

# Brexit – Where Are We Now?

This tracker notes the latest Brexit-related developments impacting the Irish investment funds industry in reverse chronological order

In the event of a hard Brexit, that is the United Kingdom (“UK”) leaving the European Union (“EU”) on 29 March 2019 without a withdrawal agreement, the UK will become a “third country” and will therefore lose the passporting rights available to UCITS, UCITS management companies and alternative investment fund managers (“AIFMs”) under EU legislation. We have been advising our clients on the implementation of their Brexit contingency plans, including advising on the establishment and authorisation of UCITS management companies, AIFMs and Super ManCos (that is, management companies with an authorisation under both the UCITS Directive and the Alternative Investment Fund Managers Directive (“AIFMD”)) in Ireland, including in many cases obtaining an additional individual portfolio management (“IPM”) authorisation. An alternative to establishing a management company is to appoint a third party management company or to use a third party platform. The implementation of these plans will ensure that UK investment fund managers will continue to have access to EU markets in a hard Brexit scenario.

We are also advising clients on the increased substance / time commitment requirements being imposed on designated persons by the Central Bank of Ireland (“Central Bank”), which is consistent with the general trend in Europe following the July 2017 European Securities and Markets Authority (“ESMA”) **opinion** on relocations from the UK to the remaining EU27.

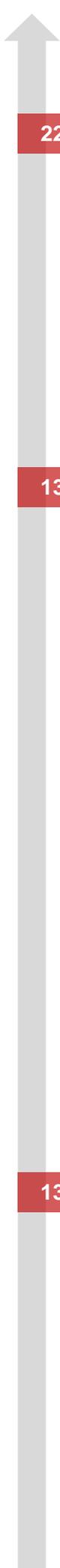
The agreement of a multilateral memorandum of understanding (“MoU”) between ESMA and the UK Financial Conduct Authority (“FCA”) ensures that UCITS management companies and AIFMs authorised in Ireland can continue to delegate activities including investment management and portfolio risk management to investment managers based in the UK.

The FCA’s temporary permissions regime (“TPR”) ensures continued access to the UK market for EU funds and EU firms in the event of hard Brexit, affording such funds and firms the time necessary to submit to the FCA relevant applications / notification for recognition.

Should a withdrawal agreement be finalised in advance of the 29 March 2019 deadline, a transitional period will apply up to December 2020. During this transitional period, EU legislation will continue to apply to the UK and therefore UK UCITS, UCITS management companies and AIFMs can continue to avail of passporting rights during any such transitional period. The basis of their future operations will depend upon the terms of the agreement on the future UK / EU relationship, which is likely to be based on the existing EU equivalence regime, perhaps with some modifications.

This tracker includes Brexit-related developments impacting Irish- domiciled investment funds in particular. It does not, for example, include all of the various legislative and regulatory measures proposed in the UK that impact UK domiciled funds only.

*Please get in touch with your usual **Asset Management and Investment Funds Department** contact or any of the contacts listed in this publication should you require further information in relation to the material referred to in this tracker.*

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22 February 2019

### Irish Brexit Omnibus Bill Published

On 22 February 2019, the Irish Government published the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2019 (available [here](#)) to prepare Ireland for a no-deal withdrawal by the UK. Part 7 of the bill addresses “Financial Services: Settlement Finality (Third Country Provisions)” and introduces legislative amendments to support the implementation of the European Commission’s (“**Commission**”) equivalence decision under the Central Securities Depositories Regulation (“**CSDR**”) and to extend the protections contained in the Settlement Finality Directive to Irish participants in relevant third country domiciled settlement systems. The explanatory memorandum is available [here](#).

13 February 2019

### Central Bank Speech on the Brexit Discontinuity

On 13 February 2019, the Governor of the Central Bank, Philip Lane delivered a **speech** to the European Financial Forum in Dublin Castle. The central focus of the speech was on Brexit and the potential impact it may have on the Irish economy. Within the framework laid out in legislation, the post-Brexit EU will have to develop and implement a revised supervisory approach that recognises the shift in the geography of cross-border trade in financial services within the EU27, with less reliance on the UK as a bilateral trading partner and more reliance on newly-formed and expanded connections across EU27 member countries. In addition, in meeting their individual mandates, EU and non-EU regulators will have to work together in the supervision of large financial groups, in view of the ongoing intra-firm sharing of technology and services platforms and inter-linked balance sheets between EU entities and non-EU entities (including UK entities).

Mr Lane states that well over one hundred firms have applied for new authorisations or permission to expand their existing businesses. While some of these applications relate to firms that now plan to serve Irish customers directly rather than through a UK entity, most of the volume is driven by export-orientated international firms that will serve EU27 customers from an Irish base. The speech notes that, because of the work that the Central Bank and others have undertaken, the immediate “cliff-edge risks” of a hard Brexit have been largely addressed. These include the temporary permission by the European authorities for the UK central securities depository (“**CSD**”) to continue to serve Irish securities during the transition to an alternative EU27 CSD arrangement and legislation to provide a temporary run-off regime that will protect insurance customers.

13 February 2019

### ESMA Speech on Brexit - The Regulatory Challenges

On 13 February 2019, Steven Maijoor, chair of ESMA delivered a **speech** on Brexit and regulatory challenges at the European Financial Forum 2019 in Dublin. The speech focused on ESMA's preparations for a no-deal Brexit across a number of areas, including secondary markets, clearing and settlement and cooperation agreements while also looking to the future of the EU's market after Brexit. Mr Maijoor made it clear that a no-deal Brexit will result in UK market participants losing their passporting rights and also warned that under the Markets in Financial Instruments Directive II (“**MiFID**”

II") investment firms are allowed to trade shares only on EU exchanges and foreign exchanges recognized as equivalent by the Commission. Mr Maijor states, "*To date no such equivalence decision exists for the UK.*" Looking beyond Brexit, Mr Maijor stresses that Brexit has increased the convergence challenges of European financial supervision as the structure of the financial market is changing "*increasing the need for consistency and additional and stronger convergence tools.*"

The European Parliament has proposed that ESMA should have powers to issue "no action letters" that advise firms they will not face sanctions if they do not comply with a rule or deadline after Britain leaves the EU. Such letters are used by US regulators, and would avoid the EU having to make time-consuming legislative changes if temporary problems with rules crop up.

8 February 2019

## Transfers of Personal Data to the United Kingdom

On 8 February 2019, the Data Protection Commission ("DPC") published **guidance** on its webpage on transfers of personal data from Ireland to the United Kingdom ("UK") in the event of a no-deal Brexit. The guidance includes a list of ways in which companies might transfer data to a UK company and information on the extra measures that can be put in place to legally transfer personal data to the UK in the event the UK leaves the European Union ("EU") on 29 March 2019 without a withdrawal agreement and becomes a "third country". This will mean restrictions on transfers of personal data to the UK, even on a data controller to data controller basis. The DPC notes the use of standard contractual clauses is likely to be the most relevant to Irish entities that transfer personal data to the UK and presents a brief overview of the contents of the standard contractual clause.

7 February 2019

## Central Bank Letter to QIAIFs with UK AIFMs

On 7 February 2019, the Central Bank wrote to Irish qualifying investor alternative investment funds ("QIAIFs") that are currently managed by an AIFM authorised in the UK. The letter requested QIAIFs to select one of the options below to address the impact of the UK's exit from the EU on 29 March 2019. QIAIFs are requested to respond no later than 22 February 2019, stating which option will be implemented by the QIAIF.

- **Option 1: Retention of current UK AIFM as a non-EU AIFM.** If this option is selected, the QIAIF must notify the Central Bank by 22 February 2019 of its intention to designate its current UK AIFM as its non-EU AIFM from 29 March 2019. The current UK AIFM of the QIAIF must notify the Central Bank of its intention to continue to act for the QIAIF. Where updates are required to the QIAIF's documentation to reflect the retention of the UK AIFM, the QIAIF must submit the updates by email by 1 March 2019. The Central Bank advises that, in its capacity as a non-EU AIFM, the marketing of the QIAIF by the AIFM into other EU member states under the AIFMD passport will no longer be permitted and will instead be subject to member states' national private placement regimes. QIAIFs migrating to such an arrangement need to assess the impacts arising from the loss of the marketing passport under the AIFMD including notification to investors, amendments to documentation, filings with the Central Bank or other supervisory authorities and any other operational issues.

- **Option 2: Change of AIFM to an Authorised EU27 AIFM.** If this option is selected, the QIAIF must submit a change of service provider (“**COSP**”) application to the Central Bank by 1 March 2019.
- **Option 3: Termination.** If this option is selected, the QIAIF must notify the Central Bank by 22 February 2019.

6 February 2019

## ESMA Supervisory Work Programme 2019 – Brexit Aspects

On 6 February 2019, ESMA published its **Supervisory Convergence Work Programme 2019** which sets out ESMA’s work streams to promote sound, efficient and consistent supervision across the EU. The elements of the work programme of particular relevance in the context of Brexit are set out below.

