Global Legal and Professional Services

Brexit – Ireland as a location for Payment and Electronic Money Institutions

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The outcome of the recent UK EU membership referendum has raised a host of questions on what will happen next following the UK's decision to exit from the EU. One major concern for UK payment and electronic money ("e-money") institutions is the ongoing uncertainty in relation to the continuation of the financial services passporting regime currently enjoyed by UK payment and e-money institutions throughout the EU/EEA.

While the full implications of Brexit will depend on subsequent negotiations between the EU and UK, some UK payment and e-money institutions, particularly those which require continued guaranteed and unfettered access to EU/EEA markets, are now likely to consider investigating the possibility of moving their operations from the UK to elsewhere in the EU.

As a common law and English speaking jurisdiction with an educated workforce and developed financial services sector that is attractive on tax grounds, Ireland will be seen by many UK payment and e-money institutions as a natural venue to consider in the event it is necessary to establish operations outside the UK post-Brexit. We have set out below a brief overview of the Irish financial services environment, along with a short illustrative case study on the process of obtaining authorisation as a payment institution in Ireland.

The Irish regulatory environment

UK payment and e-money institutions will find many close similarities between the Irish and UK regulatory environments. The majority of Irish financial services law is made up of Irish implementing measures for EU financial services directives (along with over-arching directly effective EU financial services regulations).

As a general comment, the Irish legislature tends to adopt a 'copy-out' approach when implementing EU directives into Irish law by way of enacting primary or secondary legislation (statutory instruments) which follow the text of the relevant directive closely. This approach applies in the case of the Irish domestic implementing legislation for both the Payment Services Directive ("PSD") and the 2nd E-Money Directive which tracks many of the provisions of the respective directives on a word for word basis. This approach assists in providing clarity as to scope and intent of domestic legislation and avoids unhelpful or unnecessary 'gold-plating'. We anticipate a similar approach will be taken in respect of PSD II.

The Central Bank of Ireland (the CBI)

The CBI is the body responsible in Ireland for both the prudential and conduct of business regulation of payment and e-money institutions in Ireland. Unlike the UK, where the Payment Systems Regulator operates as an independent regulator for the payment systems industry, the CBI also has responsibility for oversight of payment systems operating in Ireland. Historically, the CBI has had complete overall responsibility for the authorisation and supervision of regulated financial service providers in Ireland. Since 4 November 2014 this changed with certain supervisory responsibilities and decision making powers moving to the European Central Bank (ECB) through the establishment of the Single Supervisory Mechanism.

The substantial difference in size, scale and resources available between the CBI and the UK Financial Conduct Authority (the FCA) means that UK payment and e-money institutions dealing with the CBI will notice some differences between the approaches of each regulator. As a general comment, the CBI produces less industry guidance than the FCA – for example, there is no Irish equivalent to the FCA Payment Services Approach Document. Payment and e-money institutions are expected to obtain their own legal advice when queries arise on how they should comply with their regulatory requirements and obligations.

In order to focus its resources efficiently, the CBI operates a risk-based framework for the supervision of firms, known as The Probability Risk and Impact SysteM (PRISM). Under PRISM, larger and more significant firms (those with the potential to have the greatest impact on financial stability and consumers) receive the highest level of direct supervision. Lower impact firms are supervised on a proportionate basis to their perceived risk, for example with thematic reviews, reactive or desk based supervision.

The CBI has identified the following as the principal areas to be assessed when considering an application for authorisation as a payment institution:

» Organisation of the applicant;
» Business plan;
» Financial information, initial capital and own funds;
» Payment services proposed;
» Operational procedures and processes;
» Outsourcing arrangements and oversight;
» Governance of the applicant (including consumer protection governance);
» Directors and managers;
» Shareholders/members; and
» Regulatory background.

Timing of relocation

The exact date of departure of the UK will not be known until Westminster invokes Article 50 of the EU Lisbon Treaty by notifying the European Council of the UK's intention to withdraw from the EU. Once the notification is delivered the process appears to be irreversible and the final deadline for exit will be 2 years after such notification. Given the relatively short period before the final separation between the UK and the EU, and the complicating factor of PSD II's January 2018 deadline for implementation, it would now seem to be in the interest of payment institutions generally to consider their options. With this in mind we outline below a short case-study highlighting the steps involved in the migration of a UK payment institution to Ireland.

One point to bear in mind at the outset is that early engagement with the CBI is important – while the CBI has guidelines on the timing for approval of payment institutions these are not binding on the CBI and, as such, to ensure continuity of regulation within the EU, earlier engagement with the CBI will obviously be of benefit and will reduce the risk of any gap in regulatory oversight.

Sample Case Study – Migration of a Payment Institution

By way of an illustrative example, we have set out below a brief overview of the authorisation process for a payment institution in Ireland, along with some observations and comments on this process. Although the CBI has made a public commitment to abide by the timelines set out below, there is a strong risk that these timelines will slip if there is a flood of applications for authorisation post-Brexit.

Applicable legislation	S.I. No. 383 of 2009– the European Communities (Payment Services) Regulations 2009 (the "PS Regulations") implements PSD in Ireland and governs the authorisation of payment institutions. Payment institutions in Ireland will also be subject to ancillary or related EU financial legislation as implemented into Irish law, e.g. the 3rd AML Directive.

Pre-application steps

In advance of submitting an application for authorisation, the firm should satisfy itself that:

- its proposed business model requires authorisation pursuant to the PS Regulations;
- it can comply with the authorisation requirements for payment institutions;
- it is capable of complying with, and adhering to, the authorisation requirements and on-going supervisory requirements that must be satisfied on an on-going basis;
- it is familiar with the prudential requirements for payment institutions e.g. capital requirements and safeguarding of users' funds;
- it has read the guidance note on completion of an application for authorisation as a payment institution and has taken the information therein into consideration when completing the application for authorisation.

The CBI offers the facility of a one-off optional pre-application meeting to firms to answer specific questions about any aspect of the application process and completing the application form. Firms who wish to avail of this facility will need to bring their application material to an advanced state before requesting such a meeting.

Submission of application

A complete application will typically include at a minimum:

a. CBI application form;
b. detailed business plan including financial projections and capital calculations;
c. a programme of operations;
d. fitness and probity information for directors/senior managers;
e. details of conduct of business and AML policies and procedures;
f. an appointment of agents application form (where the applicant proposes to appoint agents or establish a branch as at the date of authorisation)

It should be possible to leverage off existing UK documentation and/or past UK applications to prepare the application in an efficient manner.

Timing of authorisation

The CBI will check that the application contains all the key information and documentation required to proceed to the assessment phase, and, within 10 working days of receipt of the application, will advise the applicant of its determination in this regard.

Where sufficient information has been received, the CBI will then proceed to the assessment phase of the application process which involves reviewing the application material against the relevant authorisation requirements. The CBI has committed to a 90 working days turnaround for the assessment phase. However, it should be noted that in the event of further and/or subsequent information being sought, this 90 day 'clock' is paused until such information is received by the CBI from the applicant.

Key Contacts

If you have any queries on the above or would like to discuss in more detail please do not hesitate to contact us or your regular Walkers contact.

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