



Brexit update for financial services firms - week ending 23rd November 2018

The week in outline:

This week saw continuing political debate in the UK, while the EU and the UK Government (HMG) published a longer version of the draft **Political Declaration of the Framework for the Future Relationship** between the EU and the UK (PD) (see Document 1 below). HMG also published a set of slides on the Withdrawal Agreement (WA) (see Document 2 below). The WA and the previous draft of the PD were analysed in [our update last week](#).

The new version of the PD is longer but remains vague and rehearses the, often conflicting, objectives of the two sides. The text on **financial services (FS) is essentially unchanged** but now appears in prose rather than in bullet point text. The FS paragraphs remain brief (as set out in Document 1 below) and our analysis last week stands.

The UK's **no deal contingency planning** continues. The FCA published its second consultation paper (CP18/36 - see Document 5 below) which involves extensive changes to NtA¹/domesticated versions of Binding Technical Standards and to the FCA's Handbook. It includes changes relating to the Temporary Permission Regime and to the FCA's new role regulating credit rating agencies and trade repositories. There was also further progress on NtA SIs under the European Union (Withdrawal) Act 2018 relating to FS (see Documents 6 to 11 below) and our [NtA database](#) includes the further draft orders in CP 18/36 and the progress on the SIs below.

ISDA published an interesting analysis of the impact of a hard Brexit for US market participants (see Document 3 below). This is in tabular form and covers two aspects in separate tables. The second table looks at the UK/EU regulatory position after hard Brexit and the position of US firms doing business with UK and EU-27 firms.

The first table looks at US regulation and the question of CFTC equivalence decisions and no action relief which are based on/applicable to the EU and which currently apply to the UK as an EU member. It considers whether these decisions/reliefs under US regulation will continue to apply to UK market participants after the UK exits the EU. It identifies a long list of CFTC measures where the CFTC will need to extend or confirm the application of these measures to the UK in time for 29/3/19. If the CFTC were not to take such action, this would cause market disruption. The report notes that similar action may be required even in the event of a soft Brexit.

This report only deals with one aspect of US regulation. In addition, the US is just one of the many non-EU/EEA regulatory regimes where the current favourable regulatory treatment of UK firms is dependent on EU membership and where action by foreign regulators/governments may be required to maintain the status quo after 29/3/19. The current treatment may be based on unilateral measures by the third country covering the EU or under bilateral arrangements with the EU (either non-treaty/MoU style arrangements or under bilateral agreements/treaties). During the transition period under the WA, the UK will be bound by EU third country harmonisation, including the treatment of third countries under EU equivalence decisions, but may lose the reciprocal benefits under the third country's regulatory regime, unless the third country takes action to preserve this. Most reciprocal FS regulatory arrangements are not made under binding agreements/treaties (as explained in [our April 2017 report](#)). Where they are (such as the 1989 treaty with Switzerland referred to below), the footnote to Article 129 of the WA provides that the EU will '*notify the other parties to these [international] agreements that during the transition period the United Kingdom is to be treated as a Member State for the purposes of these agreements.*' This may not, however, bind the third country.

In Europe, it is envisaged that there will be a [post-Brexit UK/Swiss bilateral agreement](#) and preparatory work has already been undertaken. The topics covered are broad and include FS. The Swiss have a 'Mind the gap' strategy of maintaining and building on the current relationship, which is largely determined by Swiss/EU treaties. A Swiss statement reported that "*On 25 April 2018, the Federal Council clarified its 'Mind the gap' strategy, deciding that the possibility of temporarily continuing third-country agreements within the framework of the above-mentioned EU-UK transition period should also be applicable to Swiss-UK relations. This would mean that the bilateral agreements*

¹ Nationalising the *acquis*

between Switzerland and the EU would continue to apply to Swiss-UK relations from 29 March 2019 until the end of 2020. This would extend the time frame for agreement on the future relationship between Switzerland and the UK". In FS, this could involve the Swiss maintaining, after 29/3/19, the current equivalence based treatment of UK firms and the arrangements for branches of UK non-life insurers in Switzerland (under the 1989 EU/Swiss treaty – see [our April 2017 report](#)).

