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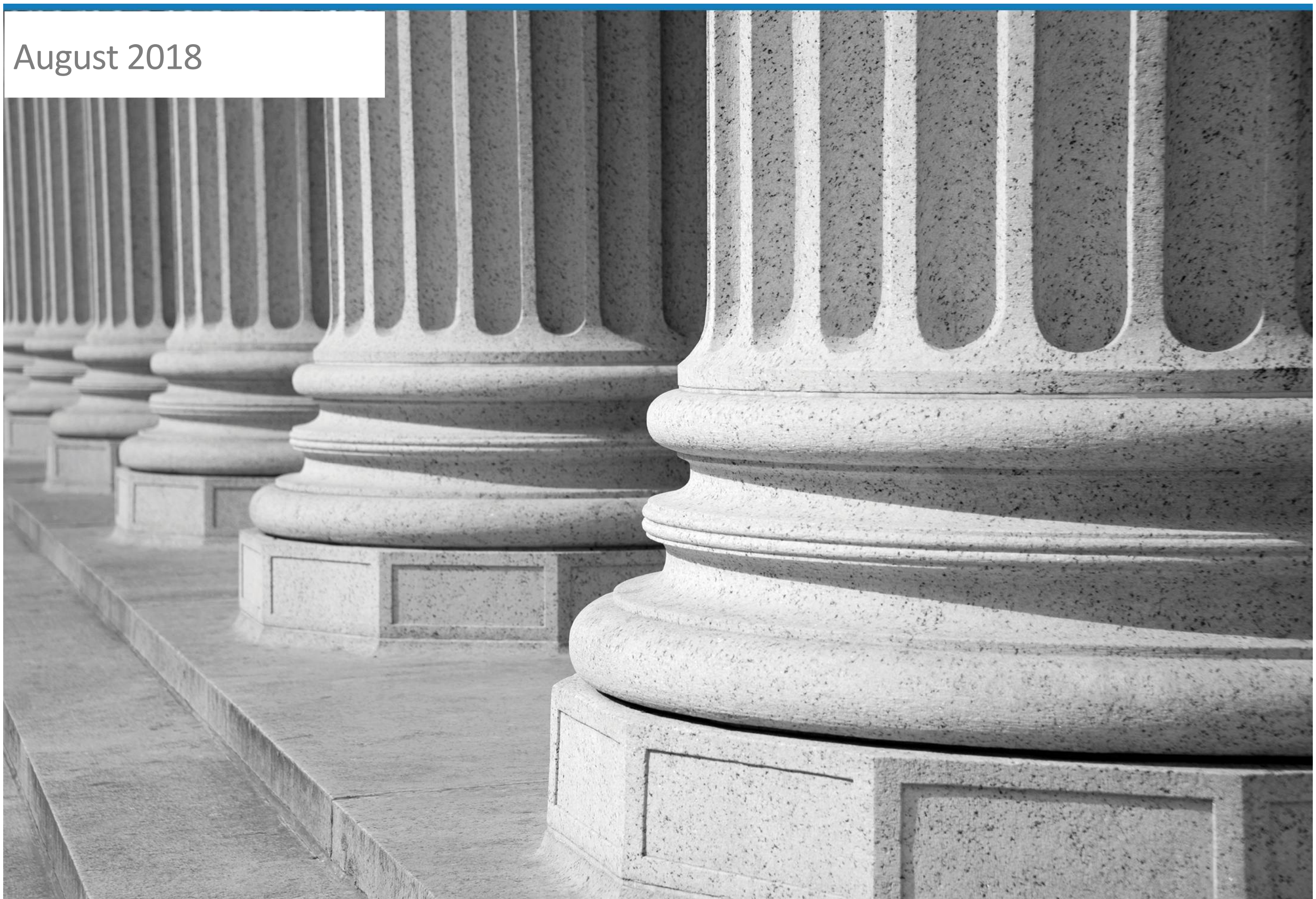
Planning for Brexit: an interim update for Asset Managers

August 2018



The asset management sector has been gearing up for a hard Brexit for some time, inevitably assuming a worst case scenario. Indeed, for most asset managers there has been some sort of starting point, with funds domiciled, and management companies and operations, in other European centres which could be enlarged or restructured.

Uncertainty though is the real problem. Even now, we still have no news of the end position. We do though now have some information on the potential transition plans which HM Treasury, the FCA and, where relevant, the PRA are putting in place.

In this Briefing Paper, we look at the recently published transition plans, including the temporary permissions regime or "TPR", as it might apply to asset management firms and funds. Once we have further information of the details in the Autumn with the likely deluge of statutory instruments from the UK perspective, plus hopefully news on developments in the negotiations and so the EU's position, we will update this Briefing Paper – hopefully in October.

For now, we can usefully look at three areas: first, the current negotiating position; secondly, the recently publicised temporary permissions regime; and thirdly, a brief look at the possible end game - starting to guess how asset managers might plan for the post Brexit world.

The UK's negotiating position

Whilst we have no idea of the outcome of the negotiations, we do have the recent publication of the Government's White Paper "The future relationship between the United Kingdom and the European Union" issued in July,[1] post the Chequers Cabinet meeting, which sets out the UK Government's current negotiating position. It moves the position on somewhat because it makes it clear that the UK Government is no longer trying to seek some of the options which might previously have been on the table such as any mutual recognition regime.

