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Brexit - EU Commission issues Notice to Stakeholders in the Asset Management industry

Introduction

The European Commission (the “**Commission**”) has issued a notice to stakeholders in the asset management industry on some of the main legal and regulatory repercussions arising from the UK becoming a “third country” following Brexit.

While the notice acknowledges that there are currently “considerable uncertainties”, particularly in relation to a finalised withdrawal agreement and any transitional arrangements that may be contained therein, the purpose of the notice is to remind stakeholders of the need to assess the potential impact that Brexit may have on their businesses and plan accordingly.

Impact on UK Asset Managers

As of 30 March 2019, the EU rules in the field of asset management, most notably the UCITS Directive¹ and the AIFM Directive² will no longer apply to the UK.

As a result, UK UCITS management companies and UK AIFMs will no longer benefit from the “EU passport” and will in each case be treated as third-country AIF managers. Consequently, those UK entities will no longer be able to manage funds and market funds in the EU on a cross-border basis using their current passport.

¹ Directive 2009/65/EC

² Directive 2011/61/EU

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In addition, post-brexit, all UK authorised funds (including UCITS, AIF, EuVECA and Money Market Funds) will be re-categorised as non-EU AIFs.

With the EU passport denied to them, UK managers (including their branches) may only be allowed to market AIFs (EU AIFs and non-EU AIFs) in EU Member States pursuant to applicable National Private Placement regimes ("**NPPR**"). However, as you will be aware, each Member State has discretion as to whether or not to activate the NPPR. To date, some Member States have not permitted the NPPR while other Member States have only allowed marketing on a more limited basis. As a result, the ability of UK AIF managers to market funds within certain Member States will be significantly impacted from 30 March 2019.

Impact on EU Asset Management

In order for EU-27 UCITS management companies to continue to manage former UK UCITS funds³, they will need to obtain an authorisation to manage non-EU AIFs under AIFMD. In order to be able to manage such former UK UCITS funds which are not marketed within the EU, such management companies must comply with AIFMD (except depositary and annual report rules) and with cooperation agreements for exchange of information between EU competent authorities and the relevant third country authorities.

Delegation

Unsurprisingly, the Commission acknowledges that any delegation of portfolio management or risk management by an EU manager to a UK domiciled entity must be implemented in accordance with [ESMA's Opinion on Investment Management](#) and highlights the risks of UK managers relying on 'letter-box entities' which may arise from the use of such outsourcing arrangements or from the use of non-EU branches for the performance of such functions. The Commission notes that any delegation of tasks back to the UK must be based on objective reasons linked to the services provided in the UK and reiterates that then the necessary cooperation agreements for exchange of information between EU and UK competent authorities must be in place.

Depositaries

The Commission highlights that where the depositary of a UCITS delegates safekeeping to an entity established in the UK, it will need to demonstrate objective reasons for delegation and ensure that in the event of an insolvency of that third party, the assets held in custody are unavailable for distribution to that UK sub-custodian's creditors.

Non-EU AIFs domiciled in the UK and managed by an EU AIFM can appoint a UK depositary in the subject to specific requirements.

Investors and other considerations

In addition, the Commission's notice reminds stakeholders to consider potential impacts such as how UCITS management companies and AIFMs will address notifications to investors of the

³ All UK domiciled UCITS will be classified as non-EU AIF post Brexit

consequences of Brexit related changes to legal and regulatory status (for example disclosure by an AIFM in the annual report or a revision by a UCITS management company of the key investor information). The eligibility of UK domiciled funds as a target investment for other UCITS funds and individual investors is something that will also need to be assessed prior to them being re-categorised as non-EU AIFs.

Conclusion

Much like the Central Bank's Brexit contingency planning letters from late 2017, the Commission's letter serves as reminder to stakeholders in the asset management industry to ensure that they are assessing the potential legal, regulatory and commercial repercussions that Brexit, particularly a "Hard Brexit", may have on their businesses. Both notices look to emphasise that we are little over a year away from significant change in the industry and asset managers must now be fully engaged with the reality of Brexit and look to ensure that their plans to deal with the changes and challenges that it presents are being finalised.

The full text of the Commission's Notice is available here:

https://ec.europa.eu/info/sites/info/files/180208-notice-withdrawal-uk-asset-management_en.pdf

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