- ESMA states, “*In addition to the discussion on concrete cases of relocation by UK-based entities to the EU27, ESMA will investigate the prospect for further convergence on certain topics such as back-branching and minimal presence requirements in the EU.*”
- ESMA will consider forms of enhanced supervisory cooperation among national competent authorities (“**NCAs**”) in the aftermath of the UK’s withdrawal.
- A peer review will be launched at the end of 2019, looking into NCA’s handling of relocation requests.

On 5 February 2019, the Minister for Finance and Public Expenditure and Reform, Paschal Donohoe, delivered a **statement** to the Joint Committee on Finance, Public Expenditure and Reform on Brexit preparations and also made some comments in relation to the financial services sector. Mr Donohoe stated that the Department of Finance has been working closely with the Central Bank on planning for Brexit along with the relevant industry stakeholders. In terms of financial services, he notes that the responsibility for contingency planning remains with individual firms. He believes, however, that the financial system as a whole should be resilient enough to withstand a hard Brexit and that the most material “cliff edge” financial stability risks arising from Brexit have been largely mitigated. Speaking about CSDs, Mr Donohoe notes that the proposed legislation in the Brexit Omnibus Bill will support the implementation of the Commission’s equivalence decision under the CSDR and extend the protections contained in the Settlement Finality Directive to Irish participants in relevant third country domiciled settlement systems.

5 February 2019

## Irish Department of Finance Speech on Brexit and Financial Services

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4 February 2019

## Central Bank Publishes Updated AIFMD Q&A – UK AIFMs

On 4 February 2019, the Central Bank **published** an updated version of its questions and answers (“**Q&A**”) document on the application of the AIFMD. The updated Q&A includes a new Q&A ID1129, which clarifies that a QIAIF will be permitted to designate a UK AIFM as its AIFM. The QIAIF and its UK AIFM must comply with the provisions of the Central Bank's AIF Rulebook that apply in the case of QIAIFs with registered AIFMs (as applies to all non-EU AIFMs). The Central Bank advises that QIAIFs migrating to such an arrangement need to assess the impacts arising from the loss of the marketing passport under the AIFMD including notification to investors, amendments to documentation, filings with the Central Bank or other supervisory authorities and any other operational issues.

4 February 2019

## Central Bank Notice of Intention on Location Requirements for Directors and Designated Persons of Irish Fund Management Companies

On 4 February 2019, the Central Bank published a **notice of intention** for directors and designated persons of Irish fund management companies. The notice deals with the location requirements for directors and designated persons of Irish fund management companies in the event of a hard Brexit. The Central Bank notes the potential disruption in the event that the UK withdraws from the EU without ratifying a withdrawal agreement and states that should such an eventuality arise, the Central Bank will consider whether the UK is a country to be determined as meeting their “Effective Supervision Requirement”. The notice states that 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*”. The notice states that Central Bank will confirm the UK's status by publishing a notice on its website. It is noted that such determination may be changed.

4 February 2019

## ESMA Agrees MOUs with the Bank of England for Recognition of UK Central Counterparties and the UK CSD

ESMA has **agreed** MoUs with the Bank of England (“**BoE**”) for the recognition of central counterparties (“**CCPs**”) and of the CSD established in the UK that would take effect should the UK leave the EU without a withdrawal agreement. The MoUs reaffirms ESMA's support for continued access to UK CCPs and to the UK CSD. It will also allow the UK CSD to continue to serve Irish securities, and to limit the risk of disruption to the Irish securities market. The conclusion of MoUs between ESMA and the BoE satisfies one of the recognition conditions under the European Market Infrastructure Regulation (“**EMIR**”) and the Central Securities Depositories Regulation. The MoUs are based on the standard template for the recognition of third country CCPs and amended to reflect the

relevant conditions in the two equivalence decisions of the Commission (see 19 December 2018 update below).

ESMA aims to complete the next steps for the recognition of the UK CCPs and the UK CSD and to adopt the recognition decisions well ahead of Brexit date. The recognition decisions would take effect on the date following Brexit date, under a no-deal Brexit scenario.

## 1 February 2019

### ESMA Statement on EMIR Derivatives Reporting in Event of No-deal Brexit

On 1 February 2019, ESMA published a **statement** on how derivatives data reported under Article 9 of EMIR should be handled in the event of a no-deal Brexit. In summary, ESMA notes that counterparties should continue using their usual reporting channels (including, where relevant, reporting to UK trade repositories) until the occurrence of a no-deal Brexit. Following a no-deal Brexit EU27 counterparties should comply with their EMIR reporting obligations by ensuring they (or their reporting delegate) report to EU trade repositories. This may require EU27 counterparties (including Irish funds who have appointed UK counterparties as their reporting delegates), to ensure that their EMIR reporting is switched from a UK trade repository (such as DTCC Derivatives Repository plc) to an EU trade repository (such as DTCC's newly authorised Irish trade repository, DTCC Data Repository (Ireland) plc).

## 24 January 2019

### ESMA and FCA Agree on MoU Permitting Delegation Activities

On 1 February 2019, ESMA **announced** that ESMA and the European securities regulators have agreed MoUs with the FCA. The MoUs form part of preparations for a no-deal Brexit and will only take effect in the event of a UK withdrawal without an agreement. ESMA states that the MoUs are similar to those already concluded on the exchange of information with many third country supervisory authorities.

The MoUs are:

- a multilateral MoU between EU / EEA securities regulators and the FCA covering supervisory cooperation, enforcement and information exchange between individual regulators and the FCA, and will allow them to share information relating to, amongst others, market surveillance, investment services and asset management activities. This, in turn, will allow certain activities, such as fund manager outsourcing and delegation, to continue to be carried out by UK based entities on behalf of counterparties based in the EEA; and
- an MoU between ESMA and the FCA concerning the exchange of information in relation to the supervision of credit rating agencies and trade repositories.

## 24 January 2019

### Central Bank of Ireland Speech on Asset Management after Brexit

On 24 January 2019, Michael Hodson, Director of Asset Management and Investment Banking at the Central Bank gave a **speech** on asset management after Brexit to the British Irish Chamber of Commerce.

- **TPR:** On the risks relating to the loss of the financial services passport, Mr Hodson states that the FCA's announcement on the TPR and the Central Bank's Deputy Governor, Ed Sibley's, recent speech on "safety and soundness" should "*give industry sufficient confidence on this matter.*"
- **CSDs:** Another critical Brexit risk the Central Bank is monitoring relates to continued access to CSD services. Mr Hodson notes that a 24 month temporary equivalence period for UK CSDs would be provided for in the event of a hard-Brexit. The Central Bank is working closely with ESMA and the Bank of England around the practicalities of implementing the associated recognition process for Euroclear UK & Ireland ("**EUI**"). The Central Bank is also working with the European Central Bank and EUI on the continued provision of euro settlement upon EUI being recognised as a third country CSD. Mr Hodson states that while temporary equivalence is welcome and would alleviate the short-term cliff edge risk, it also means that an alternative long-term arrangement must be in place once this period comes to an end. He notes that Euronext Dublin has expressed a preference to migrate its market to Euroclear Bank Belgium. Both parties are working with market stakeholders, including issuers, registrars and brokers, to begin the implementation of this model.
- **Authorisations:** On authorisations, Mr Hodson made it clear that the Central Bank will not lower their assessment standards in light of the increased number of authorisation requests. No firm should expect the Central Bank to provide an "insurance policy" for inadequate Brexit planning. The Central Bank has no appetite for firms who have not done the work or for firms that have no real intention in setting up a substantial business in Ireland, but rather just see their authorisation as a last resort for a hard Brexit.

24 January 2019

## General Scheme of Irish Brexit Bill Published

On 24 January, the **General Scheme** of the Miscellaneous Provisions (Withdrawal of the United Kingdom from the European Union on 29 March 2019) Bill 2019 was published as part of the Irish Government's Brexit Contingency Action Plan. The general scheme consists of proposed primary legislative measures required in the event of a no deal Brexit. While ratification of the withdrawal agreement is still the Government's preferred outcome, this publication is the next step in a series of measures that the Government is taking, both nationally and in conjunction with the EU, in preparation for the possibility that the UK fails to agree a deal for their departure from the EU on 29 March 2019.

One noteworthy aspect of the bill is the proposed introduction of legislative amendments to support the implementation of the Commission's equivalence decision under the CSDR and to extend the protections contained in the Settlement Finality Directive to Irish participants in relevant third country domiciled settlement systems.