Although the comments in the White Paper are quite general, there are some key points for financial services firms to note including the following:

- It is recognised that the UK and the EU will not have current levels of access to each other's markets, instead the UK is to seek new arrangements on financial services that "preserve the mutual benefits of integrated markets and protect financial stability noting that these could not replicate the EU's passporting regimes" (paragraph 7(b).

- Whilst appreciating at paragraph 1.3 that the UK is world leading in many services sectors including legal business and financial services, there is no thought now of trying to negotiate some sort of new customs arrangement for services trade as is the case for goods. Paragraph 48 of the White Paper puts it plainly: "This means that the UK is proposing new arrangements for services and digital that would provide regulatory flexibility, which is important for the UK services based economy. This means that the UK and the EU will not have current levels of access to each other's markets."

- Although the UK may seek a new economic and regulatory arrangement for financial services, it is unclear what shape that might take. It certainly would not seem to encompass a mutual recognition system. Paragraph 60 is clear that the UK can no longer operate under the EU's passporting system as this is intrinsic to the Single Market of which it will no longer be a member.

- It is noted that both the UK and the EU will wish to maintain autonomy of decision making and the ability to legislate for their own interests. At least, taking rules made by the EU is not accepted. Indeed, in many peoples' book, this might have been the worst case scenario – UK firms being subject to rules, the contents of which the UK Government and UK regulators could not influence.

- Third country equivalence regimes which are currently available provide only limited access for some of third country partners to some areas of the EU financial services markets and are insufficient to deal with a third country whose financial markets are deeply interconnected with the EU's markets. The UK Government indicates the following failings of these current limited regimes:

  - no bilateral mechanism for the EU and the third country to discuss changes to their rules on financial services to maximise the chance of maintaining compatible rules and minimise the risk of regulatory arbitrage or threats to financial stability.

  - insufficient tools for reciprocal supervisory, co-operation, information sharing, crisis procedures or supervision of cross border financial market infrastructure;

  - a need for phased adjustments and careful management of the impacts of change, so that businesses can have a predictable environment;

1 HM Government White Paper entitled "The future relationship between the United Kingdom and the European Union" July 2018 (CM 9593)

- some form of mediated solution is needed where equivalence might be threatened by a divergence of rules or supervisory practices.

  And the overriding problem is that the current set of third country equivalence regimes is so limited that there are some services where currently no such regime is available.

Key features of the UK position are set out in Appendix 1: one of a set of slides published by the Government on 20 August.[2]

Effectively, the UK Government is arguing for a better version for access to the EU via frameworks for equivalent third country regimes than the existing third country provisions currently offer. A bilateral arrangement between the UK and the EU should hopefully deal with the above perceived difficulties with the third country regimes at present. For example, there is a suggestion of close supervisory co-operation and a structured consultation process of dialogue at political and technical level on regulatory matters "while respecting the autonomy of each side's legislative process and decision making". The UK has developed a proposal for how this autonomy model could work – as set out in the slide in Appendix 2. The key difficulty of course will be making sure that any such system can be relied upon by firms wishing to use it, such that firms trust its durability in order to base a reliable business model on it.

One suspects that asset managers will remain sceptical unless and until the current third party regimes can be demonstrably and significantly improved on a bilateral basis. Of relevance to asset managers, there are two limited options for MiFID investment services, the AIFMD third country AIFM passport is yet to be switched on; and no third country regime exists for UCITS.

Also, this is the UK Government's current negotiating position or wish list. We have no idea how the EU negotiating team will respond or what the outcome of negotiations will be. There may potentially be no deal.

Likely transitional arrangements

Given that time is marching on, firms need to work out how to deal with matters in the immediate future, and in any transitional period.

Just in case, we now have details of a "back stop" temporary permissions regime for firms passporting into the UK.

Helpful papers were published in July 2018 by HM Treasury, the Bank of England and FCA which indicate plans that would effectively plug the gap should there be no Brexit deal – and defer the issue for a period of time to allow for a firm operating in the UK to transition to become a UK authorised firm. The July set of papers essentially set out contingency planning.

HM Treasury's Paper published on 25 July reasserts the Government's confidence that an implementation period will be in place between 29 March 2019 and 31 December 2020 but, nevertheless, it has to plan in case it is not. Given the extraordinary last minute timing of Brexit negotiations, the Government appreciates the need to prepare for some transitional period so that firms "do not fall off a cliff" at the exit date on 29 March 2019.

Whilst indicating that, in the event of a no deal scenario, we can fall back on the strong UK regulatory framework, there is to be a two pronged approach to accommodating those entities which operate cross-border:

- **Introduction of a temporary permissions regime (TPR) in line with the December 2017 announcement**

  EEA firms could continue to operate in the UK for a time limited period after the UK has left the EU. For those wishing to operate in the UK on a permanent basis, this should allow sufficient time to apply for full authorisation from UK regulators.

- **In addition, HM Treasury plans to introduce further specific transitional regimes for entities operating cross-border and outside of the passporting framework**

  HM Treasury intends to provide financial services regulators with a general power to phase in post exit requirements, allowing flexibility for firms to transition to a fully domestic UK regulatory framework

Allocation of new powers

Work is well underway to enable the relevant bodies to undertake the relevant actions.

