central] Bank and the competent authorities where the third-country firm is established*”.
- **ESMA Multilateral MOU** between EEA regulators and the FCA announced by ESMA on February 1st, 2019 satisfies this requirement. The Central Bank previously confirmed that the IOSCO multi-lateral MOU, of which the Central Bank and FCA are signatories, also satisfied this requirement.

Where we stand on the key regulatory issues

▣ Central Bank's "Location Rule" for Irish management companies

- Status of Designated Persons or Directors located in the UK post Brexit?
- Central Bank's "notice of intention" of 4th February, 2019 in the event of a hard Brexit: (as you were for the time being but need to keep an eye on it):

*"Should such an eventuality arise, the Central Bank **will consider** whether the UK is a country to be determined as meeting the Effective Supervision Requirement. For the period while this is under consideration, the Central Bank **does not propose** adopting a default position which would treat the UK as not satisfying the Effective Supervision Requirement. After consideration of the above, the Central Bank **will determine** whether the UK, as a country, continues to satisfy the Effective Supervisory Requirement and the Central Bank **will confirm** same by publishing a notice on its website. **Such determination may be changed, including if circumstances change.**"*

▣ Continued access by Irish Funds to CREST services facilitated by EU temporary equivalence decision

Areas to watch

- ▣ **Reverse Solicitation:** UK firms / EU clients may look to rely on reverse solicitation (MIFID II services/activities from UK, etc.) in the case of continuous service across Brexit; beware!
- ▣ **Urgent requests for novations!** UK firms looking to novate to EU affiliate service providers (where the service is not covered by a safe harbour – non-MIFID services by UK banks, services to non per se professional clients, services to EU clients where there is no domestic safe-harbour);
- ▣ **MiFID II safe harbours** may come under some pressure in Europe;
 - ESMA's view, set out in a September 26th, 2018 letter to the European Commission is that MiFID II *could be reworked* to:
 - ensure some direct supervisory powers by national EU authorities over investment services provided by third country firms to professional clients in the EU [potential impact on Article 5(5)(b) of Irish MIFID II Regulations];
 - review the reverse solicitation rules, in which third country firms can provide investment services/engage EU-based clients solicit business from third country firms without MiFID II applying [potential impact on Article 46 MiFIR, Regulation 51(1) Irish MIFID II Regulations].
- ▣ **Ireland's Omnibus Brexit Bill;**
 - Draft of 24th January, 2019;
 - States that it may change as we near Brexit;
 - Wide ranging subject matter; currently only Part 7 impacts Funds – reflects the EU's temporary equivalence decision (allowing CREST, operated by Euroclear UK to continue to engage with Irish funds).

Financial institutions
Energy
Infrastructure, mining and commodities
Transport
Technology and innovation
Life sciences and healthcare