The EEA Council met on 20th November (see minutes at Document 4 below)) and welcomed the close dialogue and flow of information over the WA negotiations between the EU-27 and the EEA-3. The EEA Council called for continuing dialogue and emphasised the EEA dimension to Brexit. The meeting documentation refers to the positive contributions of the EEA-3 in the decision-shaping process of single market legislation through their '*participation in the relevant committees, expert groups, studies and agencies, as well as through the submission of EEA EFTA Comments*'. The need for prompt incorporation of EU FS legislation was also raised because '*outstanding legislation in the field of financial services represented about half of the total EEA-3 backlog*'. Reference was made to the conclusions approved by the EU and EEA EFTA Ministers of Finance and Economy on 14 October 2014. This was intended to solve the EEA objections to the enhanced role of the ESAs (EBA, ESMA and EIOPA) under EU FS legislation, as explained in our [RegZone article on the problems in the application of FS legislation in the EEA](#).

Some MPs at Westminster continue to express interest in, so called, 'Norway plus' (i.e. UK membership of the single market/EEA and customs union), as an alternative to the WA itself or as an alternative route, after the transition period, to the framework in the Political Declaration.

1. DRAFT POLITICAL DECLARATION SETTING OUT THE FRAMEWORK FOR THE FUTURE RELATIONSHIP BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION

This draft Political Declaration sets out the framework that has been agreed at negotiator's level and agreed in principle at political level, subject to endorsement by Leaders. It can be accessed [here](#).

"The Parties should conclude ambitious, comprehensive and balanced arrangements on trade in services and investment in services and non-services sectors, respecting each Party's right to regulate. The Parties should aim to deliver a level of liberalisation in trade in services well beyond the Parties' World Trade Organization (WTO) commitments and building on recent Union Free Trade Agreements (FTAs).

[...]

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.

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.

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."

2. PMO: THE WITHDRAWAL AGREEMENT AND OUTLINE POLITICAL DECLARATION ON OUR FUTURE RELATIONSHIP WITH THE EU

This slide presentation provides an outline of the Withdrawal Agreement and the outline of the political declaration. Arrangements for financial services are set out in slide 25. The presentation can be accessed [here](#).

This is what has been mentioned in relation to financial services (in the context of the Political Declaration on the future relationship):

- *"Principles:*
 - *Commitments to preserving financial stability, market integrity, investor protection and fair competition, while respecting regulatory autonomy.*
- *Equivalence*
 - *Endeavouring to conclude equivalence assessments before the end of June 2020*
- *Cooperation*

- *Close and structured regulatory and supervisory cooperation, grounded in the economic partnership, recognising that this is in the mutual interests of both sides.”*

3. ISDA: HARD BREXIT IMPACT ASSESSMENT FOR US MARKET PARTICIPANTS

ISDA's report highlights the issues that must be addressed in the case of a "hard" Brexit, including existing CFTC equivalence determinations. The full report can be accessed [here](#).

4. EC: CONCLUSIONS OF THE 50TH MEETING OF THE EEA COUNCIL

A note of the Council meeting of 20 November 2018 follows. It is stated that "the EEA Council highlighted the importance of promptly incorporating outstanding legislation in the field of financial services – representing about half of the total backlog – in order to ensure a level playing field throughout the EEA in this important sector". The full note can be accessed [here](#).

"While welcoming the recent progress made at expert level, the EEA Council highlighted the importance of promptly incorporating outstanding legislation in the field of financial services – representing about half of the total backlog – in order to ensure a level playing field throughout the EEA in this important sector. The EEA Council recalled its continuous commitment to the conclusions approved by EU and EEA EFTA Ministers of Finance and Economy on 14 October 2014, in particular to the two pillar solution set out therein."