The European Union (Withdrawal) Act ("EUWA") repeals the European Communities Act 1972 and converts in UK domestic law the existing body of directly applicable EU law (including EU Regulations). It also preserves UK laws relating to EU membership (for example legislation implementing EU Directives – this body of law being referred to as "Retained EU law"). The EUWA also gives Ministers powers to prevent,

2 HM Government (published by DExEU): Presentation slides: Framework for the UK-EU partnership Financial Services (dated 25 July 2018, published 20 August 2018)

remedy or mitigate any failure of EU law to operate effectively or any other deficiency in retained EU laws through statutory instruments.

HM Treasury plan to delegate powers to the UK financial services regulators:

- to address deficiencies in the regulators' rule books arising as a result of exit.

  Where a regulator uses this power, HM Treasury will be required to approve the instruments which give effect to those fixes

and

- to address the EU Binding Technical Standards (BTS) which will become part of UK law.

  Where a regulator proposes a change to BTS, HM Treasury will be required to approve the instrument that gives effect to the change, and note that HM Treasury may not approve a change if it appears to the Treasury that the proposal would have implications to public funds or would prejudice negotiations for an international agreement.

HM Treasury is also taking actions to start splitting responsibilities between HM Treasury and financial services regulators – with announcements in April along the lines one would expect in the draft Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018. HM Treasury will, in addition, transfer supervisory powers currently supervised at European level by ESMA – to the FCA to regulate credit rating agencies and trade repositaries and to the Bank of England for non-UK central counterparties and non-UK central securities depositories.

The regulators will be required to provide an annual report to Parliament setting out how they have exercised any powers delegated to them under EUWA.

A series of financial services statutory instruments (Sis) can be expected from HM Treasury. The first is the set regarding temporary permissions alongside the temporary recognition regime for central counterparties, and the SI sub-delegating the power to fix deficiencies in BTS and Regulators' Rule Books to the financial services regulators. Further, SIs fixing deficiencies in EU legislation will be laid over the Autumn into early 2019.

The Treasury publications in July deal only with the first aspect for the present. The FCA though in their publication set out more as to how they expect the regime to work for both firms and investment funds.

Temporary permissions regime

The first of a planned series of technical notices issued on 23 August by the UK Government includes one for banking, insurance and other financial services if there is no Brexit deal.[3]

It acknowledges that, whilst the UK Government is committed to putting in place unilateral action if necessary to resolve things as far as it can, it cannot fully address risks for outgoing business where there are EEA customers of UK firms currently using financial services passports. Such unilateral action can though help inbound firms and funds.

Inbound firms that currently operate without UK authorisation or recognition should be able to plan on the assumption that UK authorisation or recognition will not be needed before the end of the implementation period. If however there is no implementation period a temporary permissions regime, or " TPR" is required.

With the prospect of the UK becoming a third country in relation to the EU, there is prospect of EEA firms needing to seek authorisation and EEA investment funds requiring UK recognition in order to continue to access the UK market or market into the UK respectively.

Should the "back stop" temporary permissions regime be required, it would have the following key features:

- **a three year transition**

  The current plan is that the TPR will allow a transition period of up to three years from exit day (so perhaps beyond 31 December 2020). The SI itself though includes a power for extension of deadlines by which the PRA and FCA have to make a determination on an application for authorisation (including for a variation of permission) for EEA firms operating in the UK via a passport, so there is built in flexibility. HM Treasury also has the power to extend both the length of the regime and the deadlines by no more than twelve months at a time in certain circumstances.

  The intention seems to be that this three year transitional period will apply to all sorts of passported arrangements. This first SI only deals with EU passported firms and the Schedule 3 and Schedule 4 regimes. Similarly temporary regimes lasting three years with the power to extend if necessary are to be provided for EEA payment institutions, EEA electronic money institutions and also EEA funds that are marketed into the UK. We will have to await further

[3] https://www.gov.uk/government/publications/banking-insurance-and-other-financial-services-if-theres-no-brexit-deal/banking-insurance-and-other-financial-services-if-theres-no-brexit-deal

information as to how the Government proposes to deal with fund passports both for UCITS and AIFs currently in use.

- **to full UK authorisation**

  This is a transitional regime – a firm transitions to authorisation:
  - Firms whose applications are successful will immediately become fully UK authorised and leave the TPR regime.
  - If a firm's application is unsuccessful, or a firm does not submit an application by the allotted deadline, or a firm withdraws its application without submitting another it will be eligible to have its temporary permissions cancelled by the PRA or the FCA, as appropriate. Provision can be made for them to wind down their UK regulated activities in an orderly manner and this will be included in a separate statutory instrument.

- **for authorised firms currently using Schedules 3 and 4 FSMA**

  Currently passported in firms use the provisions in Schedule 3 and Schedule 4 of FSMA to which Section 31(1)(b) and (c) FSMA refer respectively.

  - Schedule 3 covers an EEA firm qualifying for authorisation and

  - Schedule 4 covers a Treaty firm qualifying for authorisation.

  Both of these categories of persons are regarded as authorised for the purposes of the Act under Section 31 of FSMA.

  With these Schedules removed, firms currently within them would need to move either to Section 31(a) status – a person who is a Part 4A permission to carry on one or more regulated activities, or be a person who is otherwise authorised by way of a provision of or made under FSMA.

- **who should contact the relevant regulator**

  EEA credit institutions and insurers operating in the UK are expected to contact the PRA at the Bank of England. Other firms should contact the FCA.