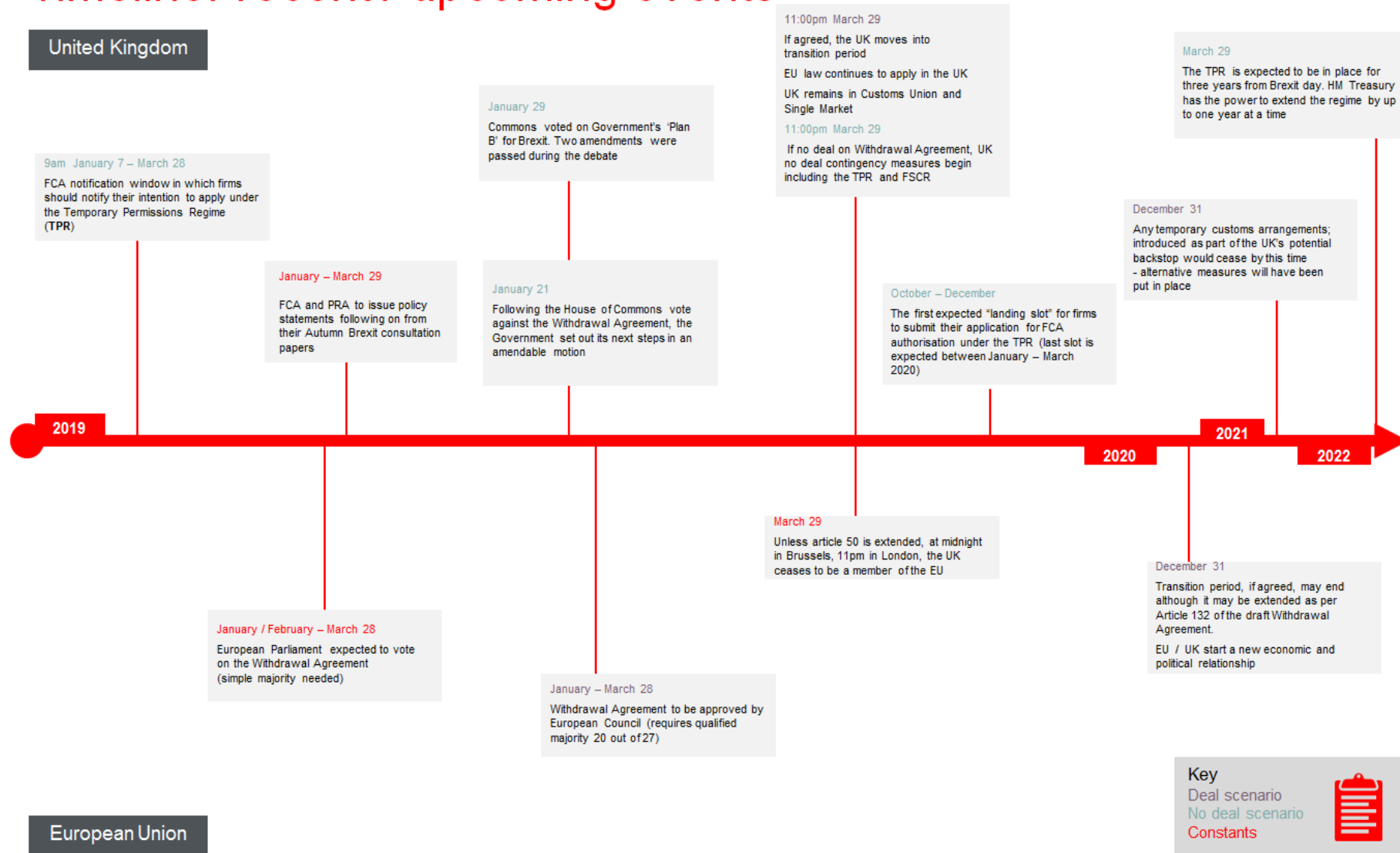


Brexit: Some UK perspectives

8 February 2019
Imogen Garner, Partner
Norton Rose Fulbright LLP



Timeline: recent / upcoming events



What are the key buy-side concerns?

