



## Brexit update for financial services firms - week ending 16th November 2018

### The week in outline:

The week was dominated by the completion of the negotiations (as between the UK Government (HMG) and the European Commission teams) of the draft **Withdrawal Agreement** (WA) (see Document 1 below) and the subsequent political drama at Westminster. For financial services (FS) firms, there were no surprises in the draft WA text and all the key points have already been analysed in our previous updates.

**The WA does not contain any provisions specific to FS.** In particular, it does not contain a much-needed commitment from the EU to avoid an FS regulatory 'cliff-edge' when the UK leaves the EEA single market (see further below).

The draft WA now runs to over 500 pages. In essence, it provides **3 stages** after the UK's exit on 29/3/19 – stage 1 is an extendable standstill (the transition period), stage 2 is the Protocol Regime and stage 3 is the treaty on the final relationship. Stages 1 and 2 are legally binding/operative under the WA, although there are many areas where negotiations will continue long after exit (particularly relating to Stage 2). There is no agreement on the final treaty; there will be a political declaration on its 'framework', to accompany the WA. It is possible that stage 2 will be modified by subsequent agreements or, if the final treaty is agreed and takes effect in time, that stage 2 will be skipped. Equally, there is no guarantee when or if stage 3 will ever be agreed. HMG continues to express optimistic views about the timetable and outcome; it says it is 'highly unlikely' that stage 2 will be implemented and is still hopeful that no extension to the transition period will be needed. Few commentators seem to think that this is a realistic assessment.

**The key aspect for FS firms is the transition (or implementation) period (TP)** which would maintain the single market regime after the UK leaves the EU on 29/3/19. As expected (see previous updates), Article 132 of the WA permits the UK and the EU (through the Joint Committee) to agree (before July 2020) that the TP should be extended (on a one-off basis) beyond 31/12/20. Article 3 of the Protocol on Northern Ireland confirms that the UK can request an extension but cannot unilaterally require this. It must be agreed under Article 132 of the WA, and this would require negotiations over the extra UK contributions to the EU budget. The maximum permitted extension is still blank in the draft WA but the EU has suggested that this could be (no later than) the end of 2022. On this basis, the TP will last for at least 21 months and no more than 3 years and 9 months.

The WA has best endeavours/good faith obligations with a view to the UK/EU treaty on the final relationship (the FT) taking effect at the end of the TP on 31/12/20, so that there would be no need to extend the TP. If the negotiations/ratification slip from this timetable (as seems almost inevitable), then the TP may be extended by agreement before July 2020, failing which the regime under the 'legally operative' Protocol on Northern Ireland (the PR) will take effect at the end of the TP on 31/12/20. If the TP is extended, the PR would take effect at the end of the extended TP. In both scenarios the PR would not take effect to the extent the UK and the EU have by then agreed alternative arrangements (in whole or in part). This might be the final treaty or some other interim or partial solution.

The PR (despite its name) is UK wide and regulates a broad range of areas, but the PR does not cover FS regulation. At the end of the TP (whenever that occurs) the UK - both Northern Ireland (NI) and Great Britain (GB) (i.e. England & Wales and Scotland) - will therefore leave the FS single market.

### FS therefore faces the following scenarios:

**The WA takes effect** and the FS single market DRC<sup>1</sup> continues after exit on 29/3/19 until the end of the TP (whenever that may be). At that point, FS single market DRC between the EU-27/EEA-30 and the UK will cease, irrespective of whether the PR or FT take effect at that point - the FT (as currently envisaged – see further below)

<sup>1</sup> Dual regulation coordination (DRC) is explained in Chapter 1 of our April 2017 Report. DRC is a broad term to cover a variety of techniques such as "mutual recognition", "home state recognition/supervision", "deference", "substituted compliance" and "passporting".

will not provide for any preferential/bilateral DRC in FS. If the FT takes effect at that point, one would hope that there would be reciprocal equivalence decisions and, if needed depending on the timetable, transitional relief for both sides (as the UK has proposed). If the PR comes into effect, the situation for FS may be similar to a no deal scenario, although firms will have had much more time to prepare. The UK's NtA<sup>2</sup> regime would be expected to come into effect; however, the acquis as fully applicable in the UK until the end of the TP would by then have developed considerably since the current SIs were enacted, so the NtA process would need to be 'refreshed'. It is possible that despite the lack of commitments in the WA, the EU may decide to process a full set of UK equivalence decisions (under whatever EU equivalence provisions are in effect at that time) in time for the end of the TP, but that is not the course of action they are currently pursuing (see below).