  However, note that incoming credit institutions that are not accepting deposits in the UK should contact the FCA. (This might include those passporting safe custody and depositary business.)

To benefit from the temporary permissions regime prior the exit day, eligible firms will need to submit an application form for UK authorisation or a notification of their intent to enter the TPR regime.

In outline, the core provisions of the published draft Statutory Instrument for EEA passport rights include:

- under paragraph 9, that a person to whom the Regulation applies shall be treated as if the person has permission to carry on a regulated activity in the United Kingdom under Part 4A of the 2000 Act were varied. The variation is that the regulated activity the person is permitted to carry on includes one which immediately before exit day the person is authorised to carry on in the United Kingdom by virtue of Section 31(1)(b) as an EEA firm by way of passport rights under Schedule 1 or 31(1)(c) as a Treaty firm under Schedule 4.

- under Regulation 12, the person concerned must take certain steps before exit day

  - to make an application (whether for permission under Part 4A or, in the case of a person who is already authorised under Section 31(1)(a) in addition to paragraph (b) or (c), for a variation of such permission) where such application has not been determined by the regulator in accordance with Section 55V of FSMA or

  - notify the relevant regulator that the person wishes to be treated in accordance with Regulation 6 or 9 – for temporary permission or temporary variation.

  Notifications must be made in such manner as the relevant regulator directs.

Once a firm is in the TPR regime, it can be directed by the relevant regulator to make an application if it has not already done so within two years from the exit date.

Firms in the TPR regime will be treated as if they were fully authorised in the UK enabling them to carry out activity as before – provided it relates to activities which each firm was permitted to carry on immediately before exit day under their passport. (How top up permissions are to be dealt with is not entirely clear. One assumes that since they have got a top up permission that would continue as it is a top up permission.) To facilitate transition to UK rules, regulators will have powers to phase in UK regulatory requirements.

The FCA's approach

The FCA plans to issue a formal consultation in Autumn 2018.

Ahead of this though, as on 24 July, they issued a brief document outlining how the temporary permissions regime will work and how the FCA will apply its rules ahead of that consultation. This includes the following:

- **continued passporting in for the transitional period**

  Firms and investment funds which would continue to benefit from passporting between the UK and EEA will continue to benefit from passports between 29 March 2019 and the end of December 2020.

- **a temporary permissions regime leading to an orderly end position, whether to UK authorisation or to UK recognition**

  For inbound passported firms and funds, the plan is to enable them to continue their activities in the UK for a limited period after withdrawal. If there is no implementation period and the passporting regime falls away when the UK leaves the EU, the temporary permissions regime will provide a backstop. It will allow:

  - inbound firms to continue operating in the UK within the scope of their current permissions for a limited period after exit day whilst seeking full UK authorisation; and

  - will also allow funds with a passport to continue marketing in the UK whilst seeking UK recognition. The FCA seem to indicate that they will receive a notification of intention to market both in respect of UCITS schemes (which is obvious for Section 264 FSMA) but also AIFs, which would appear to refer to a current Article 36 notification, but it is unclear quite what will be allowed post exit. Without sight of the end game and, given the considerable UK regulator's caution about promotion of unregulated collective investment schemes, the views on this will need to await publication of more detailed new provisions.

  Nonetheless, the initial indications are encouraging that the FCA propose to ensure that firms and funds which currently access the UK markets can continue to do so and there will be some transition to a new way in which that will be possible on an orderly basis.

The process for firms

If there is no implementation period and the temporary permissions regime is required:

- Firms will need to notify the relevant regulator that they wish to use the temporary permissions regime. It will be an online process with the notification window opening in early January 2019. Note the notification window will close prior to exit date.

- Once the window has closed, the firms that have not submitted a business application will not be able to use the TPR.

- The details of firms which have temporary permission will be shown in the FS Register.

- The regulator will allocate firms a period, "a landing slot", within which they will need to submit their applications for UK authorisation. After exit day, the regulator will confirm a firm's landing slot so they can start to prepare their application. They expect the first landing slot will be October to December 2019 and the last will be January to March 2021. Firms with the top up permissions will need to seek a variation of permission application rather than an authorisation application.

It is appreciated of course that some firms will change their plans or restructure and, if a firm changes their plans, they can apply to cancel their temporary permission once they have ceased all UK business.

The process for funds

The FCA expects the regime to work similarly for investment funds. Fund managers will notify the FCA of which of their funds they want to continue to market in the UK. As with firms, they will start accepting notifications in early January 2019 and the notification window will close prior to exit day.

The FCA indicates that, once the notification window closed, a fund manager that have not submitted a notification will be unable to use the temporary permissions regime and will not be able to continue marketing the fund in the UK. This seems a rather curious statement. Whilst they cannot continue marketing the fund in the UK on a basis which previously could have been passportable surely they would still be able to continue marketing the fund in the UK on another basis that any unauthorised firm could do so. No doubt further details will be disclosed in due course clarifying this. We assume this sentence is shorthand assuming there is no alternative option, so exemption routes will remain available and so without having any contrary and more restrictive implication.

Fees

A consultation is expected on the periodic fees for the 2019/20 fee year for firms and funds in the temporary permissions regime. Also there will be a consultation on the proposed basis and amount of fees that firms and funds will pay if they apply for authorisation/recognition.

What does a temporary permission mean?

It is important to recognise what being within the temporary permissions regime means. Firms in the regime will have a deemed Part 4A permission.