As with other sectors, the buy-side is pushing forward with no-deal preparations

Absence of co-operation arrangements between UK and EU competent authorities

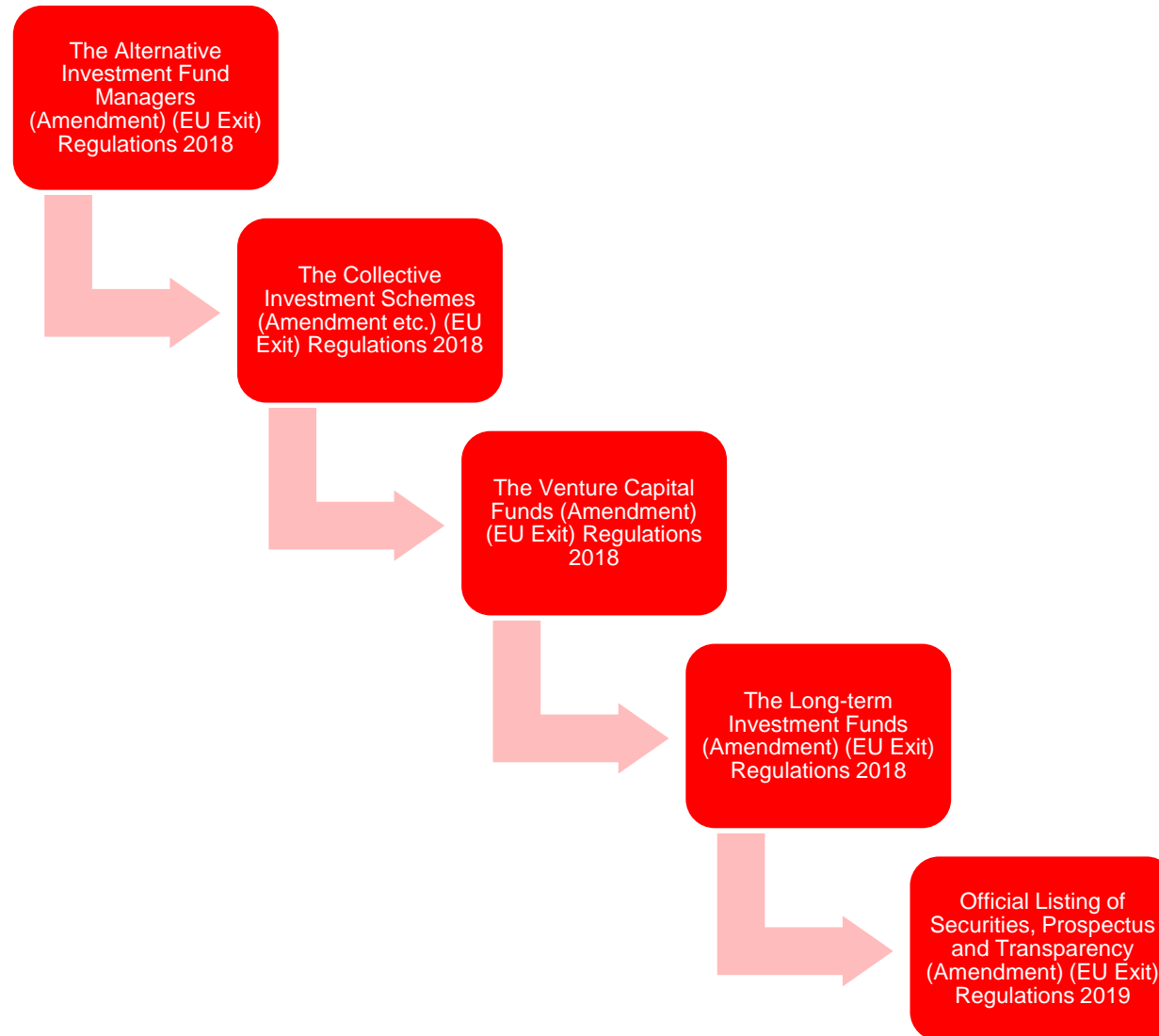
Future direction of EU financial services legislation, including third country access rules

