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Newsletter

UK financial services in a post-Brexit world – is it all doom and gloom? There are still avenues left open to foreign funds managed from outside the UK looking to market to certain categories of investors in the UK.

1. Introduction

On 31 December 2020, the Brexit transitional period ended, and EU law ceased to apply in the UK and in spite of the EU and the UK having signed the UK-EU trade and Cooperation Agreement, this does not provide anything like the levels of market access that was previously available. The EU and the UK made declarations under which they agreed to establish structured regulatory cooperation and agreed a draft MOU establishing a framework for this cooperation. This MOU remains to be ratified. In the declaration, both parties also committed to a dialogue on how to move forward with equivalence determinations, but no equivalence has been granted by the EU to UK firms as of yet.

2. Loss of passporting

One of the keenly felt consequences of Brexit has no doubt been the loss of passporting rights. For firms on either side, this means loss of access to the other's markets based on home state authorisation. Whilst the UK has made a number of equivalence declarations in respect of EEA member states, reciprocation by the EU is currently lacking, resulting in UK firms certainly having had to consider relocating some of their operations to the EU to carry on their previous activities, and address the resulting substance requirements imposed by EU agencies intended to head off empty shells being set up with material operations outsourced back to the UK. The UK guidance on its approach to international firms wanting to set up in the UK however is more flexible and the PRA (one of the UK regulators) will for example allow for the authorisation of a UK branch office of a foreign firm, rather than require the establishment of a subsidiary.

3. Temporary permissions regimes

The UK also set up a temporary permission regime (TPR) and temporary marketing permissions regime (TMPR) intended to apply to EEA firms still operating in the UK after the end of the transition period. The aim of the regimes was to enable investment firms and funds to continue their business post Brexit (at least for three years or five years, depending on the applicable regime) as well as allowing firms with a passport to continue temporarily marketing in the UK. The end result however is that permanent FCA or PRA authorisation (or recognition for funds) will be needed following the expiry of this regime. The firms which can use these regimes include EEA domiciled UCITS schemes and AIFs under the UCITS Directive and the Alternative Investment Fund Managers Directive. However, those qualifying firms or funds who failed to notify during the transitional period (which expired at the end of 2020) will not qualify under the TPR or TMPR. Furthermore, these temporary permissions come with restrictions and failure to adhere e.g. to allocated landing slots within which fund managers need to submit formal applications for recognition, would lead to the loss of the temporary permission.

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The following funds will be able to continue to be marketed in the UK in a post-Brexit world outside of these regimes:

- ✓ *UK authorised funds that are UCITS and non-UCITS retail schemes*
- ✓ *Funds marketed in the UK using certain exemptions under the UK financial promotion regimes and/or non-EEA AIFs marketed through private placements*
- ✓ *AIFs that receive individual recognition from the FCA*
- ✓ *Closed-ended investment companies whose securities are traded on a UK regulated market*

4. Marketing non-UK investments to non-retail investors

In addition to the marketing of funds described above, it may also be possible to market overseas UCITS or AIFs (as well as other investments) to certain categories of non-retail investors, without the need to involve a UK authorised person, or have the fund in question approved by the FCA, or have the issuer or agent regulated themselves by the FCA, so long as applicable notifications are made and exemptions can be found and their requirements are satisfied. These exemptions may be available to both foreign based issuers and their intermediaries. In this respect, Brexit will have had little impact as these exemptions have been available to third country-based fund managers for some time.

However, should an exemption on which it is relied to avoid a more burdensome regime not be strictly followed, the likely result is that a regulated activity will be deemed to be carried on in the UK even if the activity is, in fact, carried out from abroad. This is because marketing of qualifying financial investments 'to' investors in the UK is generally construed as marketing of regulated investments being carried out 'in' the UK.

It is also important to remember that a failure to meet the precise requirements of any applicable exemption may result in a criminal offence being committed and entitle disgruntled investors to unwind their investments and seek restitution and/or compensation.

If you wish to market your financial products to UK investors, please always seek professional advice and feel free to contact us for more information, we are happy to help.

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