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Brexit Update: UK Provides More Details on its Proposed Temporary Permissions Regime

30 July 2018

Introduction

On 29 March 2019, the UK is set to leave the EU (a process most commonly referred to as "Brexit"). The UK and EU are currently in negotiations to agree upon a transitional period which is proposed to run from 29 March 2019 through to 31 December 2020.

Under the terms of the proposed transitional agreement, the UK would continue to be treated as part of the EU's single market in financial services, meaning that UK and EU firms would continue to have access to their respective markets on current terms and firms will be able to trade on the same terms as now until the end of the transitional period. Financial services passporting rights would continue to apply, therefore EU firms operating in the UK, and UK firms operating in the EU, would be able to continue to undertake regulated investment activities, either by means of passporting rights or under other relevant EU frameworks.

The proposed transitional period will only come into force with the ratification of a final version of the overall withdrawal agreement[1] between the EU and UK (the "Withdrawal Agreement"). If no Withdrawal Agreement is agreed (i.e., if there is a "no deal" or "hard" Brexit) then no transitional period will apply. This would lead to significant disruption to the EU and UK financial services sectors that currently rely on the passporting framework to carry on cross-border activities.

Temporary permissions regime

With the Brexit negotiations still ongoing and with no certainty that the Withdrawal Agreement will be agreed, the UK Government, in co-ordination with its financial regulatory authorities (the Prudential Regulatory Authority ("PRA") and the Financial Conduct Authority ("FCA")), are preparing for a range of possible scenarios. This includes a scenario where the UK leaves the EU without a deal and without a transitional period.

To minimise the disruption caused in such a scenario, the UK has proposed a temporary permissions regime ("TPR"). This regime would act as a backstop and would apply to firms in other EU Member States that passport either their services or funds into the UK and will allow them to continue their activities in the UK for a limited period after withdrawal.

How would the TPR work?

EU firms

EU firms seeking to rely on the TPR would need to notify the FCA via an online process which would most likely open in early January 2019 and would close the day before Brexit (i.e., 28 March 2019).

EU firms that have notified under the TPR would be able to continue to access the UK market as they could prior to Brexit under the current passporting regime. In due course, the FCA would allocate these firms a time period (a 'landing slot') within which they will need to submit their application for UK authorisation. It is expected that the first landing slot would be October to December 2019 and the last would be January to March 2021.

Once the notification window has closed, firms that have not submitted a notification would not be able to use the TPR.

EU Funds

The FCA's expectation is that the regime would work in a similar way for investment funds with fund managers notifying the FCA which of their funds they want to continue to market in the UK.

The FCA expects to start accepting such notifications in early January 2019 and the notification window would close prior to the date of Brexit.

Once the notification window has closed, fund managers that have not submitted a notification for a fund within the prescribed time period would not be able to market the fund under the TPR.

The FCA is yet to provide details on how funds marketed under the TPR would transition to a post-TPR longer term framework.

Who would the temporary regime be relevant to?

The TPR would be relevant to EU firms and EU funds that utilise one or more financial services passports in order to gain access to the UK. By way of example, the TPR would be relevant to:

- EU alternative investment fund managers that market EU funds into the UK under the Alternative Investment Fund Managers Directive (AIFMD) marketing passport; and
- EU funds authorised under the Undertakings for Collective Investment in Transferable Securities (UCITS) that are marketed into the UK under the UCITS marketing passport.

The TPR would not be relevant (or available) to firms and funds outside the EU as these are not currently able to utilise the passport. For example, the TPR would not be relevant to US managers that market funds into the UK under the AIFMD national private placement regime.

Next steps

The FCA proposes to consult in autumn 2018 on the detail of the rules that would apply to firms and funds while they are in the TPR, including on fees and levies.

It is still generally expected that a transitional period will be agreed between the UK and EU and, in such circumstances, the TPR is not expected to come into effect. If there is no transitional period agreed and the TPR is required, the FCA would expect to open the notification window in early 2019.

EU firms and funds that could notify under the TPR under the current UK proposals need take no action at this time other than to monitor developments relating to Brexit and any further statements on the TPR from the FCA and UK Government.

The EU has not indicated that it would introduce a similar regime to facilitate access by UK firms and funds into the EU market in the event of a 'hard' Brexit. As such, UK firms should continue to make their Brexit contingency plans on the basis of the law and regulation as it currently stands.

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[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_691366/20180319_DRAFT_WITHDRAWAL_AGREEMENT.pdf

Related Professionals

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