17 January 2019

## Central Bank of Ireland Speech on its Strategic Priorities for Next Three Years, including Brexit

On 17 January, Ed Sibley, Deputy Governor of the Central Bank gave a **speech** to the Banking and Payments Federation Ireland on the "future supervisory landscape," of Ireland's financial sector. In his speech Mr Sibley addresses the impact of Brexit, stating that the Central Bank is satisfied from a financial stability perspective that, "*cliff-edge risks are now manageable,*" and that the most significant

firms operating in Ireland across all sectors have prepared and are executing contingency plans for a hard Brexit. Mr Sibley was also confident that there will be MoUs in place to facilitate:

*“the continued high level of cooperation between UK and European authorities, including on a bilateral basis. It is reasonable for firms to plan on the basis that MOUs will be in place by 29th March. Firms that delegate portfolio management to the UK can have sufficient confidence that this will continue to be allowed post 29th March.”*

Mr Sibley was also mindful that the UK’s departure will require increased engagement on the Central Bank’s part in the relevant EU and international regulatory forums and notes that the Central Bank is aiming to ensure that they are operating and influencing European supervisory norms, supporting the development of supervisory guidelines and enhancing their reputation by maintaining and growing key leadership positions in committees and working groups.

15 January 2019

## UK House of Commons Rejects Withdrawal Agreement

On 15 January 2019, the withdrawal agreement agreed by UK and EU negotiators in November 2018 was decisively rejected by a vote in the UK House of Commons, requiring the UK government to present an alternative plan to the House of Commons on 21 January 2019.

7 January 2019

## FCA Opens Notification Window for Temporary Permissions Regime

On 7 January 2019, the FCA announced that the notification window for the TPR is now open and will close on the 28 March 2019. Firms will need to notify the FCA that they wish to enter the TPR using the FCA’s “Connect” system. Fund managers are also required to notify the FCA of which of their passported funds they wish to continue to market in the UK temporarily via Connect. The FCA published a guide for Connect covering the notification process for firms and investment funds. There will be no fee for notifying under the regime for firms and fund managers.

Once the notification window has closed, fund managers that have not submitted a notification for a fund will be unable to use the temporary permissions marketing regime for that fund. They will not be able to continue marketing that fund in the UK on the same basis as they did before exit day. The FCA notes the only exception to this is for new sub-funds of European Economic Area (“EEA”) UCITS that are in the temporary permissions marketing regime on exit day. It is possible for such new sub-funds to enter the temporary permissions marketing regime after exit day. Details of firms and investment funds with temporary permission will be shown on the Financial Services Register.

19 December 2018

## European Commission Communication on Preparing for a No-Deal Withdrawal of the UK from the EU

On 19 December 2018, the Commission published a **communication** on preparing for a no-deal withdrawal of the UK from the EU. The communication is in response to the European Council calling for work on preparedness for the consequences of the UK’s withdrawal to be intensified. After

examining the risks linked to a no-deal scenario, the Commission has adopted the following measures in the area of financial services to try to reduce the impact of a no-deal Brexit:

- a temporary and conditional equivalence decision for 12 months to ensure that there will be no disruption in central clearing of derivatives. This will allow the ESMA to recognise temporarily central counterparties currently established in the UK, allowing them temporarily to continue providing services in the EU;
- a temporary and conditional equivalence decision for 24 months to ensure that there will be no disruption in services provided by UK central securities depositories. It will temporarily allow them to continue providing notary and central maintenance services to operators in the EU. This will allow EU27 operators that currently have no immediately available alternative in the EU27 to fulfil their obligations under EU law; and
- two delegated regulations facilitating novation, for a fixed period, of certain over-the-counter derivatives contracts with a counterparty established in the UK to replace that counterparty with a counterparty established in the EU. This allows such contracts to be transferred to an EU27 counterparty while maintaining their exempted status and thus not becoming subject to clearing and margining obligations under EMIR. Such contracts, pre-dating EMIR, are exempted from EMIR requirements.

The communication goes on to say that firms should continue to take all the necessary steps to mitigate risks and should actively inform clients about the steps they have taken and how they are implementing them.

19 December 2018

## ESMA Issues Warning to Firms to Disclose Brexit Implication to Clients

On 19 December 2018, the ESMA issued a **statement** to remind firms that provide financial services of their MiFID obligations to provide clients with information on the implications of the withdrawal of the UK from the EU on their relationships and on the impact Brexit will have on the operations or measures a firm has taken already taken or intends to take.

ESMA states that, in order to prevent any potential disruption arising from Brexit, firms should ensure that they provide clear information to clients whose contracts and services may be affected. The information should be provided in a timely manner, once available, and should cover the following areas:

- impact of the UK departure for the given firm and its business, and the implications this has for the relationship between the client and the firm;
- actions the firm is taking such as organisational arrangements to deal with client inquiries;
- implications for clients of any corporate restructuring and, in particular, any relevant changes to contractual terms; and
- contractual and statutory rights of clients in these circumstances, including the right to cancel the contract and any right of recourse, where applicable.

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7 December 2018

## HM Treasury Clarifies that New Sub-Funds of an Umbrella Fund May Access TPR after Exit Day

One of the points of concern raised when the FCA announced its TPR related to the ability of new sub-funds launched after Brexit day to be allowed to access the TPR. This point was clarified by HM Treasury on Friday 7 December 2018, with the publication of **Draft EU Exit SIs** for investment funds and their managers, as follows:

*“New sub funds of an umbrella fund will be permitted to notify the FCA to enter the TPR after exit day. New sub-funds of an umbrella fund are those which become authorised in accordance with the UCITS Directive by their EEA home state regulator on or after exit day. For those new sub-funds to enter the TPR after exit day, at least one other sub-fund of the new sub-fund’s umbrella fund must have notified to enter the TPR before exit day.”*

3 December 2018

## Central Bank Speech on Brexit and the Evolving Landscape of the Asset Management Sector

On 3 December 2018, Michael Hodson, Director of Asset Management and Investment Banking at the Central Bank delivered a **speech** regarding the potential cliff effects that may arise in the event of a hard Brexit. The speech also addresses some of the changes in the Irish financial services landscape as a result of Brexit and the expectations the Central Bank has of financial firms, both existing and newly authorised.

**Brexit Cliff Effects:** Mr Hodson highlights the real risk of UK fund managers losing their passporting rights. He states that it is imperative that fund boards look at what contingency plans are in place in the event of a hard Brexit. The Central Bank is aware of the potential loss of the ability of Irish funds to delegate their portfolio management to UK investment managers. In light of this, he states that establishing MoUs remains very much a live issue at a European and domestic level and that the Central Bank is confident that the required level of work is on-going to ensure that the necessary MoUs will be in place by the end of March 2019.

The Central Bank has concerns about the settlement of Irish securities post Brexit. At present, Ireland has no indigenous securities settlement systems infrastructure with all Irish equity transactions and a proportion of exchange traded funds settled through the CREST CSD, which is operated out of the UK. In the event of a hard Brexit, the UK operator will no longer be able to passport in and service the Irish market. As a result of this, the Central Bank continues to engage with the Department of Finance, market participants and a number of European stakeholders with the objective of mitigating the risk of any service disruption.

**Engagement with Market Participants:** The Central Bank asked a number of entities to provide analysis of the potential impact Brexit may have on their business model, operations, financial resources, and legal and regulatory structures. Following analysis of the responses, common risks were identified across the sector, which include: (1) continued access to a CSD; (2) UK market access; (3) macroeconomic effects; (4) investor impact; and (5) staffing and the General Data Protection Regulation (“**GDPR**”).

**A Changing Landscape:** Since the UK voted to leave the EU, the Central Bank has seen a notable uplift in the number of firms seeking authorisation. This has included a number of firms operating business models in the capital markets and investment banking space that are new to Ireland. In preparation for the ongoing supervision of these firms, the Central Bank has established a new division, the Investment Banks and Broker Dealers Division. Mr Hodson states that firms must put in place strong and robust risk management processes, stand up their operations as agreed with the Central Bank and demonstrate their independence from any group or parent company in another jurisdiction. In addition to the above, all firms relocating to Ireland must demonstrate that they have the staff necessary to carry out their functions and this means full time staff dedicated to the management company.

Mr Hodson also notes that many entities are seeking to set up operations in more than one jurisdiction. He states that close relationships with other NCAs and Central Bank participation with their supervisory colleges will become increasingly important as regulators will need to find tools and mechanisms to get a holistic view of the supervisory risks from an EU27 perspective.

**Transitional Period:** In the event of a transitional period, firms who have not yet made their plans will need to engage with the Central Bank early to make sure they have everything in order:

*“You should not underestimate the challenge as you will have multiple tasks to complete including the sourcing of office space, hiring or moving staff, repapering clients, not to mention getting regulatory approval. There will be little sympathy for firms from regulators or indeed their clients if, come December 2020, they have not made the necessary arrangements to continue to service EU27 clients.”*

**Outsourcing:** Mr Hodson states that a high degree of reliance on outsourcing, particularly intragroup outsourcing, is a common feature of authorisation applications. Many firms seeking to be authorised in Ireland plan to outsource to existing group entities located in the UK. The boards and senior management of any applicant firm must be able to demonstrate to the Central Bank that the new entity has robust governance, risk management and business continuity arrangements in place in respect of any existing or proposed outsourcing.