Lack of clarity regarding future EU27 outbound marketing, outbound services into the EU27 and inbound marketing and services into the UK

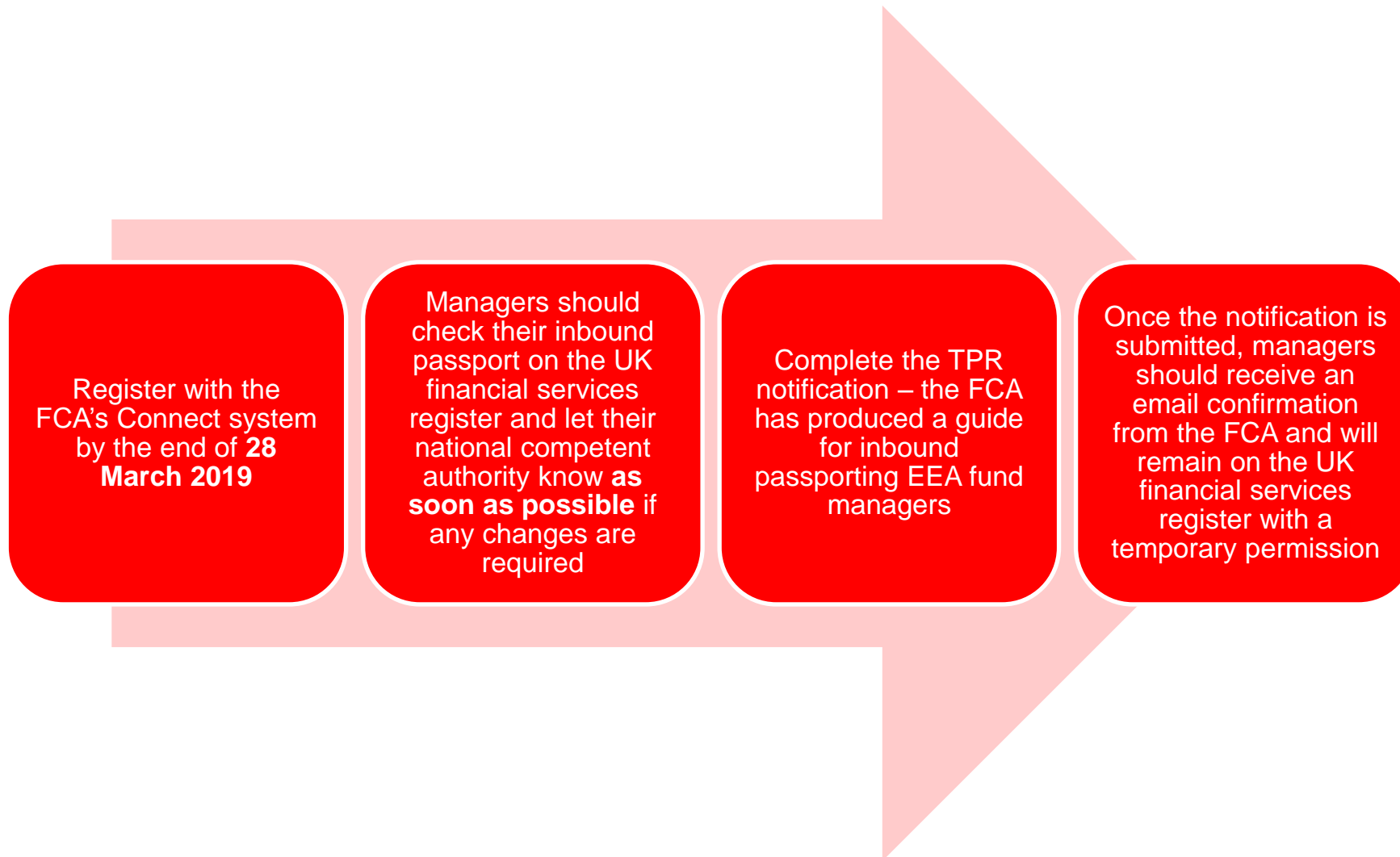
Lack of clarity regarding treatment of existing investors