"...recognised the positive contributions made by the EEA EFTA States to the decision-shaping process of EEA-relevant EU legislation and programmes through their participation in the relevant committees, expert groups, studies and agencies, as well as through the submission of EEA EFTA Comments. The EEA Council underlined the importance of inviting EEA EFTA Ministers to informal EU Ministerial meetings and Ministerial conferences relevant to EEA EFTA participation in the Internal Market, and expressed its appreciation to the current Austrian and incoming Romanian Presidencies for the continuation of this practice. The EEA Council recognized the important role of parliamentary cooperation and cooperation between economic and social partners through the EEA Joint Parliamentary Committee and the EEA Consultative Committee, respectively [...] The EEA Council agreed that a holistic approach was required to tackle some of the main challenges facing the Internal Market, and stressed the importance of the close involvement of the EEA EFTA States in the further design and development of Internal Market policies and initiatives."

5. FCA: BREXIT: PROPOSED CHANGES TO THE HANDBOOK AND BINDING TECHNICAL STANDARDS – SECOND CONSULTATION

The FCA has published a further consultation paper (CP18/36) on its approach to the UK's exit from the EU. This paper sets out additional proposals for a hard Brexit scenario. The consultation paper can be accessed [here](#).

The consultation paper covers the following topics:

"Chapter 2 discusses a range of cross-cutting issues which span our Handbook and BTS and our proposed approach to these. This includes further issues identified since publication of the first CP.

Chapter 3 explains the Handbook proposals covered in this CP (except those related to the introduction of the TPR and the new credit rating and trade repository regimes). This includes an explanation of the more significant changes we are proposing.

Chapter 4 sets out certain proposals about the TPR which were previously described but not consulted on in CP18/29 [...]

Chapter 5 outlines the changes we propose to make to BTS. An explanation of our approach to BTS was included in the first consultation.

Chapter 6 summarises our approach to forms and the guidance we propose to issue on this

Chapter 7 outlines changes because we will take on regulating credit rating agencies and trade repositories

Chapter 8 summarises our proposed approach to non-Handbook guidance issued by us and the guidance we propose to issue on this."

6. DRAFT BENCHMARKS (AMENDMENT AND TRANSITIONAL PROVISION) (EU EXIT) REGULATIONS 2019

HMT has published the explanatory information for the Draft Benchmarks (Amendment and Transitional Provision) (EU Exit) Regulations 2019 which is to be laid before parliament. The explanatory note can be accessed [here](#).

"Consistent with the general onshoring approach to transfer functions under the BMR from ESMA to the FCA, this SI makes a change to refer to a UK register of benchmarks which the FCA will have the responsibility for maintaining from EU exit day. The UK BMR use restriction will therefore apply to UK supervised entities such that they may, subject to the transitional provisions of the UK BMR, only use benchmarks which are on the UK register.

This SI provides that on exit day, administrators that have already been authorised or registered in the UK by the FCA will be automatically migrated to the UK register without the need to submit a new application to the FCA under

the onshored BMR. This SI makes the same provision for third country benchmarks and/or administrators that have been recognised by the FCA, or endorsed by UK administrators or supervised entities (with such endorsement authorised by the FCA) prior to exit day.

Benchmark administrators that are located outside the UK will be subject to the onshored third country regime which will require the administrator or benchmark to become approved by equivalence, recognition or endorsement in the UK to be added to the UK register. This will apply to third country benchmarks/administrators even if they already appear on the ESMA register (unless they appear there as the result of an FCA decision, as set out in the preceding paragraph).

However, we want to avoid any market disruption which could result from a sudden loss of UK access at the end of the transitional period in the BMR to benchmarks which already appear on the ESMA register at exit day, or benchmarks provided by administrators which already appear on the ESMA register at exit day. This SI therefore contains an additional transitional provision which temporarily migrates over to the UK register for a 24-month period any benchmarks or administrators which appear on the ESMA register at exit day as a result of a successful application outside of the UK. This will automatically enable continued use of these benchmarks, or benchmarks provided by these administrators, by UK supervised entities for 24 months after exit day, unless and until an application for approval in the UK is refused. These third country administrators or benchmarks must become approved by the FCA through equivalence, recognition or endorsement to enable their continued use within the UK beyond this 24-month period.