4 December 2018

## Central Bank Speech on Culture and Specific Issues in the Asset Management Market

On 4 December 2018, Derville Rowland, Director General at the Central Bank delivered a **speech** that highlights the importance of effective culture within the asset management market and addresses specific issues related to Brexit. Ms Rowland states that Brexit presents many risks to the financial services system and that financial services firms operating in Ireland, or intending to do so, need to understand these risks and ensure they have effective mitigation plans in place. In tandem with other regulators, the Central Bank has pushed firms to prepare for worst-case scenarios rather than “hoping for the best”. Ms Rowland goes on to say that the Central Bank, has seen variation in the levels of contingency planning by entities over recent months. Such variation, she notes, can be linked back to the culture of a firm.

On the specific issue of MoUs, the Central Bank is working through ESMA in order to reach a coordination solution with UK regulators. The objective, like other regulators, is to prepare for and mitigate significant cliff-edge effects to the greatest extent possible, regardless of the outcome of the

political negotiations. Ms Rowland states that this is a vital objective in terms of protecting investors from the impact of any disorderly interruption of portfolio management mandates.

23 November 2018

## ESMA Statement on Risks of Central Clearing in Event of a No-deal Brexit

On 23 November 2018, ESMA issued a public **statement** to address the risks of a no-deal Brexit scenario in the area of central clearing. ESMA's Board of Supervisors has stated its support for continued access to UK CCPs to limit the risk of disruption in central clearing and to avoid negatively impacting EU financial market stability. ESMA also states that it supports the communication published on 13 November 2018 by the Commission where the Commission stated that it will act, to the extent necessary, to address financial stability risks in the EU arising from the withdrawal of the UK without any agreement. In the case of a no-deal Brexit, the Commission has declared that it will adopt a temporary and conditional equivalence decision in order to ensure that there will be no disruption to central clearing. Finally, ESMA has stated that it is engaging with the Commission to plan the preparatory actions for the recognition process of UK CCPs, in case of a no-deal scenario and has already begun to engage with UK CCPs to carry out preparatory work. The aim is to ensure continued access to UK CCPs for EU clearing members and trading venues at the time of the proposed exit date.

14 November 2018

## UK and EU Negotiators Publish Draft Withdrawal Agreement

The **withdrawal agreement** covers all elements of the UK's withdrawal from the EU: citizens' rights, the financial settlement, a transition period, governance, Protocols on Ireland, Gibraltar and Cyprus, as well as a range of other separation issues.

The EU and the UK negotiators agreed on how to avoid a hard border between Ireland and Northern Ireland. Both stated that they would use their best endeavours to have - by 1 July 2020 - a future agreement concluded before the end of the transition period. Should this not be the case, the EU and the UK could jointly extend the transition period. The length of any such extension was the only matter left to be finalised in the withdrawal agreement, which provides: "the Joint Committee may, before 1 July 2020, adopt a single decision extending the transition period up to 31 December 2022." Alternatively, as of January 2021, the backstop solution for Ireland and Northern Ireland would apply, subject to a joint review mechanism.

That backstop solution means that a single EU-UK customs territory would be established, which would apply from the end of the transition period until such a time as a subsequent agreement became applicable. Northern Ireland would therefore remain part of the same customs territory as the rest of the UK. The single customs territory covers all goods with the exception of fishery and aquaculture products.

The creation of the single customs territory includes the corresponding level playing field commitments and appropriate enforcement mechanisms to ensure fair competition between the EU27 and the UK.

The European Council at a special meeting endorsed the withdrawal agreement and the joint political declaration on the framework for a future relationship. However, before the withdrawal agreement can

enter into force, it must be ratified by the UK and the EU. For the EU, the Council of the EU must authorise the signature of the withdrawal agreement before sending it to the European Parliament for consent. The UK must ratify the agreement by its own constitutional arrangements, including a vote in the House of Commons.

14 November 2018

## UK and EU Negotiators Agree Draft Political Declaration for Brexit Deal

On 14 November 2018, the EU and the UK negotiators **agreed** a draft political declaration setting out the framework for the future relationship between the EU and the UK. The declaration (published on 22 November 2018) pledges an “*ambitious, broad, deep and flexible partnership*”. In respect of financial services the below sections have been included in the declaration.

### IV. FINANCIAL SERVICES

*37. The Parties are committed to preserving financial stability, market integrity, investor and consumer protection and fair competition, while respecting the Parties’ regulatory and decision-making autonomy, and their ability to take equivalence decisions in their own interest. This is without prejudice to the Parties’ ability to adopt or maintain any measure where necessary for prudential reasons. The Parties agree to engage in close cooperation on regulatory and supervisory matters in international bodies.*

*38. Noting that both Parties will have equivalence frameworks in place that allow them to declare a third country’s regulatory and supervisory regimes equivalent for relevant purposes, the Parties should start assessing equivalence with respect to each other under these frameworks as soon as possible after the United Kingdom’s withdrawal from the Union, endeavouring to conclude these assessments before the end of June 2020. The Parties will keep their respective equivalence frameworks under review.*

*39. The Parties agree that close and structured cooperation on regulatory and supervisory matters is in their mutual interest. This cooperation should be grounded in the economic partnership and based on the principles of regulatory autonomy, transparency and stability. It should include transparency and appropriate consultation in the process of adoption, suspension and withdrawal of equivalence decisions, information exchange and consultation on regulatory initiatives and other issues of mutual interest, at both political and technical levels.*

From the declaration, it is evident that the future relationship would be based on equivalence, but the phrase “*cooperation would include...appropriate consultation on the process of adoption, suspension and withdrawal of equivalence decisions*” might suggest a modified form of equivalence differing to the current EU equivalence regime whereby the Commission makes unilateral decisions as to equivalence and can withdraw an equivalence decision where 30 days’ notice has been given. The EU, however, made no promises to improve or broaden its existing equivalence agreements, as the UK had hoped.

13 November 2018

## European Commission Outlines Contingency Action Plan for No-Deal Brexit

On 13 November 2018, the Commission published information on its ongoing preparedness and contingency work in the event of a no deal scenario in the Article 50 negotiations with the UK. It has published a **communication**, which outlines a limited number of contingency actions in priority areas (including financial services) that could be implemented if no agreement is reached with the UK. This follows a first preparedness communication published on 19 July 2018. The Commission notes that

many financial services firms have prepared for a scenario in which the UK is no longer part of the single market, for example by adjusting their contracts or relocating capacities or activities to the EU27. It is noted that this transfer of activities and capacity building should be accelerated, but it will not be possible to complete it in time for all areas by March 2019. While this could cause risks to financial stability in the EU, “the risks in this sector linked to a no deal scenario have diminished significantly”. The communication states that, should not agreement be in place, the Commission will adopt temporary or conditional equivalence decisions in order to ensure that there will be no disruption in central clearing and depositary services. These decisions will be complemented by recognition of EU-based infrastructures, which are therefore encouraged to apply to ESMA for recognition. The Commission also encouraged the European Supervisory Authorities (“**ESAs**”) to start preparing cooperation agreements with UK supervisors to ensure that the exchange of information related to financial institutions and actors is possible immediately after the withdrawal date in the case of a no deal scenario.

7 November 2018

## UK Legislation Formally Creating Temporary Permissions Regime Published

On 7 November 2018, the European Economic Area (“**EEA**”) Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 were **published**. The purpose of the regulations, is to remove references to the passporting framework set out in the UK Financial Services and Markets Act 2000 (“**FSMA**”) and to ensure a smooth transition from the use of the EEA financial services passport to the requirement that regulated activities in the UK must be authorised by the UK’s competent authorities (the Prudential Regulation Authority (“**PRA**”) and the FCA.

The regulation creates a TPR whereby EEA firms currently operating in the UK via an EEA financial services passport are granted UK authorisation for a limited time until the PRA and the FCA determine their applications for UK authorisation. The regulations came into force on 7 November 2018 with the exception of certain sections which will come into effect on exit day. An **Explanatory Memorandum** has been published with the legislation.

15 October 2018

## Clarification on the Impact of Brexit on Existing Contracts

On 15 October 2018, the House of Commons’ Exiting the European Union Committee published a **letter** from Guy Verhofstadt MEP to Seema Malhotra MP, on the impact of Brexit on existing contracts. Mr Verhofstadt is the European Parliament’s Brexit Coordinator. In his letter, Mr Verhofstadt states that, in relation to ensuring the continuity of contracts concluded before Brexit (such as insurance and OTC derivatives contracts), the assessment made by the EU so far indicates that “*issues are likely to be linked to a far more limited set of contracts than initially feared by some*”.

For cross-border insurance contracts, the vast majority are one-off or short-term year contracts, such as travel insurance. There are no cliff-edge risks. The limited number of these contracts that would remain in place post-Brexit would be valid, and the performance of existing obligations could generally continue to take place.

Many uncleared OTC derivative contracts expire before 30 March 2019. In addition, derivative contracts concluded between UK and EU market participants should, in principle, remain valid, even in

a no-deal scenario. There is, therefore, no issue of contract certainty. However, the performance of certain life-cycle events, such as roll-over, novation and portfolio compression, imply, in general, the creation of new rights and obligations, for which an authorisation under EU or national law may be required.

