

## EU Commission notice on the withdrawal of the UK and EU rules in the field of asset management

On 8 February 2018 the EU Commission released a number of “Notices to Stakeholders” in relation to Brexit. These notices covered a wide range of sectors, including investment managers and MiFID firms, both of which will be of interest to asset managers in the EU.

In this client briefing, we highlight some of the potential implications of these notices for both UK and EU27 asset managers and areas that firms should be considering as part of their Brexit planning.

### Cooperation Agreements and the Issue of Delegation

One important point to note relates to cooperation agreements between the FCA and other national regulators in the remaining EU27. Without cooperation agreements in place EU27 Management Companies (AIFMD or UCITS) will be unable to delegate portfolio management to UK investment managers, and EU27 MiFID firms (as well as Management Companies performing permitted MiFID activities) will not be able to outsource portfolio management. In addition, UK AIFMs will be unable to make use of National Private Placement Regimes (‘NPPRs’) to market into the EU27 and nor will they be able to manage EU AIFs.

Whilst it seems reasonable to expect that cooperation agreements will be put in place it is not a certainty. Accordingly, we recommend that firms take this into account when considering their plans and operating models for post-Brexit.

### Passporting

Cross-border services passports will no longer be available to UK firms across the EU27 or for EU27 firms into the UK.

For EU27 firms with branches in the UK the [UK Government has confirmed](#) that if no transitional period is agreed it will create a temporary permissions regime for these firms. The [FCA has confirmed](#) that it will be publishing more details about its approach, but these branches will need to become directly authorised by the FCA.

UK firms with a branch in an EU27 member state will need to obtain direct authorisation for the branch, although it is important to note that this will not confer any cross-border passporting rights on the branch. We recommend this is taken into account during wider Brexit planning.

## UK Managers

### Managing & Funds

UK firms undertaking portfolio management for EU27 Management Companies will only be able to continue to do so if, as noted above, cooperation agreements are in place. If they are not, firms will need to look at alternative arrangements and take into account [ESMA's Opinion](#) regarding the use of sub-delegation and investment advisory mandates.

EU27 UCITS funds with a UK Management Company will, post Brexit, become AIFs unless a new Management Company is appointed. The EU Commission has highlighted the need to contact investors and make clear the impact and risk as a result of this change.

If cooperation agreements are not in place UK AIFMs will be unable to manage EU-AIFs.

### Marketing

If there are cooperation agreements in place, UK AIFMs can continue to use NPPRs to market any non-EU AIFs and will, post Brexit, need to use this route for EU-AIFs. Firms will need to give greater consideration to their distribution channels and how they can reach their target investor base as NPPRs differ from Member State to Member State. Even marketing within the UK could face fresh complexities until rules are updated to reflect Brexit. For example, UCITS funds that have not been recognised by the FCA cannot be marketed to retail clients without complying with COBS 4.12.

It is also important for UK firms to note that even if a fund (UCITS or AIFMD) has a passport it can use that enables the Management Company to market it across Europe, it will not necessarily enable the UK investment manager to undertake this marketing. Further consideration of distribution will be required.

## EU27 Managers

### Managing & Funds

Any UK domiciled UCITS funds will become non-EU AIFs post Brexit and managers need to consider whether they need to change their authorisation or make notifications to their national regulator in order to be able to continue to manage them. However as noted above, without cooperation agreements an EU AIFM cannot manage a non-EU AIF (even if it is not being marketed within the EU).

## Marketing

The change from UCITS to non-EU AIF makes a significant difference to the marketing of funds; in particular, the ability to market to retail investors in EU27 locations will be restricted. For both UCITS and current UK based AIFs, becoming non-EU AIFs means only NPPRs are available for marketing, resulting in different approaches from Member State to Member State. Once again, the existence of cooperation agreements is key.

The changes in categorisation will also affect how firms market into the UK. The FCA's plans in relation to UCITS funds have yet to be confirmed; at present, there are alternative routes to gain recognition for an overseas fund in the UK. However, without recognition, there are additional requirements to comply with, particularly to market to retail investors, and this may affect both UK and EU27 funds.

## Implications for Firms

We have highlighted a number of significant uncertainties that arise pending the agreement of new trading arrangements, and a possible transitional period, between the UK and EU. For asset managers the interplay of MiFID II, UCITS and AIFMD, along with the different impacts on fund management and marketing arrangements, creates additional complexity. We recommend firms take into account which regulatory regime they need funds to be in and consider in particular:

- the type and location of investors;
- how they will be able to market funds and services; and
- as a contingency, the impact should cooperation agreements not be agreed.

It is also important to ensure that [ESMA's Opinions](#), and in particular the points on substance, are taken carefully into account. Firms will need to ensure that any EU entity has sufficient substance and resources to meet the relevant directive's authorisation criteria and that when delegating investment management it needs to be considered on a fund by fund basis. In addition, ESMA was clear that firms must have sufficient resources and competence to properly monitor delegated activities.

For UK firms some of the key considerations in selecting a post-Brexit location include:

- existing footprint;
- existing service provider relationships;
- distribution model;
- locations staff are open to moving to;
- any regulatory differences;
- tax consequences; and
- perception of local regulators and their view of planned target operating model.

## How Deloitte can help

We can assist you with your Brexit planning in a number of ways. We have experience in assisting clients using multi-disciplinary teams from the UK and EU offices covering the regulatory, tax and other areas impacted by Brexit. We aim to provide clients with a cohesive service covering the disciplines and jurisdictions necessary to meet their needs.

Our Risk Advisory and Tax teams have worked with clients to undertake impact assessment and to outline potential solutions and their advantages and disadvantages. We have assisted clients with the design of target operating models and undertaken in-depth analysis of the regulatory and tax consequences. For those clients that have started their implementation we are providing assistance in this including tax work and preparing the required regulatory applications.

In addition, depending on the target operating model and jurisdiction of choice the local Deloitte offices have a variety of other services that can help clients in their overall solution design.

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