Issues relating to staffing, e.g. recruiting new EU27 employees in the UK, finding skilled/experienced individuals to fill new EU27 functions and uncertainty regarding existing EU27 employees in the UK

The UK's contingency measures for the buy-side



Practical next steps for EEA fund managers



Financial services contract regime

The FSCR will provide a limited period of time during which EEA firms can continue to service UK contracts entered into prior to exit, in order to wind down their UK business in an orderly fashion

Relevant to EEA firms that passport into the UK to carry on a regulated activity and fail to notify under the TPR or are unsuccessful in securing authorisation at the end of it, but still have UK regulated business to run off


EEA firms within this regime will not be able to write new UK business and will be limited to regulated activities necessary for the performance of pre-existing contracts

EEA firms managing UK authorised funds (including trustees and depositaries of such funds) will not be able to continue to manage those funds under FSCR after exit day – they must use the TPR

FSCR is time limited and will apply for a maximum of five years for all non-insurance contracts (extension by the Treasury and the regulators is possible)

Firms in the FSCR will have to retain home state authorisation and must notify the FCA if this is cancelled or varied

FCA/ESMA cooperation agreement



ESMA and European securities regulators have agreed MoUs with the FCA to collaborate even in the case of a no-deal Brexit

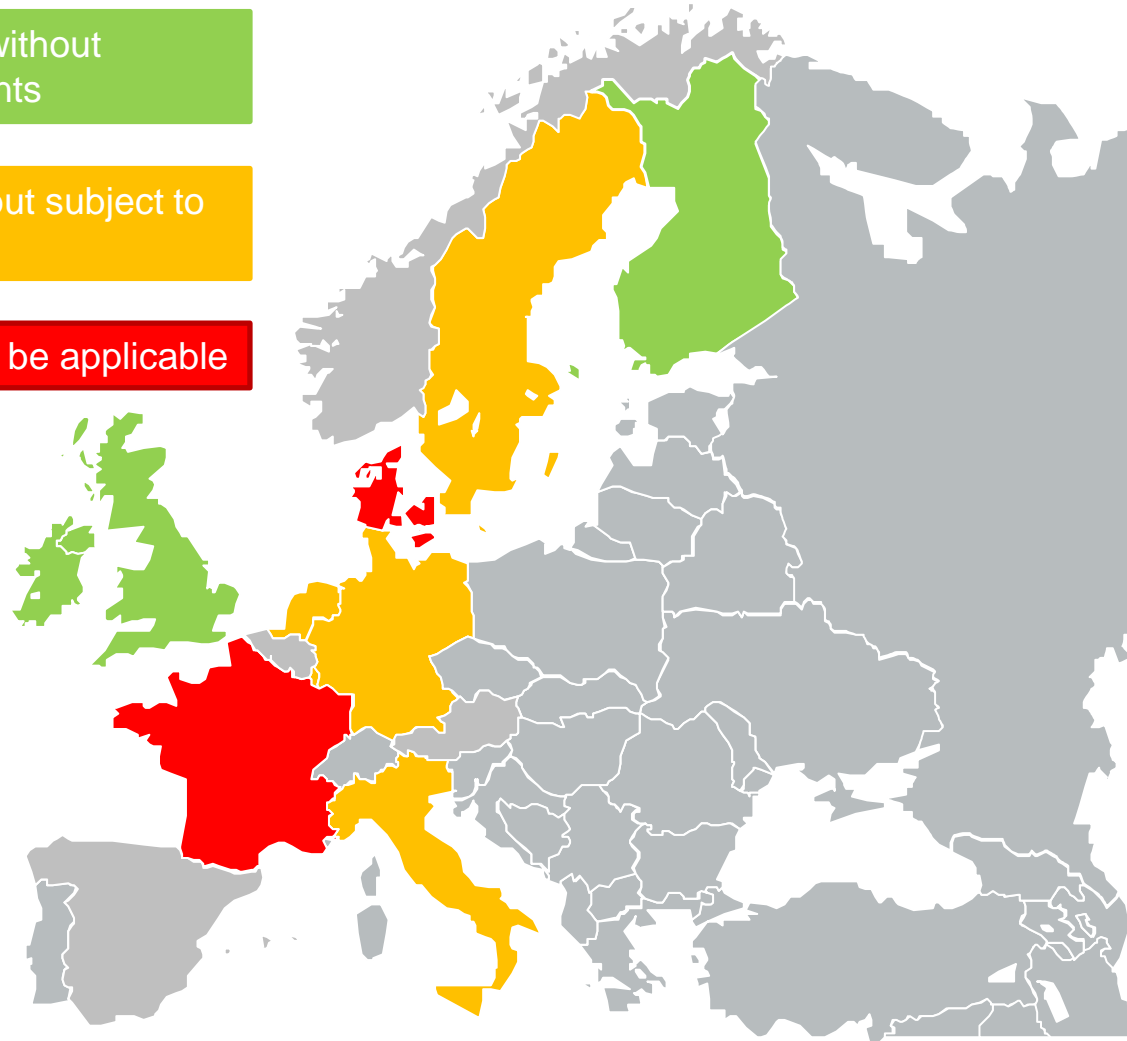
The deal will ensure cooperation between regulators, including exchanges of information, in the case of no-deal Brexit, allowing markets to continue functioning while the UK transitions to life outside the EU and negotiates its permanent relationship with the bloc