This will mean that home – host state – restrictions on actions will no longer apply and they come within the full scope of FCA or PRA supervision and rule making powers, as appropriate. There is an indication of taking a proportionate approach that will enable firms to comply with requirements from day 1 while maintaining an adequate level of consumer protection. The starting point is that firms in the TPR regime will be required to comply with the following:

- **all FCA Handbook Rules and Guidance** which currently apply to them;

- **all FCA Handbook Rules which implement a requirement of an EU Directive and relevant guidance which are currently reserved to the Home State** – and which therefore the FCA does not currently apply to EEA firms. The firm intends to accept "substituted compliance" in respect of these rules. Consequently, if a firm can demonstrate they continue to comply with equivalent Home State rules in respect of their UK business, they will be deemed to comply with the FCA's Rules and Guidance. This though will not be applied in relation to capital and related requirements because it would require the FCA to oversee the firm's worldwide capital position rather than just supervise it in respect of UK business, which the FCA consider to be neither practical nor appropriate;

- **certain additional FCA Handbook Rules which the FCA believes should apply to provide appropriate consumer protection**.

The FCA will have access to a complete set of supervisory powers and tools to ensure firms remain compliant. Firms may have more direct contact with the FCA where the FCA are seeking to identify or reduce harms and the FCA may request information directly where they perceive a risk of harm to consumers or markets.

There are additional comments on specific requirements on firms in the temporary permissions regime.

- **Compensation Scheme**

  Firms in the TPR regime will be required to pay the FSCS levy that funds the Financial Services Compensation Scheme. (The exceptions will however remain for EEA insurers that currently operate in the UK via a passport without an establishment here and certain EEA based fund managers which are managing UK authorised funds, which will continue to retain their existing FSCS membership.)

  Each of the FCA and PRA make rules which set out how FSCS works and is funded, covering different areas of the financial services industry. The draft SI provides that the FSCS is only to cover UK branches with limited exceptions during the temporary permissions regime in relation to the FCA's areas of responsibility. The FCA's starting point is therefore to provide customers of firms for the UK branches in the regime with FSCS protection equivalent to the cover provided to customers of UK firms. (Customers of firms in a regime without a UK branch will not have access to the FSCS other than where there is an existing FSCS cover in respect of the activities of certain incoming fund managers.)

- **Financial Ombudsman Service**

  The FCA's starting point is that firms without a UK branch should be included in the compulsory jurisdiction of the FOS.

- **SM&CR**

  There will be discretion for regulators to choose to treat individuals to whom the SM&CR applies as having been granted approval from a time stated in a notice until their firm comes out of the temporary permissions regime pending a decision on approval.

  The FCA indicate that firms with branches should continue to comply with the requirements in relation to the Approved Persons that currently apply to them and then comply with the requirements for SM&CR which are currently stated to apply to EEA branches when these requirements come into force. No requirements in this area are intended for services firms in line with the current position and general approach.

- **Safeguarding client money and custody assets (client assets)**

  - TPR firms would need to report their client asset arrangements to the FCA;

  - MiFID II investment firms should provide an English translation of client assets audit reports to the FCA upon the FCA's request or receipt of "an adverse" audit report on the adequacy of the firm's arrangements under their client assets obligations;

- firms should disclose certain information to UK clients relating to the treatment of their client assets in the event of the firm's failure. Firms must make this disclosure at the point of entry into the regime in a durable medium or via a website providing certain conditions are met.

- **Single Financial Guidance Body (SFGB):** All firms in the regime should be required to contribute to recovering SFGB costs from the 2019/20 levy fee year (which is already going to be the case for incoming EEA firms with a UK branch).

- **Illegal Money Laundering (IML) Levy:** This will also apply to consumer credit firms currently operating in the UK on a cross border services basis.

- **Status disclosure:** Firms will need to include specific status disclosure in letters (or electronic equivalents) to indicate that they are in the TPR regime.

- **The FCA's Principles for Business:** As ever the FCA's Principles set out in the FCA's PRIN Sourcebook are important. They should apply generally, in full, to firms in the TPR. If in doubt the FCA always fall back to the Principles should there be a perceived problem with regulation of a firm and where they cannot point to a specific rule breach. Firms in the temporary provisions regime should therefore be cautious in their approach, having regard to the very wide nature of the Principles for Business, which are UK specific.

The FCA have indicated that it will set out further details of how phasing in of post exit requirements will be available for firms in the temporary permissions regime.

How should asset managers plan ahead for Brexit?

As time is short, it is useful to know the likely direction of travel for temporary permissions/recognition should such be necessary.
We need to await the FCA's formal consultation paper with full details in the Autumn: and their policy statement and final rules are not expected to be published until early 2019. Nonetheless it is helpful to have this indication of a clear intention to provide, and outline summary of, a temporary and transitional "back stop" set of provisions.

In the meantime, firms and fund managers should complete the short online survey for inbound firms and funds if they have not already done so. The FCA will contact those firms and fund managers that have completed the survey directly when the consultation paper is published in the Autumn.

Of course this TPR regime explained above is only for a proposed transitional period. What might be the wider set of issues to consider, and likely end game?
The FCA acknowledges this and no doubt well understands that firms need to plan. On 6 August it issued a memo on "Preparing your firm for Brexit". This looks at both directions – both of trying to go out of the UK into Europe and those firms and funds coming from Europe into the UK; and offers an outline checklist.