There is also the possibility of various **other scenarios** that HMG is seeking to avoid. These include a no-deal scenario where the UK leaves the EU without the WA/TP at 29/3/19 when FS single market DRC ceases. EEA firms would have the benefit of broad transitional relief in the UK under the European Union (Withdrawal) Act 2018 regime (NtA) (see previous updates and our database [here](#)). UK firms would face a much more difficult position – the FS 'cliff-edge' - with no EU transitional measures and very few EU equivalence decisions for the UK (see further below). In the current political climate, there are still those supporting other outcomes which must remain a possibility until the WA is concluded – for example a second UK referendum, an extension to Article 50, a different treaty to cover exit etc.

### The Protocol Regime

The PR involves a single EU/UK customs territory (including GB) and horizontal obligations on 'open and fair competition' (applicable to GB as well as NI). These include commitments to certain EU tax-related measures as they stand at the end of the TP (with commitments to the Code of Conduct on Business Taxation), an ongoing UK commitment to harmonise with EU state aid rules as they develop during the PR and non-regression commitments on EU standards as they stand at the end of the TP in areas such as, the environment and labour protection. There are similar commitments on competition law (where, at the end of the TP, enforcement in relation to the UK will switch to the UK's Competition and Markets Authority).

There are also provisions of the PR which only apply to NI (but not GB). These include certain EU VAT and excise rules with respect to the movement of cross-border trade in goods, the single/all-Ireland electricity market regime, EU (single market) legislation on industrial, environmental and agricultural goods (as necessary to avoid a hard border) and other EU legislation regulating the movement of goods.

The PR can be seen as a hybrid interim step, which goes some way towards the Chequers/White paper in that it has a quasi-single market solution for goods but not for services, and it has a single customs territory. The difference is that the former only applies to NI (creating the NI/GB border issues, which are controversial in the UK) and the latter, whilst UK wide, does not accommodate the more sophisticated customs arrangements that HMG proposed in the Chequers/White paper.

The PR is important for two reasons. First, there is clearly, at least, a possibility that it will indeed come into effect, even if HMG hopes it will not. Secondly, irrespective of whether the PR comes into effect, once the WA is in operation, the PR becomes the baseline/default for the FT negotiations. If those negotiations do not run smoothly and the TP expires without an FT (or other agreement), the PR will be the default position. The UK (and the EU) will no longer have the threat/risk of defaulting to no deal with only WTO commitments applying.

The PR is described as temporary and HMG argues that it cannot be permanent under Article 50. There are complicated provisions which would allow the UK (or the EU) to seek an end to the PR on the basis that it was no longer necessary to achieve its stated objectives; this must be considered by a joint committee which must act in good faith. Ultimately, an independent arbitration panel can consider disputes over whether there has been a breach of best endeavours (in the FT negotiations) or good faith obligations. These do not really change the fundamental position; the UK still does not have any reliable way of unilaterally bringing the PR to an end at any given point in time.

### The future relationship

A further document was published last week entitled 'Outline of the **Political Declaration on the framework of the Future Relationship** between the European Union and the UK (see Document at 1 below). This is merely an outline and is a rather crude draft – no more than a list of bullet points/headings for the FT framework. The outline is due to be developed further this month. It is important to remember that even when complete, the political declaration will not be legally binding (unlike the PR above), it will only describe the envisaged '**framework**' for the future relationship and it will not contain any negotiated terms.

On services, the draft refers to WTO/FTA style provisions (beyond the parties' basic WTO commitments) on services with non-discrimination and market access under national treatment under host state rules. As we explained in [our report in April 2017](#), these do not involve DRC based access. The text on FS confirms the previous abandonment by the UK of its original proposals for bilateral/preferential access and the acceptance of the EU position that the UK would be treated as a third country with both sides making autonomous decisions on equivalence. It does refer to equivalence decisions being in place by July 2020 (6 months before the end of the TP) but this is not binding and is therefore only a possible outcome. One would hope that the UK would also secure from the EU a transitional regime for FS firms similar to the regimes being adopted by the UK for a no deal scenario (something that was identified in the Chequers White Paper). This would smooth the switch from single market

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<sup>2</sup> Nationalising the acquis

DRC (such as passporting) to the much more limited equivalence based third country DRC. The potential outcomes on FS are now quite narrow; an FT (following the WA) should provide a smoother transition than a no-deal scenario but will not radically change the ultimate end result.