Mr Verhofstadt notes that, under the Solvency II Directive insurance firms must take measures to ensure contracts can continue to be serviced. As stated by EIOPA, customers must be clearly informed about the possible impact of Brexit on their insurance contracts and on the relevant measures taken by insurance firms.

In Mr Verhofstadt's view, a transition period until the end of 2020, during which the current position (including passporting rights) would be maintained, would provide stakeholders with more time to adapt to the new situation. However, until a withdrawal agreement is concluded and ratified, there is no legal certainty on a transition period.

11 October 2018

## Equivalence in a Future EU-UK Trade Framework for Financial Services

On 11 October 2018, UK Finance (a trade association for the UK banking and financial services sector formed in July 2017) published a Brexit **quick brief** on equivalence in a future EU-UK trade framework for financial services.

In the Brexit quick brief, UK Finance analyses the EU's use of equivalence in financial services. It highlights potential problems arising from the current equivalence regimes in the context of the UK's relationship with the EU following Brexit and summarises potential reforms to equivalence proposed at an EU level. It also analyses the UK government's initial proposals for a future trading relationship with the EU in financial services, which contemplated an enhanced form of the EU's equivalence regime.

UK Finance concludes that the existing EU equivalence framework is far from ideal as the basis for a future EU-UK trading relationship in financial services. It calls for a range of enhancements to the framework relating to:

- the scope of the current EU equivalence regimes with respect to cross border contracting rights would need to be expanded to include core products and services currently not covered, and existing equivalence regimes that would permit the cross-border provision of certain other core products and services should be activated; and
- the protocols for making equivalence determinations should be refined to make them as transparent and collaborative as possible, preferably based on objective prudential criteria, guided by market needs and technical regulatory considerations, seeking to avoid politicisation.

UK Finance also calls for any and all equivalence determinations possible between the EU and the UK to be made and become operational at the point the UK leaves the EU single market, even in a no deal scenario.

UK Finance suggests that these enhancements and contingency planning steps could be applied through a mix of binding commitments in an EU-UK free trade agreement or association agreement,

unilateral legislative and regulatory change and regulatory and supervisory co-operation, or a combination of these instruments.

10 October 2018

## FCA Consultation on Temporary Permissions Regime for Inbound Firms and Funds

On 10 October 2018, the FCA published a **consultation paper** on the TPR for inbound firms and funds. The TPR will come into force when the UK leaves the EU if there is no transition period and the current passporting regime under the FSMA falls away.

The consultation paper includes:

- details of the regime for firms and fund marketing activities, including which firms and investment funds can use the regime (chapter 2);
- how the regime will operate for firms, including what the FCA expects from firms and how it will supervise them (chapter 3);
- the rules that the FCA proposes to apply to firms and fund marketing activities during the temporary permissions regime (chapter 4);
- how the regime will operate for investment funds (chapter 6); and
- the FCA's proposals for how the regime will be funded (chapter 7).

Investment funds can use the regime if they have been eligible to market in the UK under a passport before exit day and if they have notified the FCA seeking temporary permission. Notification is expected to be an online process using the FCA's Connect system. The FCA expects to open the notification window in early 2019 and it will close before exit day.

Significantly, the consultation paper notes that if a sub-fund was not eligible to be marketed in the UK under the passporting regime before exit day, or a notification for TPR has not been received by the FCA in respect of the specific sub-fund, this sub-fund will not be able to use the TPR.

While funds are in the TPR, where a requirement to notify information currently falls to the home state authority of the fund or the fund manager, the fund manager will instead need to provide the information directly to the FCA. The details as to how this is to be done will be published on the FCA website.

Once in the TPR, investment funds will be able to continue to market to investors in the UK for up to three years. Investment funds will be given a 'landing slot' to submit an application / notification for recognition and so the period spent in the TPR will vary from fund to fund depending on the landing slot.

The draft rules are set out in the Exiting the European Union: Temporary Permission (General Rules) Instrument 2019, which is in Appendix 1 to the consultation paper. Provisionally, it will come into force on 29 March 2019 at 11pm.

Comments were invited on chapters 4 and 7 of the consultation paper before 7 December 2018. The FCA intends to publish a policy statement, with final rules, in Q1 2019.

The Irish Funds Brexit Steering Group and UK Distribution Working Group prepared and submitted an industry **response** to this consultation. One of the main issues highlighted in the response was the need for new sub-funds launched after Brexit day to be allowed access to the TPR, which was later addressed by HM Treasury with the publication of the draft EU Exit guidance for investment funds and their managers.

3 October 2018

## ESMA Speech on Brexit and MiFID II Implementation

On 3 October 2018, ESMA published a **speech** given by Stephen Maijoor, ESMA Chair, on the state of implementation of MiFID II and preparing for Brexit. The key points addressed in the speech are set out below.

- ESMA is co-ordinating preparations for MoUs between EU NCAs, as well as ESMA, and their UK counterparts necessary if there is a no-deal Brexit. ESMA plans to start negotiations with the FCA to finalise these MoUs before the end of March 2019.
- Mr Maijoor calls for measures to ensure continued access to UK CCPs for EU clearing members and trading venues. He believes that this continued access would be in line with the proposed regulation amending the EMIR supervisory regime for EU and third-country CCPs. He supports a swift conclusion to the legislative process for this regulation, complemented by a transitional period allowing for continued access to UK-based CCPs, subject to conditions ensuring that UK CCPs continue to comply with EMIR requirements and colleges continue to monitor this compliance.
- Mr Maijoor calls for a harmonised EU regime for third-country trading venues under MiFID II and sets out the key elements that he considers should form part of that regime.
- ESMA is working to identify the effects on the markets of a no-deal Brexit arising from the impact of MiFID II calculations performed at the EU level, such as the double volume cap. It is also working to find the most efficient way to limit the impact for EU financial markets.

25 September 2018

## Central Bank Speech on the Future of the Asset Management Sector Addresses Relocations from the UK

On 25 September 2018, the Central Bank published a **speech** delivered by Michael Hodson, Director of Asset Management Supervision at an IDA event in New York. In the course of his speech, Mr Hodson addresses CP86 implementation generally and relocations from the UK in particular.

Mr Hodson notes that, through its engagement at European level (likely a reference to the Central Bank's engagement with the ESMA Supervisory Coordination Network ("**SCN**")) and from reviewing new authorisation applications, the Central Bank has gained insights that reinforce its strongly held view of the significance of designated person roles. Mr Hodson states:

*“In my view, it is undoubtedly self-evident that these roles require experienced and knowledgeable people to discharge them and that people in these roles must be dedicating a considerable amount of time to them.”*

The need for Irish management companies to demonstrate that they are independent and make their own decisions is emphasised and Mr Hodson notes:

*“The EU, National Competent Authorities, ESMA and EU citizens rightly expect that the provision of key financial services will be provided, managed and controlled by regulated entities that comply with EU rules and regulations. The UK is part of that EU regulatory landscape but will not be post Brexit and so it is clear that activities and responsibilities will need to shift from the UK to the EU27.”*

The Central Bank has been approached by a number of fund management companies that also intend to provide IPM. In engaging with these firms, the Central Bank has been very clear regarding its expectations of greater substance from any firm requesting to carry out such activities, as it is the Central Bank’s view that IPM is different and carries different risks than collective portfolio management. While the Central Bank will continue to take the “nature, scale and complexity” of the business into account and each case will be assessed on its own merit, all firms relocating must demonstrate that they have the staff necessary to carry out their functions and this, in the main, means full time staff dedicated to the management company. Mr Hodson emphasises the need for firms to prepare for all Brexit scenarios, including the loss of passporting rights for UK UCITS management companies and UK alternative investment fund managers.

8 August 2018

## Central Bank Brexit Task Force Report

On 8 August 2018, the Central Bank published a Brexit Task Force **Report** June 2018 Update.

The Report notes that the Central Bank’s Asset Management Supervision Directorate has been making preparations to address increased authorisation and supervisory activities related to Brexit. Most of this work seems likely to relate to the key facts document (“**KFD**”) / authorisation processes relating to fund management companies, and to firms seeking extensions / seeking to materially alter the scale of their business models (eg, re-parenting branches in Ireland).

The Central Bank sent firms a Brexit specific questionnaire in November 2017: the results have been analysed, and approximately 70% of responses were deemed to be of “basic” or “poor” quality. Further engagement will therefore be forthcoming.

In the replies to the questionnaire, Markets in Financial Instruments Directive (“**MiFID**”) and fund service provider firms identified the following risks to their businesses: the impact of losing the ability to passport; the loss of access to UK based subsidiaries / counterparties (and related delegation / outsourcing concerns); the loss of access to the UK market; and macroeconomic effects of Brexit (eg, exchange rate fluctuations). Issues relating to the GDPR may also arise should the UK become a non-equivalent third country. Conduct risk (investor protection) was also a recurring theme.

The Central Bank continues to engage with national stakeholders regarding finding a central securities depository to settle Irish securities post Brexit. The Central Bank met with members of the Irish Stock Exchange to discuss this.