We have started to devise in the two charts in Appendices 3 and 4 to this Briefing Paper how the "before" and "after" picture may look for UCITS, UCITS ManCos, AIFs, AIFMs and MiFID investment managers. Of course this is work in progress. We will develop these charts as matters become clearer, one hopes in October/November.

To be ready to take action, it is essential that asset managers:

- assess their current operations carefully, which means not just the location of their ManCos, funds and investment managers but also all supporting arrangements and outsourcing contracts

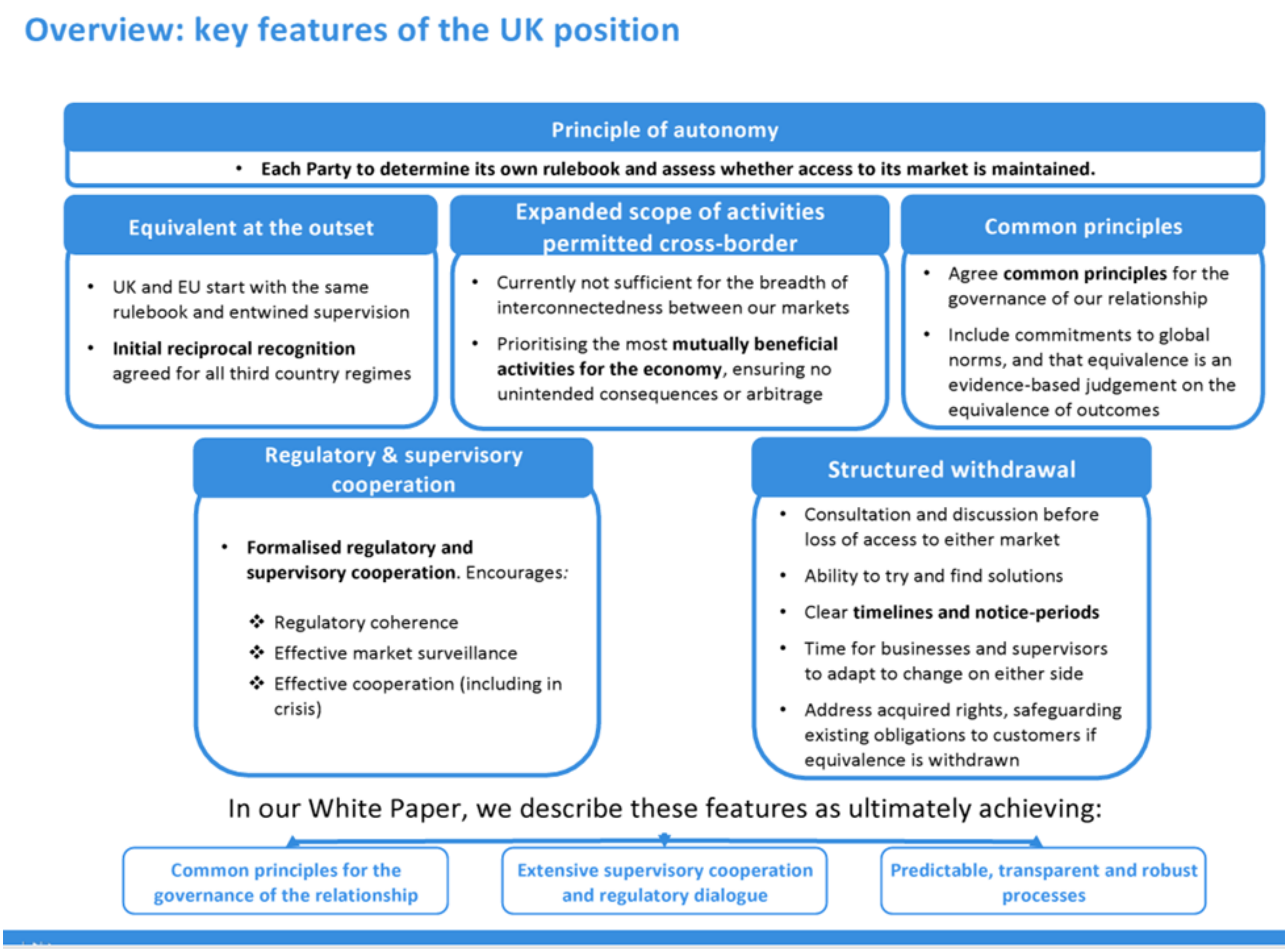
- look at all distribution arrangements. Many are perhaps more complicated and interrelated than even those within a business initially imagine – what is the position with sub-distributors; how is platform access arranged; have you analysed the unit or share register for your funds to see precisely where current investors are located?

- map out all delegation arrangements. Given the 2017 ESMA Opinions on delegated arrangements and the emphasis being put most likely on strengthening the regulation of ManCos based in Luxembourg and Dublin, delegation arrangements will need to be carefully reviewed. So the first issue is to identify their current terms and the personnel and systems and controls in place in respect of them.

There will of course be a myriad of options. The right answer for an asset manager will depend on the particular combination of the individual circumstances for its firms, funds and investment services.