### Other developments

With all the excitement at Westminster, some people may have overlooked the release of the EU's latest publications of its contingency planning for a no deal scenario. These include a specific report on FS (see Document 4 below). The EU confirms its hard-line approach to no deal preparations and it will not replicate the UK's legislation under NtA SIs, which provide broad transitional relief to EEA firms (see section 1 of our NtA database [here](#) and previous updates). The EU will only take any action where there is a major problem for EU-27 operations. Such action will not take the form of legislation but will consist of temporary and conditional equivalence decisions. It seems these will be limited to two narrow problems for the EU – “...deriving from a disorderly close out of positions of EU clearing members in the UK central counterparties. There might also be potential risks in relation to certain services provided to Union operators by UK central security depositories which cannot be replaced in the short-term.” The EU says it will **not** be making an ‘adequacy’ decision on UK data protection for a no deal scenario (see further at Document 4 below).

The UK NtA SI program continues – see Document 5 below re money laundering and our database [here](#).

Meanwhile, we expect more publicity about the case of *Wightman and Others v Secretary of State for Exiting the European Union*, which would determine whether notice given under article 50 TEU is unilaterally revocable by the UK. HMG has sought to prevent the question coming before the Court of Justice of the European Union (CJEU) and maintains that notice is not revocable. The CJEU has fixed the hearing for 27<sup>th</sup> November 2018 following a preliminary reference made by the Court of Session Inner House (in Edinburgh).

## 1. EC/PMO: BREXIT NEGOTIATIONS

*The EC press release sets out further information on the deal reached on 14 November 2018 and includes links to Q&As and the full text of the agreement itself. Theresa May's statement of 14 November and her statement to HoC on 15 November 2018 appear in the second and third links below. The EC press release can be accessed [here](#), the full text of the Withdrawal Agreement and the political declaration on the future relationship can be accessed [here](#) and the PM's statement and Q&A can be accessed [here](#). A joint statement from the UK and the EU on the Withdrawal Agreement can be accessed [here](#). Furthermore, the UK government has published an explainer for the Withdrawal Agreement and the protocol on Northern Ireland which can be accessed [here](#).*

In relation to services and in particular financial services the protocol on the future relationship states that the UK and the EU will seek to negotiate:

#### *“Services and Investment*

- *Ambitious, comprehensive and balanced arrangements on trade in services and investment, delivering a level of liberalisation in trade in services well beyond the Parties' WTO commitments, and in line with Article V of the General Agreement on Trade in Services, with substantial sectoral coverage, covering all modes of supply and providing for the absence of substantially all discrimination in the covered sectors, with exceptions and limitations as appropriate.*
- *Provisions on market access and national treatment under host state rules, ensuring that the Parties' services providers and investors are treated in a non-discriminatory manner, including with regard to establishment. While preserving regulatory autonomy, provisions to promote regulatory approaches that are transparent, efficient, compatible to the extent possible, and which promote avoidance of unnecessary regulatory requirements.*
- *[...]*
- *Provisions to enable free movement of capital and payments related to transactions liberalised under the economic partnership, subject to relevant exceptions.*

#### *Financial Services*

- *Commitments to preserving financial stability, market integrity, investor 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 and maintain any measure where necessary for prudential reasons.*
- *Commencement of equivalence assessments by both parties as soon as possible after the United Kingdom's withdrawal from the Union, endeavouring to conclude these assessment before the end of June 2020*
- *Close and structured cooperation on regulatory and supervisory matters, grounded in the economic partnership and based on the principles of regulatory autonomy, transparency and stability, recognising this is in the Parties' mutual interest.”*

With regards to enforcement and dispute resolution the protocol also notes:

- *“Robust, efficient and effective arrangements for the setting of strategic direction, for the management, supervision, implementation and development over time of the future relationship, of the resolution of disputes and enforcement, and safeguard provisions, in full respect of the Parties' own legal orders, and based on the arrangements for dispute settlement and enforcement provided for in the Withdrawal Agreement.”*

## 2. EC: STATEMENTS BY MICHEL BARNIER AND DONALD TUSK

Texts of the statements given by Michel Barnier (in French) on 14 November 2018 and by Donald Tusk following his meeting with Michel Barnier follow. The Barnier statement can be accessed [here](#) and the Tusk statement [here](#).