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24 July 2018

## FCA Webpage on Temporary Permissions Regime

On 24 July 2018, the FCA published a **webpage** entitled “*The Temporary Permissions Regime for Inbound Passporting EEA Firms and Funds – Our Approach*”.

In the event of the EU passporting regime falling away abruptly (ie, in the case of a hard Brexit), the TPR would allow firms with passporting rights to continue passporting their funds into the UK post Brexit, whilst they seek UK authorisation. If the UK leaves the EU without a deal and without entering an implementation period, the FCA expects the regime to apply for a maximum of three years from 29 March 2018 at 11pm.

The webpage details how the TPR would operate, based upon Her Majesty’s Treasury’s recently published draft statutory instrument on a TPR for financial services firms and funds, available [here](#).

### *Who May Use the TPR?*

EEA UCITS and AIFs that have notified the FCA of their intention to market in the UK under the relevant passport prior to exit day may utilise the TPR. The FCA also notes the types of financial services firms that may use the TPR.

### *Notification Process*

Firms and funds will need to notify the FCA if they intend to use the TPR online. The FCA expects to launch these pages in early January 2019. The notification window will close prior to exit day. Once closed, firms and funds will not be able to use the TPR if they did not submit an application, and funds will not be able to continue marketing the fund in the UK. Details of firms and funds with a TPR will be shown on the FS Register. Firms will be allocated a “landing slot” within which they will need to submit their application for UK authorisation after the TPR ends. The first landing slot will be October to December 2019, and the last will be January to March 2021.

### *Next Steps*

A consultation paper on the TPR will be published in autumn 2018. Fees and levies will also be consulted upon in the consultation paper. A policy statement and further rules will be published early in 2019. Firms and funds should complete the FCA’s **online survey** for inbound firms and funds if they have not already done so. The closing date for this survey was originally 31 July 2018 but the survey deadline was later extended indefinitely.

12 July 2018

## ESMA Public Statement on Authorisations and Brexit

On 12 July 2018, ESMA published a **public statement** regarding authorisation requests and Brexit. ESMA states that all market participants should be prepared for the possibility of a no-deal / hard Brexit. ESMA reminds firms that they must have a fully authorised legal entity located in one of the remaining 27 EU member states to continue providing services in these states after 30 March 2019. Firms should seek authorisations to relocate to the EU27 as soon as possible to allow these applications to be processed before 29 March 2019: some member states have already made it clear

that unless an application is submitted in June / July, there is no guarantee that authorisation will be granted before 29 March 2019. The speed with which authorisations will be granted depends on the quality of the application file. ESMA invites firms to contact their relevant national competent authorities or ESMA in the case of credit rating agencies or trade repositories as soon as possible if they have not already done so.

ESMA's statement follows similar warnings to market participants from a number of regulators, including the Central Bank and the Luxembourg regulator.

16 May 2018

## Central Bank Speech on Brexit

On 16 May 2018, the Deputy Governor of the Central Bank, Ed Sibley, delivered a **speech** entitled "*The Provision of Financial Services in Ireland and from Ireland after Brexit*". Some highlights of the speech are detailed below.

Mr Sibley opines that a hard Brexit is plausible, considering the variations in the UK and EU's backstops / incentives. The Central Bank expects firms to prepare for same. Arrangements should be commensurate with firm's size, nature and complexity.

In relation to European supervisory convergence, Mr Hodson notes a number of recent developments including: the establishment of the SCN to focus on authorisation requests and supervisions issues arising from relocations from the UK, which meets every month; the Enforcement Network providing enforcement officers across the EU with the opportunity to exchange experiences, information and good practices; and a senior supervisors' forum to enable senior supervisors to discuss supervisory issues and regulatory principles in practice. He notes that how convergence is achieved may change in the future, whether towards a single supervisory authority or single point of entry to the market.

Referring to the possible "cliff effects" of Brexit, Mr Hodson states that there may be a loss of market access to essential financial market infrastructure. For example, if London Clearing House loses its status as a qualified CCP post-Brexit, EU firms will no longer be able to discharge their EMIR obligations at this CCP. Given the lack of sufficient substitute capacity for clearing these instruments elsewhere, this could have consequences across the EU, affecting any EU firms using interest rate swaps to hedge positions. A similar risk arises in relation to the settlement of Irish equity securities, which are currently settled on the UK Central Securities Depository.

Following the Central Bank's letters to supervised entities relating to their Brexit planning, the following main risks have been identified by the Central Bank:

**Loss of Market Access:** This includes potential loss of revenue from UK clients and the potential loss of access to UK based outsourcing providers and counterparties.

**Macroeconomic Effects:** Such as increased exchange rates and market volatility.

**GDPR:** Following Brexit the UK may become a non-equivalent third country. If this becomes a reality, Irish firms may not be able to transfer or store data in that location.

**Staffing Issues:** Staff retention and wage pressure, especially in key roles, as a result of newly authorised firms entering the Irish market and current firms expanding their operation.

**Passporting:** This relates to restriction or prohibition on the marketing and distributing of UK funds into the EU, and EU funds into the UK.

The Central Bank will follow up with firms individually to discuss the steps to be taken to manage these risks.

In late 2017, the Central Bank wrote to fund management companies and self-managed investment funds regarding their contingency planning, following which a sample of 50 investment funds were selected to communicate with around their specific level of preparedness for Brexit. Mr Hodson notes the Central Bank's disappointment with the fact that the majority of respondents, while having plans in place, had not implemented any firm measures in preparation for Brexit.

26 April 2018

## Michel Barnier Speech on Impact of Brexit on Financial Services

On 26 April 2018, the Commission published a **speech** given by Michel Barnier, the EU's chief Brexit negotiator in which he talked about Brexit and, among other things, its impact on the financial services sector. Mr Barnier defends equivalence as the basis of the future EU / UK relationship in the area of financial services. Mr Barnier made the following points during his speech:

- outside the customs union and single market, there can be no frictionless trade;
- the cost of Brexit will be substantially higher for the UK than the EU. Some companies will have to rethink their business models and there may be skills shortages in the UK in the future;
- in response to opinions that the EU desperately needs the City of London and that access to financing for EU27 business would be hampered if UK operators are not given the same market access as today, Mr Barnier says that this is not what he is hearing from market participants and it is not the analysis that his team has made;
- Mr Barnier understands the UK's interest in seeking a system of mutual recognition and reciprocal regulatory equivalence, as this is what the single market achieves. However, the UK has decided to leave the EU and will not accept common EU supervision and enforcement tools. These tools are the essential building blocks of the EU's post-crisis financial regulation; and
- on the future of equivalence, there is no intention to discriminate against the UK post-Brexit. To date the EU has adopted more than 200 equivalence decisions covering more than 30 third countries. The equivalence system works well for the US and should also work well for the City of London. The equivalence system will operate more effectively if the UK decides not to diverge from EU financial regulation.

24 April 2018

## European Commission Speech on Brexit Risks for Financial Institutions and Equivalence

On 24 April 2018, the Commission published a **speech** given by Vice President Valdis Dombrovskis, European Commissioner for Financial Stability, Financial Services and Capital Markets Union (“**CMU**”) on risks arising from Brexit for financial institutions and the future UK-EU relationship relating to financial services.

In the speech, Mr Dombrovskis:

- warns firms and supervisors that they should continue their work to prepare for all scenarios, despite the political agreement reached in March 2018 on a transitional period lasting until 31 December 2020. He notes that many important issues remain to be finalised concerning the withdrawal agreement (such as the Irish border and the governance of the withdrawal agreement), which contains the transitional arrangements;
- highlights the risk of major disruption on the day that the UK leaves the EU. He states that the Commission's current discussions “confirm that companies can alleviate the main risks by repapering contracts and adapting operational models”; and

24 April 2018

## FCA Chief Executive Calls for Mutual Recognition for Future EU-UK Relationship

On 24 April 2018, Andrew Bailey, FCA Chief Executive, delivered a **speech** stating that mutual recognition would be preferable to equivalence to establish the future relationship between the UK and the EU and opined that mutual recognition should be “*eminently achievable*”.

In his speech, Mr Bailey acknowledges that the transition or implementation period cannot be taken for granted and refers to the UK authorities’ plans for unilateral action in the UK to minimise cliff edge risks, providing continuity for firms doing business in the UK, in the form of a temporary permissions regime.

Mr Bailey refers to a draft report from the European Parliament by Brian Hayes MEP, “*which notes that increased regulatory and supervisory cooperation between the EU and third countries has improved global consistency and made the EU more resilient to financial shocks. The report also notes that unlike equivalence, international agreements can provide mutual access between the EU and third countries which can better advance international cooperation.*”

The speech sets out how mutual recognition could work, starting with the UK and the EU recognising that their regulatory frameworks are equivalent on day one of Brexit. Following that, he proposes that the UK and the EU will retain autonomy in rule making, but they should put in place co-operation and co-ordination structures that work to keep them materially consistent. In addition, the UK and the EU should always base their rules on prevailing international standards. Continued alignment with such standards should be a clear intended outcome of any responsible financial centre, and where rules implement international standards, there should be a strong presumption of equivalence. He recognises that international standards are not always sufficiently detailed, and in some cases

jurisdictions may wish to go further. He states that, as the rules evolve, the UK and the EU should regularly assess the differences based on the outcomes they deliver.

