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Brexit Update: Impact on Fund Managers from 1st January 2021 and Beyond

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Background

On 31 January 2020, the United Kingdom (**"UK**") officially exited the European Union ("**EU**"), an event more commonly referred to as "**Brexit**".

From 1 February 2020 to 31 December 2020 (the "**Implementation Period**") the UK remained part of EU customs union and single market, meaning essentially EU law continued to have the same effect in the UK as it did prior to Brexit. This meant that UK firms were still able to access the EU under relevant financial services passports (including under the Alternative Investment Fund Managers Directive ("**AIFMD**")).

EU-UK Trade Deal

On 24th December 2020, the UK and EU (together, the "**Parties**") announced a trade agreement that has since been approved by EU Member States and the UK Parliament (the EU Parliament will retrospectively approve it in January this year). The text of the treaty free trade agreement (the "**FTA**") can be found here.

Whilst the FTA covers a number of aspects of the trading and cooperation relationship between the UK and EU, it does not cover financial services to any significant degree.

The Parties agreed to a joint declaration on financial services (amongst other declarations) which confirms that the Parties agree to establish 'structured regulatory cooperation' on financial services, with the aim of establishing a durable and stable relationship between autonomous jurisdictions. Whilst this declaration states that the Parties will, by March 2021, agree a memorandum of understanding establishing the framework for this cooperation this is not the same as UK and EU financial services firms having free access to each other's markets (as they did prior to Brexit and during the Implementation Period).

Consequently, from 1 January 2021 UK firms lost their financial services passport rights to EU Member States and equally EU firms lost their passport rights into the UK.

In November 2020, Rishi Sunak announced that the UK would be granting equivalence from 1 January 2021 to EU based financial services in certain financial services areas such as credit ratings agencies and derivatives trading. The concept of equivalence is a system which can be used to grant domestic market access to foreign firms in certain areas of financial services and is based on the principle that the countries where they are based have regimes which are 'equivalent' in outcome. Equivalence was not formally part of the FTA, and the absence of further equivalence decisions means that since 1 January 2021, firms need to consider the approach adopted in the relevant country which they previously passported into to determine to what degree they are able to continue their previous activities in that country.

Whilst the loss of passporting rights will have an impact on UK and EU firms across a number of financial services sectors, we have summarised the impact of the loss of passporting rights for UK and EU AIFMs seeking fund marketing approval in the respective jurisdictions in 2021.

Marketing funds under the AIFMD in 2021 and beyond

(a) Marketing by full-scope UK AIFMs in the EU

UK full-scope AIFMs are no longer able to use the AIFMD marketing passport. Instead, they need to market into EU Member States (where it is feasible to do so) through the national private placement regime("**NPPR**") which is the process which any non-EU firms need to follow to obtain approval for marketing their funds in any particular EU Member State.

(b) Marketing by full-scope EU AIFMs in the UK

Full-scope AIFMs in EU Member States are no longer permitted to market their funds in the UK under the AIFMD marketing passport. So unless they have obtained transitional relief to continue to market existing funds already approved for marketing under the UK's Temporary Permissions Regime ("**TPR**"), they would need to obtain approval for fund marketing under the UK's NPPR regime.

(c) Marketing by sub-threshold UK AIFMs in the EU

UK sub-threshold AIFMs will be able to market in EU Member States (where it is feasible to do so) under the NPPR regime. Previously sub-threshold UK AIFMs could not obtain a marketing approval in EU Member States as there was no passport available to them and equally the NPPR regime was not available to them as they were not viewed as a 'third country AIFM'. Going forward, UK AIFMs will be third country AIFMs under the EU regime and so they should be able to obtain NPPR marketing approvals in the EU Member States where it is feasible for third country AIFMs to do so.

(d) Marketing by sub-threshold EU AIFMs in the UK

Sub-threshold EU AIFMs will be able to market in the UK via the UK NPPR regime. There is a special lighter-touch regime for non-UK sub-threshold AIFMs applying for NPPR approval.

(e) Marketing by AIFMs other than UK/EU AIFMs

For other third country AIFMs, e.g. those in the US or the Channel Islands, Brexit and the FTA will have no impact on them and such firms will still need to make NPPR notifications (where feasible) in order to market their AIFs in the EU or the UK as usual.

Assess and adapt (as necessary)

If they haven't already, firms should assess how Brexit may impact their business activities, including the marketing of their funds, and adapt their activities or operational structures accordingly. Additional consequences or requirements may apply for UK AIFMs managing existing or seeking to manage new EU funds as the AIFMD management passport is no longer available to them. These requirements will differ depending on certain factors (e.g. the EU Member State where the AIF is established and whether retail investors are permitted to invest in the AIF) and should be assessed on a case-by-case basis. For further information about the impact of the Brexit deal on your activities, reach out to one of the Proskauer professionals linked to this article.

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