Quotes from the statement by Michel Barnier:

*“This brings me to my last point, which concerns the framework for such a future relationship. We will prepare ourselves and be ready to start these negotiations on 30 March 2019, the day after the UK's withdrawal.*

*Today, through this draft Joint Political Declaration, we are outlining the ambitious partnership we want.*

- *A free trade area based on deeper regulatory and customs cooperation and a level playing field. Our aim is that all goods should be free from customs duties and quotas, building on our proposals in the Withdrawal Agreement for a single customs territory. In line with my mandate from the European Council, this will, of course, be conditional on a new fisheries agreement.*
- *Sectoral cooperation, which is important and expected, for example on transport or energy.*
- *Cooperation on internal security, police and judicial cooperation.*
- *And, of course, on foreign policy, external security and defence.”*

Quotes from the statement by Donald Tusk

*“Given these extremely difficult circumstances, I would like to thank Michel Barnier and his team, especially Sabine Weyand and Stéphanie Riso, for doing this exceptionally hard work. Michel, we all put a lot of trust in you, and rightly so. You have achieved our two most important objectives. First, you ensured the limitation of the damage caused by Brexit and, second, you secured the vital interests and principles of the 27 member states, and of the European Union as a whole. If I weren't confident that you did your best to protect the interests of the twenty seven, and I am familiar with the essence of the document, I would not propose to formalise this deal.”*

## 3. HOUSE OF COMMONS LIBRARY BRIEFING PAPER: THE EU27: INTERNAL POLITICS AND VIEWS ON BREXIT

This HoL library briefing paper considers the views of each of the EU27 on Brexit. It also includes background on their internal politics and trade and economic statistics. The full report can be accessed [here](#).

*“Examining the positions on Brexit taken by the EU27, a number of common themes emerge, notably insistence on the integrity of the EU Single Market and an unwillingness to divide the four market freedoms (relating to goods, services, capital and people) when it comes to negotiating the future UK-EU trading relationship. This has also come alongside concerns that the new trading relationship should not enable the UK to gain a competitive advantage by retaining participation in some elements of the Single Market while no longer being required to comply with all the requirements of membership, including regulations relating to competition, the environment and labour market.”*

## 4. EC: CONTINGENCY WORK IN THE EVENT OF A NO-DEAL BREXIT

The EC has published information on its ongoing preparedness and contingency work in the event of no-deal Brexit. A communication outlines a limited number of contingency actions in priority areas that could be implemented (including with regard to financial services, with a particular concentration on the issue of derivative contracts); two legislative proposals have been adopted to amend existing EU law in the area of visas and energy efficiency and a notice has been published providing information on the changes that will occur in the event of no deal for persons travelling between the EU and the UK, and vice versa, after 29 March 2019, or for businesses providing services in relation to such travel. The full document can be accessed [here](#) the one in relation to financial services [here](#).

*“In the Commission's view, contingency measures adopted at all levels should comply with the following general principles:*

- *Contingency measures should not replicate the benefits of membership of the Union, nor the terms of any transition period, as provided for in the draft Withdrawal Agreement;*
- *Contingency measures will in general be temporary in nature, and should in principle not go beyond the end of 2019;*
- *Contingency measures will be adopted unilaterally by the European Union in pursuit of its interests and can therefore, in principle, be revoked by the European Union at any time;*

- Contingency measures must be adopted respecting the division of competences provided for by the Treaties as well as the principle of subsidiarity within the European Union;
- National contingency measures must be compatible with EU law, including the international obligations of the Union; and
- Contingency measures will not remedy delays that could have been avoided by preparedness measures and timely action by the relevant stakeholders.

[...]

*As regards cleared derivatives, it appears that there might be risks to financial stability in a no deal scenario, deriving from a disorderly close out of positions of EU clearing members in the UK central counterparties. There might also be potential risks in relation to certain services provided to Union operators by UK central security depositories which cannot be replaced in the short-term. In these areas, the existing systems of equivalence provide appropriate tools, which can be swiftly deployed. The time remaining until 30 March 2019 should be used in this respect. Should the Commission need to act, it will only do so to the extent necessary to address financial stability risks arising from a withdrawal without an agreement, under strict conditionality and with limited duration. Should no agreement be in place, the Commission will adopt temporary and conditional equivalence decisions in order to ensure that there will be no disruption in central clearing and in depositories services. These decisions will be complemented by recognition of UK-based infrastructures, which are therefore encouraged to pre-apply to the European Securities and Markets Authority (ESMA) for recognition.”*

[...]