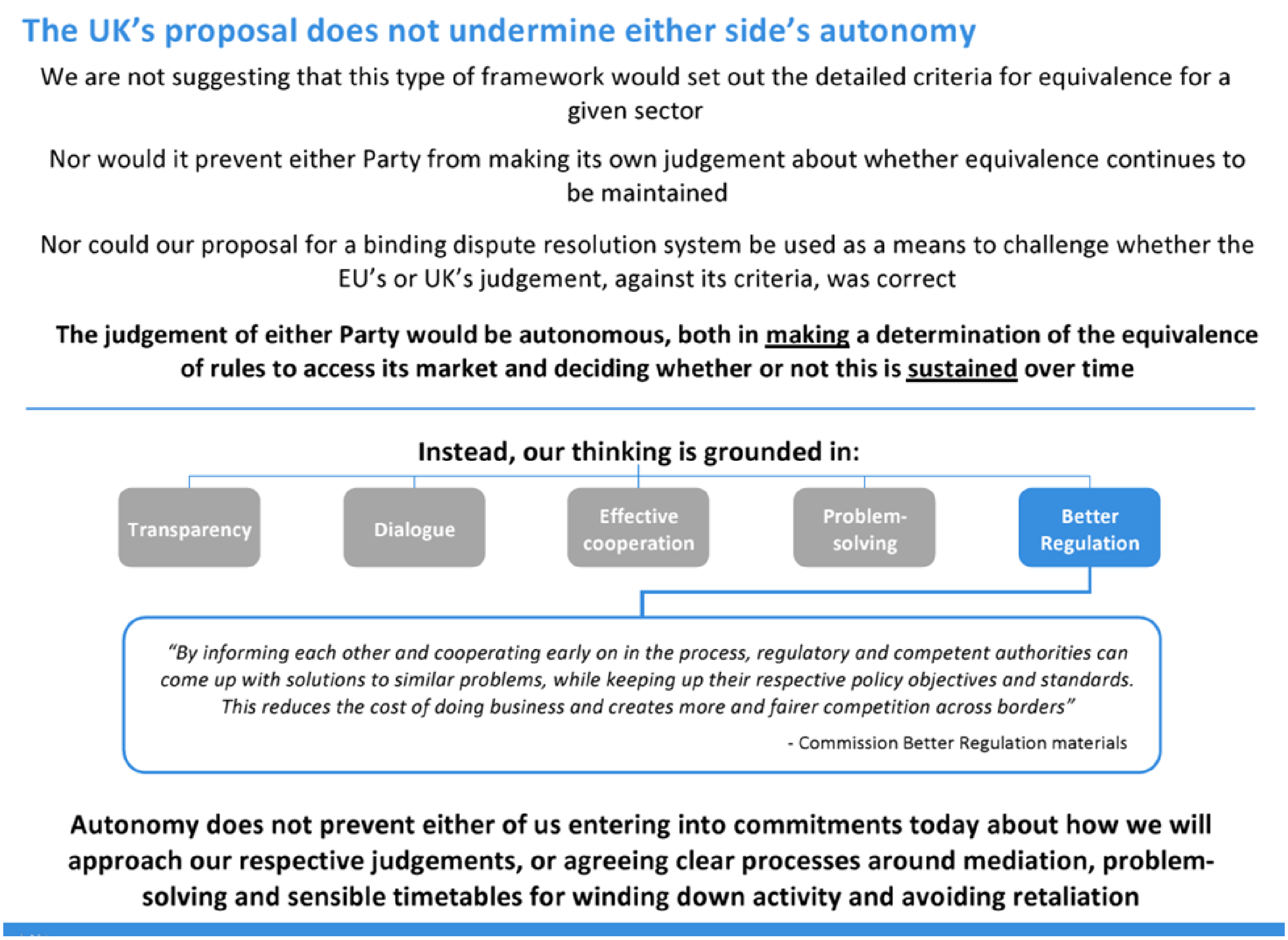
For strategic individual advice or to discuss your option, please do not hesitate to contact Kirstene Baillie at Kirstene.Baillie@fieldfisher.com or on 0207 861 4289, or your usual contact at Fieldfisher.

Appendix 1



Slide 8 from HM Government Presentation Slides: Framework for the UK-EU partnership Financial Services, dated 25 July 2018 published on 20 August 2018

Appendix 2



Slide 20 from HM Government Presentation Slides : Framework for the UK-EU partnership Financial Services, dated 25 July 2018 published on 20 August 2018

Appendix 3 : Funds and investment firms coming into the UK

	UCITS	UCITS ManCo	AIFs	AIFMs	MiFID investment managers
Now	**UCITS product passport** – Section 264 recognition	**UCITS ManCo passport**	Marketing an AIF under AIFMD notifications (and usual UK financial promotion regime behind that)	**AIFM passport**	**MiFID services passport**
Transitional period	**Temporary permissions regime** for UCITS if there is a wish to continue to market (currently Section 264 recognised schemes)	**Temporary permissions regime**	**Temporary permissions regime** for funds if there is a wish to continue to market EEA AIFs (likely which have currently given an Article 36 AIFMD notification) –	**Temporary permissions regime**	**Temporary permissions regime**
Post transitional period	**No passport** **In the fund's domicile**, UCITS fund operation and regulation continues unchanged in relevant fund domicile (usually Luxembourg or Dublin) **From UK perspective, two key areas to review:** - **Distribution** **UK recognition** (possibly within Section 272 extended) If no UK recognition, can always sell in funds on a limited basis under UK financial promotion regime exemptions, for example to investment professionals.	**No passport** **From UK perspective, management issues to review** **Full UK authorisation for ManCo** If not, a Luxembourg or Dublin based ManCo could not manage a UK based UCITS (or other type of UK fund product), in which case, appointment of new UCITS ManCo required.	**Article 36 AIFMD notification route lost** **In the fund's domicile**, AIF continues to operate unaltered and with its material contracts generally unaffected. **From UK perspective, two key areas to review:** - **Distribution** **UK recognition** (thought to be through revised Section 272 FSMA recognition which is being developed (although not clear at the moment as to the scope of the range of AIFs to which it might apply)) If no UK recognition, can always sell in funds on a limited basis under UK financial promotion regime exemptions, for example to investment professionals.	**No passport** **From UK perspective, management issues to review** **Full UK authorisation for ManCo** If not, an EEA based AIFM could not manage a UK based AIF, in which case, appointment of new AIFM required.	**No passport** **Full UK authorisation**