Where a benchmark or benchmark administrator subject to this transitional provision is removed from the ESMA register after exit day, it will also be removed from the UK register, unless the FCA considers that doing so would not be compatible with the FCA's strategic objective or would have a material adverse effect on the advancement of the FCA's operational objectives.

The BMR stipulates that where an EU administrator has had its application for authorisation or registration refused, it falls out of scope of the EU BMR's transitional provision and use becomes prohibited within the EU until the point at which the administrator makes a subsequent successful application. This SI contains a provision to maintain after exit day those prohibitions which were in place on exit day as a result of refused authorisation or registration applications from administrators located within the EU. These prohibitions will remain valid in the UK until an application is approved in the UK."

7. DRAFT LONG-TERM INVESTMENT FUNDS (AMENDMENT) (EU EXIT) REGULATIONS 2018

Draft Regulations laid before Parliament under paragraph 1(1) of Schedule 7 to the EU (Withdrawal) Act 2018, for approval by resolution of each House of Parliament. The text of the SI can be accessed [here](#).

"These Regulations make amendments to legislation in the field of financial services. Part 2 amends the Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 (S.I. 2018/1115) to specify an additional EU Regulation for the purposes of Part 2 of S.I. 2018/1115. Part 3 amends Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds."

8. DRAFT INVESTMENT EXCHANGES, CLEARING HOUSES AND CENTRAL SECURITIES DEPOSITORIES (AMENDMENT) (EU EXIT) REGULATIONS 2019

This SI is to be laid under the EU (Withdrawal) Act. The explanatory memorandum can be accessed [here](#).

The SI will:

- Remove the single market passport for EEA operators;
- Transfer the relevant supervision responsibilities to the Bank of England; and
- End the information sharing requirements with the EU.

9. DRAFT FINANCIAL SERVICES AND MARKETS ACT 2000 (AMENDMENT) (EU EXIT) REGULATIONS 2019

This SI is to be laid under the EU (Withdrawal) Act. The SI can be accessed [here](#).

"Most of the provisions in FSMA and related domestic legislation that will become deficient as a result of the UK's withdrawal from the EU are explained below, along with the fixes that will be necessary to address them. While the majority of the amendments to FSMA that are required will be made by this SI, it will be necessary to make some other amendments to FSMA and related legislation in other SIs that HM Treasury is laying as part of its contingency preparations."

10. DRAFT PACKAGED RETAIL AND INSURANCE-BASED INVESTMENT PRODUCTS (AMENDMENT) (EU EXIT) REGULATIONS 2019

This SI is to be laid under the EU (withdrawal) Act. The draft SI can be accessed [here](#) and the explanatory notes [here](#).

Consistent with the government's objective of providing continuity to businesses and consumers as far as possible, the policy approach set out in the PRIIPs legislation will not change after the UK has left the EU. This SI will make amendments to retained EU law related to PRIIPs and fix any deficiencies to the legislation, to ensure that it continues to operate effectively in the UK once the UK has left the EU.

The changes for firms resulting from this SI are expected to be minimal. This SI will effectively create a regime for the preparation and provision of KIDs in relation to PRIIPs which are made available to retail investors in the UK. The UK PRIIPs regime introduced by this SI will be operationally equivalent to the EU PRIIPs regime on exit day, so that firms manufacturing or advising on PRIIPs for sale to UK investors continue to be subject to the same obligations as they are currently.

11. INSURANCE DISTRIBUTION (AMENDMENT) (EU EXIT) REGULATIONS 2019

This SI is to be laid under the EU (withdrawal) Act. The explanatory notes [here](#).

This SI intends to address deficiencies in retained EU law relating to the IDD that arise from the UK leaving the EU. The IDD will not be retained EU law as it is a directive that has already been implemented in the UK through domestic legislation and FCA rules. This SI intends to fix deficiencies in the EU directly applicable delegated regulations that have been made under the IDD by transferring functions from EU entities to appropriate UK bodies, replacing cross references to EU legislation with the relevant UK measures which implemented those provisions, and removing other EU references which are no longer appropriate. This SI is also intended to apply the current scope of the delegated regulations that have been made under the IDD; the scope will include all UK-based firms conducting insurance distribution in the UK as well as those intermediaries and insurers operating under the Temporary Permissions Regime after the UK leaves the EU.