Mr Bailey calls on ESMA and national EU regulators to work closely with the FCA to enhance the stability and effectiveness of global markets.

19 April 2018

## Central Bank Speech on the Asset Management Sector – Supervisory Insights within a Changing Landscape

On 19 April 2018, the Central Bank published a **speech** delivered by Michael Hodson, Director of Asset Management Supervision, in which Mr Hodson seeks to provide an insight into the Central Bank's supervisory focus for 2018, including Brexit-related matters.

Mr Hodson refers to the Central Bank letters to medium high and medium low impact firms issued in November 2017, advising that the Central Bank are now reviewing the responses received and this review will feed into its supervisory strategy for the rest of the year, both for individual firms and for the wider industry. Notwithstanding the recent agreement on a transition / implementation period, Mr Hodson emphasises that the Central Bank expects firms to continue to progress with their strategic and contingency planning for Brexit and to have assessed the Brexit impact under a number of different scenarios.

Firms seeking authorisation in 2018 should engage with the Central Bank as soon as possible and should be mindful that applications are likely to require a longer timeframe in cases of complexity.

Referring to the ESMA opinions on supervisory convergence in the context of relocations from the UK to the remaining 27 member states, Mr Hodson quotes a recent speech by ESMA's chair Steven Maijor where he stated that the ESMA opinions were "*not looking to question, undermine or put in doubt the delegation model*". Mr Hodson acknowledges that the delegation model is an "*important element of the funds industry today*", but emphasises that it is of the utmost importance that authorised entities do not lose sight of the responsibility and oversight role they retain.

5 April 2018

## European Parliament Draft Report on Equivalence

One of the bases for possible future UK / EU relations in financial services is equivalence, as already enshrined in EU law. On 5 April 2018, the European Parliament's Economic and Monetary Affairs Committee published a draft **report** on the relationships between the EU and third countries concerning financial services regulation and supervision (the "**Report**"). The rapporteur attached to the report was the Irish Member of the European Parliament ("**MEP**"), Brian Hayes. The Report notes the state of the current equivalence process, its form and proposals for reforming the process.

The European Parliament recognises that there is no single framework underpinning equivalence decisions. The EU's process for granting equivalence is uncertain and lacking in transparency. Equivalence decisions require a "*structured practical framework*". The process should be objective, proportionate, risk-sensitive and taken in the best interests of the EU and its citizens.

The Report asserts that the process is not merely technical in nature and therefore the European Parliament should have a greater degree of scrutiny over equivalence decisions. It notes that in many cases, equivalence is a unilateral decision taken by the EU, and it is not applied in a reciprocal manner by third countries. The Report suggests that international agreements, by contrast, can provide mutual access for financial institutions in the EU and third countries, and can provide regulatory harmony as between different jurisdictions.

28 March 2018

## FCA Statement on EU Withdrawal

On 28 March 2018, the FCA published a **statement** on Brexit. The FCA notes that the implementation period is intended to operate from 29 March 2019 to the end of December 2020. During this time, firms and funds will still have passporting rights, and will have to adhere to EU law – including EU law that could still come into effect before the end of December 2020.

The UK Government has committed to providing a TPR as a backstop – firms currently using EU passports hence do not need to apply for authorisation at this stage. The temporary permission scheme aims to enable passporting firms / funds to undertake new business that falls within the scope of their existing permissions, to continue performing their contractual rights and obligations, and to manage existing business and mitigate risks associated with a sudden loss of permission. The FCA expects that firms and funds that will be solo-regulated by the FCA will need to notify the FCA of their desire to benefit from the regime (although notification will not require an application for authorisation). Further details on these proposals will be released later this year.

The FCA is working to ensure its handbook functions effectively when the UK leaves the EU, and is cooperating with home state regulators of EEA firms and the ESAs to address any risks to consumer protection and financial stability.

23 March 2018

## European Council Publishes Guidelines on Framework for Post-Brexit Relations with UK

Following the agreement between Michel Barnier and UK Brexit Secretary David Davis regarding a transition period or “implementation phase” to run until December 2020, on 23 March 2018, the European Council published **guidelines** on the framework for post-Brexit relations with the UK. Some highlights of the published text are set out below.

- The European Council repeats its mantra that “*nothing is agreed until everything is agreed*”, and notes that many matters have yet to be addressed.
- The European Council asserts that the EU wants a close relationship with the UK. However, as the UK is leaving the common market, there will inevitably be “*frictions in trade*”, which will lead to “*negative economic consequences, in particular in the UK*”. If however, the UK reconsidered its position, the EU would reconsider its offer.
- The agreement will have to be based on a balance of rights and obligations, and must include robust guarantees to ensure a level playing field. This will require a combination of

substantive rules aligned with EU and international standards, adequate mechanisms to ensure effective implementation domestically, enforcement and dispute mechanisms in the agreement as well as EU autonomous remedies.

- The EU will preserve its autonomy as regards its decision-making, which excludes participation of the UK as a third country in EU institutions and participation in the decision-making of EU bodies, offices and agencies.
- The European Council confirms its readiness to negotiate a “wide-ranging” free trade agreement, which may only be finalised once the UK is no longer a member state. This free trade agreement would include a provision on:

*“trade in services, with the aim of allowing market access to provide services under host state rules, including as regards right of establishment for providers, to an extent consistent with the fact that the UK will become a third country and the Union and the UK will no longer share a common regulatory, supervisory, enforcement and judiciary framework”.*

Many in the investment funds industry may be disappointed that the negotiating guidelines published on 23 March 2018 do not explicitly refer to financial services. Press commentary in the week preceding the publication referred to an annex to the draft negotiating guidelines provided to EU ministers which stated:

*“Regarding financial services, the aim should be reviewed and improved equivalence mechanisms, allowing appropriate access to financial services markets, while preserving financial stability, the integrity of the single market and the autonomy of decision making in the European Union. Equivalence mechanisms and decisions remain defined and implemented on a unilateral basis by the European Union.”*

This wording is not included in the officially published version of the negotiating guidelines.

14 March 2018

## Central Bank Communication on ESMA Brexit Opinions

On 14 March 2018, the Central Bank published a **communication** in relation to the ESMA opinions on supervisory convergence in the context of relocations from the UK to the EU27, which were published last summer.

The Central Bank has now concluded a comprehensive review of the way it addresses the issues covered in the ESMA opinions and the Central Bank has identified process enhancements related to the authorisation of investment fund managers authorised under the UCITS Directive and the AIFMD and investment firms authorised under MiFID, which will ensure the Central Bank’s processes are fully aligned with the ESMA opinions. These procedural enhancements will be made by updating the Central Bank’s application forms and internal procedures.

The application forms for UCITS management companies, UCITS self-managed investment companies, AIFMS and MiFID firms will be updated to incorporate the following requirements:

- details and rationale for the geographical distribution of planned activities;
- objective justification for delegation arrangements in relation to critical functions;

- details of due-diligence undertaken during selection process;
- information on business continuity arrangements;
- information on how legal risk is assessed;
- details on delegate remuneration requirements; and
- details on how best execution obligations continue to be met when dealing with execution venues outside of the EU.

In the interim, until the relevant application forms have been updated, the items listed above will be incorporated as part of the Central Bank's authorisation process.

9 March 2018

## FCA Launches Survey on Temporary Permission Scheme

On 9 March 2018, the FCA published a **survey** for EEA inbound passported firms. This survey is aimed at firms and funds that currently passport into the UK via a branch or on a cross-border services basis. The survey aims to ascertain the best way in which the UK might launch a temporary permission scheme for EEA firms and funds passporting into the UK, an initiative that was announced as a possible option post-Brexit by the UK government in December 2017. It was originally indicated that the survey would close on 31 July 2018 but this deadline was later extended.

16 February 2018

## Central Bank Communication to Firms Seeking Authorisation in 2018 and Updated Brexit FAQs

On 16 February 2018, the Central Bank issued **communication** to firms seeking authorisation in 2018 and urged all such firms to engage with Central Bank as soon as possible. The Central Bank noted that it is committed to a "*transparent, robust and timely approach*" to authorisation and to that end has "*committed significant additional resources to deal with these enquiries*".

The Central Bank stated that applicant firms need to dedicate sufficient resources to show the Central Bank that they are "*well-run, financially sound*" and comply with EU and Irish authorisation requirements.

Applicants should be prepared for a "*comprehensive*" authorisation process, with "*appropriate challenge*" and possibly longer timeframes in cases of "*complexity*" or to ensure that the Central Bank is satisfied that the firm meets the required standards. Firms must adopt a "*well-structured, well-prepared*" approach and ensure that there is timely engagement with the Central Bank.

