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Third Country Delegation and Brexit MoUs – A Reprieve!

Recent keynote speeches from ESMA representatives and those of other key regulatory stakeholders have sent a clear message to the European funds industry as to the positive intent of such stakeholders to ensure that delegation of investment management by UCITS management companies and AIFMs to UK based investment managers may continue even in the event of a no-deal Brexit.

Preparation of MoUs

UCITS management companies and AIFMs can only delegate investment management to entities located in third countries where a memorandum of understanding (“**MoU**”) is in place between their own regulator and the competent authority of that third country. In his recent speech to the WFE Annual Meeting on 3rd October, Mr Steven Maijor, Chair of ESMA, confirmed reports that ESMA is working to ensure that appropriate MoUs are put in place with the UK’s FCA to facilitate the continued delegation of investment management back to the UK. The stated intent is that such MoUs will be in place sufficiently in time for the 29 March 2019 deadline *“taking the wider negotiations between the EU and the UK into account”*.

Support of National Competent Authorities

Mr Maijor’s confirmation echoes and supports statements made by other ESMA representatives in recent speeches and also by Robert Ophele, Chairman of the French supervisory authority, the AMF and Gerry Cross, Director of Policy and Risk at the Central Bank of Ireland. Both regulators recognised that delegation to the UK can

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continue to be considered as part of any Brexit contingency planning for those operating in the financial services and fund management sector. Equally, the UK Government and the FCA have made it clear that their expectation is that MoUs will be in place to facilitate the continued operation of the delegation model and have indicated that they are ready and willing to sign up to those co-operation arrangements as and when required.

With interests aligned in this manner, the “cliff-edge” of a no-deal Brexit may not materialise with respect to the delegation of investment management by UCITS management companies and AIFMs to UK based investment managers.

Substance Considerations

However MoUs are just one piece of the puzzle. While in many ways the establishment of the MoUs will allow for business as usual after 29th March next, ESMA and the NCAs are also sending a clear message that real substance is required within the EEA for those UCITS management companies and AIFMs which intend to delegate investment management to UK based entities. The Central Bank’s “pre-emptive” strike on substance requirements, supervisability and the operation of delegation under its CP86 framework has positioned Ireland well in the context of ensuring that any Irish domiciled UCITS management company or AIFM regulated by it does not become a “letter-box” entity. There is no doubt that delegation arrangements back to the UK are being closely monitored by ESMA through engagement by NCAs as part of the EU supervisory co-ordination network established on a temporary basis with the aim of ensuring a consistent approach to authorisations across the EU. This level of co-ordination may be given a more permanent footing if current proposals for enhancing the supervisory convergence powers at ESMA level gain traction within the EU27. Either way the dialogue will continue and therefore UCITS management companies and AIFMs will need to ensure that delegation arrangements will stand up to the scrutiny of both their home regulator and the EU supervisory co-ordination network.

Dillon Eustace is working with a number of applicants establishing operations in Ireland while delegating certain investment management tasks to UK based entities. Please contact the authors or your usual contact in the Asset Management team for further information.

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