“Personal data

*In the case of a no deal scenario, as of the withdrawal date, the transfer of personal data to the United Kingdom will become subject to the rules on international transfers in application of the General Data Protection Regulation (EU) 2016/679, Directive (EU) 2016/680 for the law enforcement sector and Regulation (EC) 45/200126 for the institutions and bodies of the European Union.*

*The General Data Protection Regulation, Directive 2016/680 and Regulation 45/2001 contain a broad toolbox for data transfers to third countries. This includes in particular the so-called ‘appropriate safeguards’ (e.g. the Commission’s approved Standard Contractual Clauses, Binding Corporate Rules, administrative arrangements) that can be used both by the private sector and public authorities.*

*In addition, the three legislative acts mentioned above contain a number of derogations for specific situations that allow data transfers even in the absence of appropriate safeguards, for instance if the data subject provides explicit consent, for the performance of a contract, for exercise of legal claims or for important reasons of public interest. These are the same tools that are used with most countries in the world for which no adequacy decision exists.*

*In view of the options available under the legislative acts mentioned, the adoption of an adequacy decision is not part of the Commission’s contingency planning.”*

## **5. HMT: DRAFT MONEY LAUNDERING AND TRANSFER OF FUNDS (INFORMATION) (AMENDMENT) (EU EXIT) REGULATIONS 2018**

*HMT has published draft text and an explanatory note of a statutory instrument, which will make amendments to the Money Laundering Regulations 2017; EU Funds Transfer Regulation and Oversight of Professional Body AML Supervision Regulations 2017, to be laid under the EU (Withdrawal) Act. The draft SI can be accessed [here](#) and the explanatory information can be accessed [here](#).*

### **Other publications from the RegZone Brexit news feed**

**AFME/Deutsches Aktieninstitut/EDMA Europe/FIA/ICMA/ISDA/Swiss Finance Council: Investment firm regulation – third country firm regime**

*The trade associations have written to EU policy-makers with their concerns over requirements being considered in the proposals for the investment firm review. The full publication can be accessed [here](#).*

**HoC: E-petition relating to leaving the EU**

*This EU library briefing provides a debate pack a debate being held on 19 November 2018. The briefing paper can be accessed [here](#).*

**HoC Procedure Committee: Motions under section 13(1) of the European Union (Withdrawal) Act 2018**

*This report sets out three potential options for the process for HoC to approve any negotiated withdrawal agreement between the UK and the EU. The full report can be accessed [here](#).*

**EC: Regulation regarding EBA's location**

*Regulation (EU) 2018/1717 of the European Parliament and of the Council of 14 November 2018 amending Regulation (EU) No 1093/2010 as regards the location of the seat of EBA has been published in the Official Journal. The regulation can be accessed [here](#).*

**The Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018/1184**

Text of the SI and explanatory notes may be accessed via the following [link](#).

#### **HMT: Draft Interchange Fee (Amendment) (EU Exit) Regulations 2018**

HMT has published the draft text of this SI, which makes amendments to the retained EU law relating to interchange fee regulation, to be laid under the EU (Withdrawal) Act, along with explanatory notes. These can be accessed [here](#).

#### **HoC: PMQ**

Text of PMQ on 14 November 2018 follows, including discussion of Brexit. The text can be accessed [here](#).

#### **ECB: Supervisory newsletter**

The latest edition of ECB's supervisory newsletter has been published. Topics include: Brexit and an interview with Danièle Nouy. The newsletter can be accessed [here](#).

#### **Draft Social Entrepreneurship 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 draft SI can be accessed [here](#).

#### **Draft Venture Capital 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 draft SI can be accessed [here](#).

#### **Draft Payment Accounts (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 draft SI can be accessed [here](#).

#### **EC: Brexit negotiations**

This note of 13 November 2018 states that Michel Barnier has provided the EU27 ministers with an update, concluding that "intense negotiating efforts continue, but an agreement has not been reached yet". The note can be accessed [here](#).

#### **Draft Central Securities Depositories (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 draft SI 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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16 November 2018

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