In an effort to reflect the above, the Central Bank has updated its **Brexit FAQ document** and has added new questions and answers in relation to the impact of any transition period on firms' planning. The Central Bank stated that "firms are responsible for ensuring that all authorisations required post-March 2019 are in place in a timely manner" and that firms cannot proceed on the assumption that a transition period will be provided for, since this is still subject to political negotiations and agreement. Therefore, the Central Bank recommends that firms prepare for all eventualities.

The Central Bank also recommends that Irish authorised firms with activities in the UK engage with UK authorities as soon as possible to submit applications in advance of March 2019.

8 February 2018

## Commission Issues Notice to Stakeholders in Asset Management

On 8 February 2018, the Commission published a **Notice to Stakeholders** on the Withdrawal of the United Kingdom and EU Rules in the Field of Asset Management. The notice essentially underlines the status of the UK as a third country post Brexit and sets out the requirements applicable to non-EU AIFMs. The notice stressed that AIFMs need to disclose to investors the consequences of Brexit, including whether the changes may affect the fund's legal status / investment strategy. Fund-of-funds structures must assess the eligibility of formerly authorised vehicles in the UK.

30 November 2017

## Central Bank Outlines 2018 Regulatory Priorities

On 30 November 2017, Gerry Cross, Director of Policy and Risk at the Central Bank, delivered a **speech** to the Institute of Bankers in Ireland at their Certified Bank Director Annual Seminar. The address made by Cross covers a number of the Central Bank's supervisory priorities for 2018, including Brexit. The speech outlines that, over the past three months, the Central Bank has sent out "Dear CEO" letters to self-managed funds and fund management companies on Brexit preparedness. The letters highlight the importance of performing scenario analyses on the impacts of various Brexit outcomes to business models. Fund firms, amongst other institutions, have been requested to provide up to date information on preparations and contingency plans.

16 November 2017

## ESMA Speech on Priorities for 2018, including Brexit

On 16 November 2017, Steven Maijoor, chair of ESMA, gave a **speech** on ESMA's 2018 plans for the asset management industry at the EFAMA Investment Management Forum 2017 in Brussels. The topics covered by the speech include investment funds, investment fund stress testing and the effect of Brexit on supervisory convergence and delegation.

While cognisant that many firms within the asset management industry have drawn up and may soon implement Brexit contingency plans, ESMA want to avoid firms choosing relocation on basis of regulatory arbitrage. However, Maijoor also noted that ESMA opinions do not undermine freedom of establishment provided for in EU legislation.

The ESMA opinions on supervisory convergence do not call into question the delegation model, and are merely intended to clarify the appropriate degree of substantive presence required in a home member state. To build on this, ESMA has established within itself a Supervisory Coordination Network comprised of experts across NCAs. The SCN aims to be a forum for information-sharing and promoting convergent practices. Its establishment has no bearing on the existing supervisory competences of NCAs who still retain their full responsibility for authorisation decisions.

Regarding the possibility of a “cliff edge” Brexit with no political agreement reached by the withdrawal date, ESMA is continuing to identify possible mitigating actions for such an outcome, with particular regard to the effect of such a departure on financial stability and protections for investors.

19 July 2017

## Central Bank Publishes Brexit FAQ

On 19 July 2017, the Central Bank published a **frequently asked questions** (“**Central Bank FAQ**”) providing general information to financial services firms considering relocating their operations from the UK to Ireland. The Central Bank FAQ forms part of an ongoing project by the Central Bank to ensure that financial services firms are adequately prepared to cope with the impact of Brexit. The Central Bank FAQ provides general information on relocation of operations, as well as guidance on the Central Bank’s position regarding the following: (1) AML requirements post-Brexit; (2) confirmation of a firm’s substance in Ireland; (3) engagement with EU authorities; (4) authorisation; (5) oversight and control and; (6) outsourcing back to the UK. The Central Bank FAQ paper will continue to be updated on a regular basis as Brexit negotiations progress and new issues emerge and are resolved.

13 July 2017

## ESMA Issues Sector Specific Opinions on Relocations from the UK to the EU 27

On 13 July 2017, ESMA issued three opinions setting out sector-specific principles in relation to investment management, investment firms and secondary markets. The publication of the opinions is intended to provide consistency in authorisation, supervision and enforcement related to the relocation of entities from the UK. The opinions, which build on the general opinion issued in 31 May 2017, are addressed to NCAs and stress the need for standardised authorisation and supervision across the remaining EU 27 in order to support the CMU.

The **opinion** on investment management addresses regulatory arbitrage risks related to the relocation of UCITS, AIFMs and self-managed investment companies. The opinion sets out principles based on the objectives and provisions of the UCITS Directive and AIFMD, addressing risks in relation to: (1) authorisation; (2) governance and internal control; (3) delegation; and (4) effective supervision.

The **opinion** on investment firms addresses regulatory arbitrage risks related to the relocation of investment firms activities and is based on the MiFID II / MiFIR framework. In this opinion, ESMA stresses that NCAs should mitigate the risk of letter-box entities, ensuring that investment firms comply with the MiFID II / MiFIR framework. The principles addressing supervisory and regulatory risk in this opinion relate in particular to: (1) authorisation; (2) substance requirements including governance, outsourcing and non-EU branches; and (3) effective supervision.

The **opinion** on secondary markets addresses regulatory risks related to the relocation of trading venues to the EU 27 and the outsourcing of activities to their jurisdiction of origin. This opinion, which is addressed to NCAs, is aimed at all types of trading venues such as, regulated markets, multilateral trading facilities and organised trading facilities (under MiFID II / MiFIR). The principles outlined in this opinion relate to the outsourcing of activities by trading venues relating in particular to: (1) clarifying outsourcing arrangements; (2) non-EU branches; (3) due diligence; (4) substance of outsourcing of

key activities to third countries; (5) performance of key activities in the EU 27; and (6) effective supervision of outsourcing arrangements with third country service providers.

Going forward, ESMA will provide a forum for reporting and discussion among NCAs regarding market participants seeking to relocate entities, activities or functions to the EU 27.

For further information on the ESMA opinion on supervisory convergence in the area of investment management, please see our Matheson [briefing note](#).

31 May 2017

## ESMA Opinion on Supervisory Convergence in relation to Relocations from the UK to the EU27

On 31 May 2017, ESMA published an [opinion](#) which sets out general principles on the supervisory approach in relation to relocations of entities from the UK to the EU27. ESMA has issued its opinion in response to increased requests from the financial market participants seeking to relocate to the EU27 and addresses concerns raised by national regulators that some EU member states could allow for the creation of letterbox entities in order to attract UK based asset managers.

These concerns are especially relevant where UK based entities may seek to relocate to the EU27 by relying on the outsourcing or delegation of certain activities or functions to UK based entities including affiliates. By issuing its opinion, ESMA has delivered a clear message: new authorisations must comply with EU law in a coherent manner across the EU27 and any outsourcing or delegation arrangement from entities authorised in the EU27 to third country entities should be “*strictly framed and consistently supervised*”. Such outsourcing or delegation arrangement should not result in those entities becoming letterbox entities. The opinion is addressed to NCAs and is aimed at fostering consistency in relation to authorisation, supervision and enforcement. The opinion covers activities of AIFMs, UCITS management companies and MiFID investment firms.

For more information on ESMA’s Opinion, please see our [client briefing](#).

29 March 2017

## UK Government Begins the Formal Process of Leaving the EU as Article 50 is Triggered

On 29 March 2017, the UK Prime Minister Theresa May triggered article 50 of the Treaty on the European Union (“**TEU**”), signalling the UK’s intention to withdraw from the EU. The EU and the UK will have two years to negotiate a withdrawal agreement which will set out arrangements on how the country will leave the EU. Michel Barnier, the EU’s chief Brexit negotiator, has set 30 September 2018 as the deadline to conclude the terms of the agreement. The resulting agreement, if negotiations prove successful, will have to be approved by the UK Parliament, the European Parliament and by 20 of the remaining 27 member states. A separate agreement, focusing on the “*framework of future relations*” between the EU and the UK, will cover issues relating to defence, anti-terrorism policy, the environment, education, etc and may take considerably longer to negotiate.

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23 June 2016

## UK Votes to Leave EU: Implications for Asset Managers and Investment Funds

On 23 June 2016, the UK voted to leave the EU. There will be much conjecture and debate about what the consequences of this decision will be for the UK, for the EU and for Ireland, and much will depend upon the terms of the withdrawal agreement that will be negotiated between the UK and the EU. Ireland remains committed to its membership of the EU and retains its important position as an English speaking gateway to one of the world's largest markets. We have prepared a **table** outlining the potential impact the withdrawal of the UK from the EU may have on Irish domiciled investment funds, depending on the structure of the fund, its level of engagement with UK service providers and its marketing strategy. It seems unlikely at this stage that any withdrawal agreement would allow for the unaltered continuation of UK asset managers' / UK funds' current passporting rights under EU legislation. Relocation of fund service providers and funds themselves to EU member states such as Ireland may therefore need to be considered to ensure ongoing access to the European market.

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