



July 2019

Re-preparing for a Hard Brexit

Background

As readers will be aware, both the EU and the Central Bank of Ireland took a series of measures in the lead up to 29 March this year to provide as much stability as possible in the event of a hard Brexit.

The Story So Far

By way of reminder, key measures taken in that regard included the following:

- ▣ The Memorandum of Understanding entered into between ESMA and the FCA in the UK permitting Irish management companies and Irish MiFID firms to continue to delegate to UK domiciled entities in the event of a hard Brexit.
- ▣ The recognition by EMSA of certain UK central counterparties (being LCH, ICE Clear Europe and LME Clear) allowing such entities to continue to provide services in the EU for a period of 12 months from the date of a hard Brexit with the intention of ensuring that there is no disruption in the central clearing of derivatives in such circumstances.
- ▣ The UK Central Securities Depository Euroclear UK & Ireland (which operates CREST, the settlement system used for Irish equities listed on Euronext Dublin and the London Stock Exchange) being recognized as equivalent for a period of 24 months in the event of a hard Brexit.
- ▣ EU Commission Delegated Regulations being put in place to allow UK counterparties to certain non-centrally cleared OTC derivative contracts to be replaced with EU counterparties

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without triggering a clearing obligation or collateral exchange obligation under EMIR.

Next Steps

However, the Irish government has in its [revised contingency plan](#) published earlier this month restated that the responsibility for implementing appropriate contingency plans to mitigate the effects of a hard Brexit remains with individual regulated firms.

In this regard, what follows is an overview of some steps that funds and fund managers should now be considering to ensure that they are as “Brexit-ready” as possible in light of the increased likelihood of the UK leaving the European Union on 31 October next without a deal.

Assessment of investment policy

Fund managers should conduct an analysis of their existing portfolios to assess the implications of a hard Brexit on their ability to implement their stated investment policy. We have outlined below some of the considerations which should be borne in mind when conducting this analysis.

Funds gaining exposure to UK securities

If the portfolio manager is currently gaining exposure to the UK by relying on reference in the fund’s investment policy to investment in the EU, the fund’s investment policy should be reviewed to ensure that such exposure is permissible after 31 October 2019.

UCITS and RIAIF funds should also review the list of regulated markets in their prospectuses to determine whether specific reference to UK regulated markets is required.

Considerations for specific fund types

If the UK becomes a third country under EU law on 1 November next, this will have certain implications on the ability of specific types of fund structures to implement their investment strategy.

UCITS Fund of Funds

UK domiciled UCITS will automatically become UK AIFs in the event of a hard Brexit. While the Central Bank has helpfully clarified that it will, pending further consideration, consider UK AIFs as eligible investments for a UCITS or RIAIF, UCITS funds will need to ensure that, taking into account any investment in UK domiciled funds, no more than 30% of net assets are invested in all AIFs. In the case of UCITS fund of funds, this may require a realignment of the investment portfolio to ensure that the fund continues to comply with this investment restriction.

Money Market Funds

Under the MMFR, EU money market funds can only invest in deposits with credit institutions where such credit institutions have their registered office in a Member State or where a third country credit institution is subject to prudential rules considered equivalent to

EU rules under the Capital Requirements Regulation. No equivalence decision has been made by the European Commission in this regard. In the absence of any such equivalence decision being made by the European Commission, EU money market funds will not be permitted to invest in the deposits of UK banks.

Fund managers should engage with the fund's depositary and should consider updating their prospectus (and where relevant KIID/KID) to make any necessary changes to the investment policy in order to protect against any negative consequences for the portfolio manager in the event of a hard Brexit. We will keep you updated on any specific filing procedure which the Central Bank may implement to facilitate Brexit related prospectus filings.

Change of service provider arrangements

Replacement of UK UCITS management companies/UK AIFM

Any UCITS fund which has appointed a UK UCITS management company will need to replace that management company in the event of a hard Brexit. In addition, while the Central Bank has confirmed that Irish QIAIF can continue to use UK AIFM which will be reclassified as non-EU AIFM under a hard Brexit, a number of Irish QIAIFs have already taken the decision to appoint an EU domiciled AIFM so that they can rely on that AIFM to market the fund to professional clients within the EU.

In order to effect any such change of management company/AIFM, appropriate filings will need to be made with the Central Bank. We understand that the Central Bank intends to contact all Irish domiciled AIFs and UCITS funds with a UK domiciled UCITS Management Company or AIFM in August to outline the relevant filing deadlines for such applications.

Distribution Arrangements

Separately, Irish funds should be considering whether there are any necessary changes to be made to their distribution arrangements if they are currently structured on the premise that a UK entity will market the fund throughout Europe as such access may be restricted under the local rules of individual Member States.

New UK investment managers

It is worth noting that where an Irish Management Company or AIFM intends to appoint a UK investment manager after a hard Brexit, that investment manager will be considered a non-EU investment manager required. As a result, unless previously cleared to act as an investment manager to Irish domiciled funds by the Central Bank, a UK investment manager will be subject to a full review by the Central Bank rather than being able to avail of the fast-track arrangement available to EU investment managers.

Where relevant, disclosures in the fund documentation should be updated to reflect any change of service providers to the fund.

Funds currently registered for sale in the UK

Irish funds wishing to **continue** to market their shares in the UK in the event of a hard Brexit which have not yet contacted the FCA must notify it of such intention under the Temporary Permissions Regime (“TPR”) before the end of 30 October 2019.

Irish funds which have already notified the FCA of their intention to continue to market their shares in the UK post a hard-Brexit under the TPR do not need to take any further action unless they wish to update such notification or add existing sub-funds to their existing application, in which case they must email recognisedcis@fca.org.uk by the end of 16 October 2019 confirming this and including the fund’s registration number. The FCA will then advise on how to add such new notifications during the period from 17 to 30 October 2019.

Irish management companies/AIFMs which currently passport into the UK to provide services to UK domiciled funds and which wish to continue to provide such services in the event of a hard Brexit must notify the FCA of their intention to avail of the TPR by 30 October 2019 via the FCA’s Connect system.

Transfer of Personal Data to the UK

Finally, in the event of a hard Brexit, any transfer of personal data by Irish domiciled funds and fund service providers must be effected in accordance with one of the safeguards available under Chapter V of the GDPR. Therefore, unless it is possible to rely on one of the other safeguards set down in the GDPR, if an Irish entity does in fact transfer personal data to one or more UK based entities, it should be taking steps to put in place EU Commission approved Standard Contractual Clauses with any such UK entities.

We are currently working with many of our clients on their Brexit contingency arrangements including advising on the establishment and authorisation of management companies and AIFMs in Ireland, the use of a third party management company or AIFM as an alternative to setting up in Ireland and other restructuring solutions to facilitate the continued sale of Irish funds throughout the EU. If you require any further assistance with implementing appropriate contingency arrangements to prepare for a hard Brexit, please contact your usual contact in the Dillon Eustace Asset Management and Investment Funds Team.

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