Appendix 3 : Funds and investment firms coming into the UK

	UCITS	UCITS ManCo	AIFs	AIFMs	MiFID investment managers
Post transitional period	- **Delegation** Depends on how ESMA's Opinions on delegation are resolved, and reactions of local fund domiciles regulators to strengthening compliance with delegation requirements in the UCITS Directive. The Government's 23rd August technical notice indicates that UK authorities are ready to agree co-operation arrangements with EU counterparts as soon as possible, which ought to be viewed as a technical exercise to bring the UK into line with other third countries. Unless the EU confirms it does not intend to put such arrangements in place, asset management firms are advised that they can continue to plan on the basis that the delegation model will continue.		- **Delegation** Depends on how ESMA's Opinions on delegation are resolved, and reactions of local fund domiciles regulators to strengthening compliance with delegation requirements in the AIFMD. The Government's 23rd August technical notice indicates that UK authorities are ready to agree co-operation arrangements with EU counterparts as soon as possible, which ought to be viewed as a technical exercise to bring the UK into line with other third countries. Unless the EU confirms it does not intend to put such arrangements in place, asset management firms, are advised that they can continue to plan on the basis that the delegation model will continue.		

Appendix 4: Asset managers, funds and investment firms: going out into Europe

	UK UCITS	UK UCITS ManCo	UK AIFs	UK AIFMs	UK MiFID investment managers
Now	**UCITS product passport**	**UCITS ManCo passport**	**AIFMD product passport** for marketing AIFs to professionals	**AIFM passport**	**MiFID services passport**
Transitional period (assuming no transitional deal)	— **Lose passport**	— **Lose passport**	— **Lose passport**	— **Lose passport**	— **Lose passport**
Post transitional period (assuming no deal) **UK treated as a third country**	Hope national private placement provisions continue From the EU perspective, it is an AIF Utilise Article 42 for marketing an AIF – as a third country AIF with third country AIFM OR Potentially Article 37 third country AIFM passport might be switched on. Ideally improved distribution options pursuant to bilateral deal, with better third country access provisions for the UK.	—	Hope national private placement provisions continue Utilise Article 42 for marketing an AIF – as a third country AIF with third country AIFM. OR Potentially Article 37 third country AIFM passport might be switched on. Ideally improved distribution options pursuant to bilateral deal, with better third country access provisions for the UK.	—	**Use of MiFID third country passport?** Seek to use one of two options currently available under MiFID II provisions: - establish a branch in a EU Member State with limited passport rights to eligible counterparties and per se professional clients - establish a branch which can cover investment activities for retail clients or professional clients, authorised in the relevant EU Member State Review access to, and feasibility of dealing in, EU markets
If this is unworkable, set up new EU based product	Establish new UCITS product, most likely in Luxembourg or Dublin with EU based UCITS ManCo	If necessary, establish UCITS ManCo in EU Member State – most likely Luxembourg or Dublin	May set up EU based AIFs?	May set up EU based AIFM?	Establish new MiFID firm in an EU Member State and exercise MiFID services passport for that new entity which can undertake: - investment management activities for funds and/or - distribution activities for funds across EEA

Article 46 MiFIR: Establish a branch in a Member State if the Commission makes an equivalence decision in respect of the UK, in which case the firm can seek registration with ESMA. It offers limited passport for investment [se]rvices to eligible counterparties and per se professional clients (but not opt up professional clients) without the establishment of a branch where it is registered in the register of third country firms maintained by ESMA in accord[an]ce with Article 47. Article 47 sets out conditions to be fulfilled for the Commission to make an equivalence decision, and ESMA would have to establish co-operation arrangements with relevant competent authorities of third coun[tri]es

[A]rticle 39 MiFID II: Establish a branch which can cover investment services for retail clients and professional clients where there is a branch in an EU Member State authorised by the relevant regulator of that Member State. [C]ertain conditions of Article 39 to be fulfilled: AML status; co-operation agreements being in place between competent authorities; sufficient initial capital at the free disposal of the branch; one or more persons being appointed to be [re]sponsible for management of the branch, the third country having signed an agreement with a Member State where the branch is to be established which complies with standards in Article 26 OECD Model Tax Convention on [In]come and on Capital and ensures an effective exchange of information on tax matters; and the firm belongs to an invested compensation scheme authorised or recognised in accordance with Directive 97/9/EC. The branch [w]ould be obliged to comply with certain MiFID II requirements but the Member State could not impose additional requirements on the organisation and operation of the branch in respect of matters covered by MiFID.

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