Other publications from the RegZone Brexit news feed

ESMA: Managing risks of a no-deal Brexit in the area of central clearing

The European Securities and Markets Authority (ESMA) is publishing this Public Statement to address the risks of a no-deal Brexit scenario in the area of central clearing. The ESMA publication can be accessed [here](#).

The European Commission has published a press release on how the Juncker Plan has helped bring investment back to Europe

The publication summarises how the EU has increased sustainable levels of investment in Europe and states that there is a need to continue this effort by removing regulatory bottlenecks and pursue business-friendly structural reforms. The press release can be accessed [here](#).

ESMA has published a list of market makers and authorised primary dealers who are using the exemption under the Short Selling Regulation (SSR)

ESMA will continue to publish this list. The list can be accessed [here](#).

The Credit Transfers and Direct Debits in Euro (Amendment) (EU Exit) Regulations/1199

This SI has been made and will come into force on exit day. An explanatory memorandum is also available via this [link](#).

EC: Article 50 meeting

The EC has announced a meeting on 25 November 2018 at which EU27 leaders will meet to endorse the Brexit withdrawal agreement on Sunday 25 November 2018 "if nothing extraordinary happens". The item can be accessed [here](#).

BoE: FSR and stress test

BoE has announced that FSR and the full results of the annual stress test of major UK banks, due to be published on 5 December 2018, will now be published on 28 November 2018 in order for BoE to fulfil a request from TSC to provide an analysis of how the EU Withdrawal Agreement will affect the BoE's ability to deliver its statutory remits for monetary and financial stability. The full announcement can be accessed [here](#).

PMO: Speech by Theresa May

Text of Theresa May's speech to CBI on 19 November 2018 follows. She notes that "we will make appropriate arrangements on professional qualifications and right across the board ... in financial services". The full speech can be accessed [here](#).

EIOPA: Speech by Gabriel Bernardino: Insurance and pensions: securing the future

Text of this speech, given on 20 November 2018 follows, in which Gabriel Bernardino discusses Solvency II; supervisory convergence; consumer issues; digitalisation and Brexit. The full speech can be accessed [here](#).

ECB: Statement at ECON by Danièle Nouy

Text of Danièle Nouy's statement, given on 20 November 2018 follows. Topics include: key developments and risks in the euro area banking sector; ECB's supervisory activities; the results of the 2018 EU-wide stress test and completing the banking union. She notes: "on investment firms, we fully support entrusting the ECB with the supervision of systemic investment firms. This is an important and urgent issue, given the plans of large firms to relocate to the euro area due to Brexit". The full speech can be accessed [here](#).

PSR: Onshoring EU regulatory technical standards under the Interchange Fee Regulation

PSR is consulting on proposed amendments to the retained regulatory technical standards regulation adopted under Article 7 of the EU Interchange Fee Regulation for onshoring purposes. Responses are required by 17 December 2018. The consultation paper can be accessed [here](#).

The Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018/1201

This SI has been made and will come into force on exit day. An explanatory memorandum is also available via this [link](#).

EC: Statement by Michel Barnier

Text of a statement by Michel Barnier following the General Affairs Council (Article 50) on 19 November 2018 follows. The full statement can be accessed [here](#).

[CMS RegZone](#) publishes weekly updates (available via email, on-line and via Twitter) on Brexit developments for financial services firms. These provide analysis and commentary on significant developments during the week in question. A daily digest of Brexit news (without analysis or commentary) is also available by email [here](#) and online via the RZ news wizard [here](#) (both of these can be filtered using the Brexit topic). Links to publications are contained in each update; publications released before the updates commenced in April 2018 can be found in a bibliography [here](#). CMS RegZone publication 'Where we stand' provides an overview of the current position in a single report; this is updated regularly to take account of the key developments from the weekly updates.

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