The European angle

Likely continuation of services without additional regulatory requirements

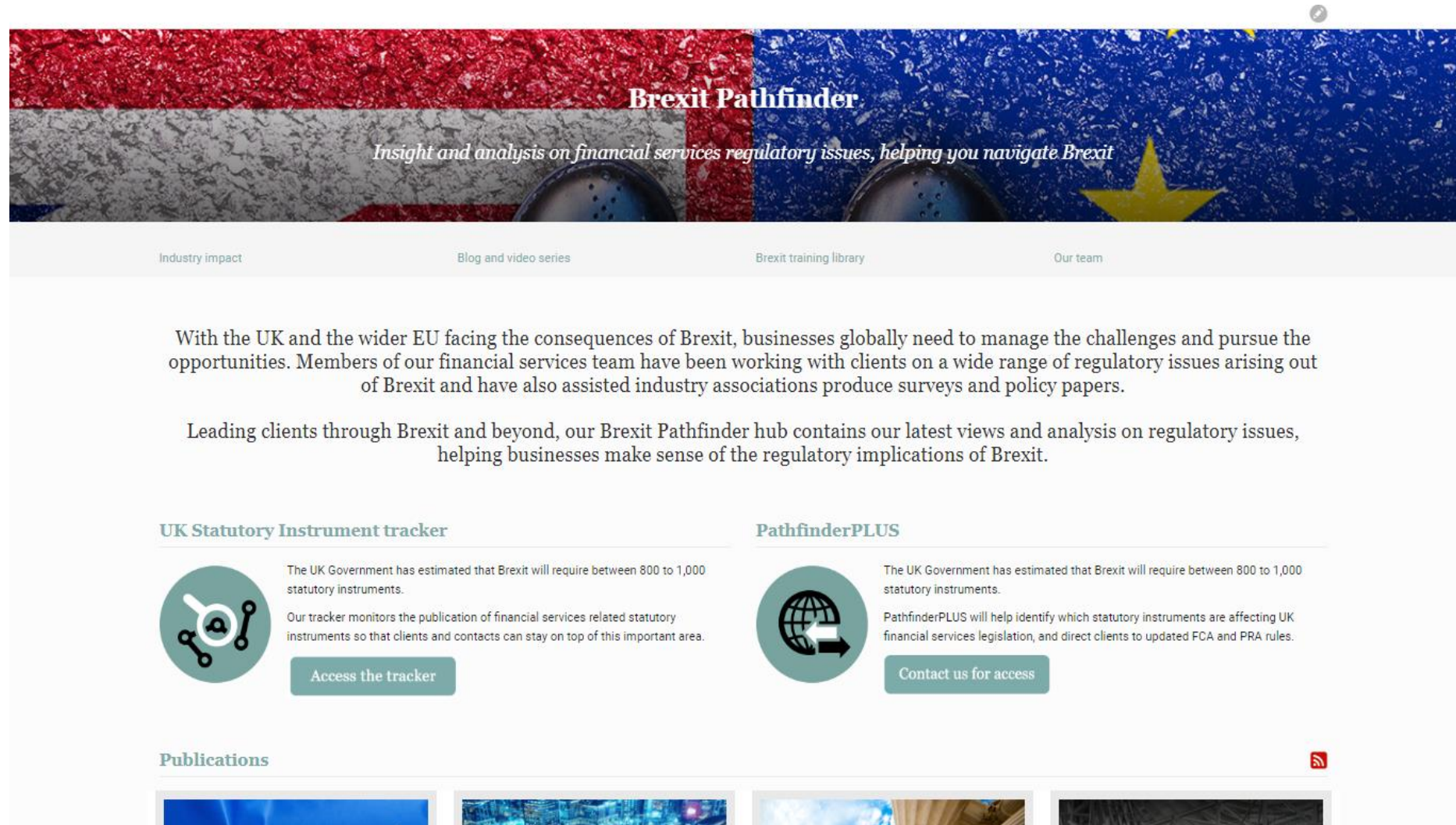
Likely continuation of services but subject to regulatory requirements

Licensing requirements likely to be applicable



Resources

Brexit Pathfinder



Brexit Pathfinder

Insight and analysis on financial services regulatory issues, helping you navigate Brexit

Industry impact Blog and video series Brexit training library Our team

With the UK and the wider EU facing the consequences of Brexit, businesses globally need to manage the challenges and pursue the opportunities. Members of our financial services team have been working with clients on a wide range of regulatory issues arising out of Brexit and have also assisted industry associations produce surveys and policy papers.

Leading clients through Brexit and beyond, our Brexit Pathfinder hub contains our latest views and analysis on regulatory issues, helping businesses make sense of the regulatory implications of Brexit.

UK Statutory Instrument tracker

The UK Government has estimated that Brexit will require between 800 to 1,000 statutory instruments.

Our tracker monitors the publication of financial services related statutory instruments so that clients and contacts can stay on top of this important area.

[Access the tracker](#)


PathfinderPLUS

The UK Government has estimated that Brexit will require between 800 to 1,000 statutory instruments.

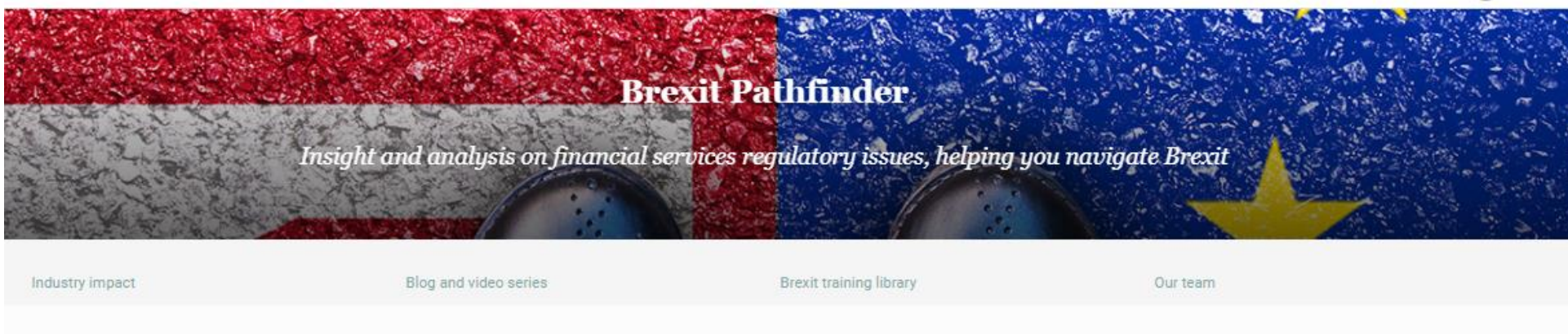
PathfinderPLUS will help identify which statutory instruments are affecting UK financial services legislation, and direct clients to updated FCA and PRA rules.

[Contact us for access](#)

Publications




EU Exit Statutory Instruments



<input type="checkbox"/>	Topic ▾	Statutory Instrument ▾	Explanatory Memorandum ▾	Explanatory Memorandum Link ▾	Date ▾	Comments ▾	Made ▾	Description ▾	Relevant E ▾
<input type="checkbox"/>	Financial Services	Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018	Yes	EXPLANATORY MEMORANDUM TO THE MARKETS IN FINANCIAL INSTRUMENTS (AMENDMENT) (EU EXIT) REGULATIONS 2018 2018 No. [XXXX]	05/10/2018	Amended 18 October 2018 Made 20 December 2018	Yes		Markets in Financial Instruments (Amendment) Regulations 2018
<input type="checkbox"/>	Financial Services	Financial Services and Markets Act 2000 (Claims Management Activity) Order 2018	Yes	EXPLANATORY MEMORANDUM TO THE FINANCIAL SERVICES AND MARKETS ACT 2000 (CLAIMS MANAGEMENT ACTIVITY) ORDER 2018 2018 No. [XXXX]	10/10/2018		No		FCA publishes Brexit CP and Treasury publishes more draft SI
<input type="checkbox"/>	Financial Services	The Collective Investment Schemes	Yes	EXPLANATORY MEMORANDUM TO	09/10/2018	Updated 7 December 2018 Laid before Parliament 17 December	No		The Collective Investment Schemes

Asset Management Regulation hub



Asset Management Regulation hub

Thought leadership and insights

Asset management regulation AIFMD insight UCITS insight

Whilst the global financial crisis may have receded, the asset management industry continues to assimilate significant regulatory change – Brexit, AIFMD review, FCA Asset Management Market Study – to name but a few.

Our highly regarded financial services team provides advice on all aspects of regulation affecting the asset management industry. We advise fund managers and segregated portfolio managers, as well as institutional and other sophisticated investors. Our asset management clients employ diverse strategies, from UCITS and traditional long-only managers through to hedge, real estate, private equity, infrastructure and debt funds. We also advise service providers, such as depositories and custodians.

This hub will keep asset managers up to date on regulatory developments as they happen through our blogs, technical resources and surveys.

Search the hub

GLOBAL ASSET MANAGEMENT QUARTERLY

Highlighting key developments that will be of interest to and affect our asset management clients, including market trends and developments in tax and buy-side regulation globally across Europe, Africa, Asia, Australia, North America and The Middle East.

[Find out more](#)

AIFMD surveys



IMA template



See <https://www.regulationtomorrow.com/eu/investment-association-publishes-new-version-of-model-discretionary-investment-management-agreement/>

Buy-side regulatory practice

Norton Rose Fulbright's buy-side regulatory practice continues to build a global reputation for providing high quality advice to a broad range of clients.

Our lawyers practice in Europe, the US, Asia Pacific, the Middle East, Canada and South Africa and have in-depth experience advising buy-side clients of all sizes

Our highly regarded team provides advice on all aspects of regulation affecting the buy-side. We advise fund managers and segregated portfolio managers, as well as institutions and other sophisticated investors. Our asset manager clients employ diverse strategies, from UCITS and traditional long-only managers through to hedge, real estate, private equity, infrastructure and debt funds. We also advise service providers, such as depositaries and custodians.





Brian Hayes MEP

Brexit and the financial
services landscape post Brexit