



European Banking Authority issues Opinion on preparations for the withdrawal of the UK from the EU

11 July 2018

Introduction

It has been clear for some time that financial institutions likely to be impacted by Brexit need to be prepared. The European Banking Authority's ("EBA") recent Opinion (available [here](#)), sets out its view that not enough has been done. Indeed, the EBA's view is that firms must now consider the potential impact of a 'hard' Brexit on their business and take necessary steps to prepare for such an eventuality, rather than rely on political developments to solve the issue.

Since the Opinion was published the UK Government has issued its statement from Chequers on 6 July 2018 (available [here](#)). If anything, the uncertainty surrounding the UK position on services and the lack of a legally binding transition period only serve to emphasise the EBA's warning that preparations for a hard Brexit should be pursued sooner rather than later.

A summary of the key points from the Opinion and our conclusions are set out below.

Executive summary

On 25 June 2018, the EBA published an Opinion on preparations for the withdrawal of the United Kingdom from the European Union.

The EBA is focused on the level of preparedness of financial institutions (see "Scope", below) for Brexit, particularly with the possibility of no ratified withdrawal agreement being in place (and thus no transition period) by the 30 March 2019 deadline. The Opinion effectively presents a warning for firms to progress or, if they have not already done so, to commence Brexit planning for a worst case scenario and warns that financial institutions should not rely on public sector solutions, as they may not be proposed and/or agreed. The EBA finds that current preparations are "inadequate".

The EBA states that mitigating actions should be pursued by financial institutions without delay. The Opinion also gives details of the risk assessments and preparedness competent authorities should require of financial institutions, as well as including an express requirement to notify competent authorities of assessments, plans and customer communications.

The EBA has also set out requirements to provide clear information to customers whose contracts or services may be affected, as soon as that information becomes available to them, and in any event no later than the end of 2018.

Scope

The Opinion is addressed to national competent authorities and the ECB, but contains matters of importance for financial institutions. It covers credit institutions, investment firms, payment service providers, electronic money institutions, creditors and credit intermediaries.



Aims

The Opinion sets out the EBA's expectations with the aim being to ensure competent authorities:

- » ensure that financial institutions are adequately considering the risks entailed by the possible departure of the UK from the EU without a ratified withdrawal agreement, and that they are putting in place appropriate plans to mitigate any risks in an appropriate timeframe; and
- » draw attention to the customer protection obligations of financial institutions in these circumstances.

Inadequate preparations to date

The EBA believes Brexit planning should advance more rapidly in a number of areas and that where planning is taking place, there appears to be delay in triggering the necessary actions. The EBA states that financial institutions should not rely on public sector solutions, as they may not be proposed and/or agreed. This could be a reference to EU-UK negotiations as well as to co-operation agreements between regulators and the UK Financial Conduct Authority ("FCA").

The Opinion is given at this time as: (a) preparations for Brexit in March 2019 without an agreement are "inadequate"; (b) the recent political agreement does not give legal certainty until ratified; (c) there is a "material possibility" of Brexit occurring on 30 March 2019 without a transition period; and (d) the necessary mitigating actions take time and should be pursued without further delay, and need to start now if they have not already commenced.

The EBA comments that financial institutions and their boards have obligations to shareholders and customers to take action in a timely manner.

Risk assessment and preparedness required

The EBA sets out a detailed sequence that competent authorities should ensure financial institutions follow to assess and respond to the implications of Brexit occurring without a ratified withdrawal agreement, including:

1. **Identifying risks** – including financial exposures; contracts with UK (for EU27 entities) or EU27 (for UK entities) counterparties; reliance on UK or EU27 financial market infrastructures; storage of data in, and transfer to, the UK or EU27; and reliance on UK or EU27 funding markets.
2. **Considering implications if the risks materialize** – including solvency and liquidity positions, as well as business models. This may include withdrawing from the relevant market.
3. **Ensuring necessary regulatory permissions are in place** – applications for new or extended permissions to be made as soon as possible.
4. **Considering organizational structures** – the booking model should articulate how and where risk will be managed. Emphasis is again placed on ensuring outsourcing does not lead to empty shells and the need for institutions to have the substance to identify, and the capability to manage, the risks they generate from day one of Brexit.
5. **Identifying affected contracts** – including consideration of whether existing or future contracts require regulatory permissions and options to mitigate risks, including amendments. Financial institutions should commence making the necessary changes to contracts as soon as possible.
6. **Data transfer and storage** – identify where data is stored and transmission requirements. The General Data Protection Regulation is to be considered and mitigating actions such as new storage locations.
7. **Identifying financial market infrastructure access requirements** (UK or EU27 as applicable) – consider alternatives and, amongst other things, the ability to transfer to alternatives.
8. **Assessing reliance on wholesale funding** – including considering ability to access funding after Brexit and other sources.
9. **Bank Recovery and Resolution Directive plans** – including leveraging BRRD plans (where applicable) and considering MREL-eligible liabilities or instruments issued under EU27 law or UK law (as appropriate), as such issuances may no longer be eligible.
10. **Inform competent and resolution authorities** – results of risk assessment, details of plans to address risks and the timeline for implementation of actions should be provided to those authorities.



Customer communication

Competent authorities should engage with financial institutions to ensure that they have carefully assessed their obligations to (existing and prospective) customers, and taken any necessary actions to ensure the continuity of service. The EBA requires that financial institutions provide clear information to customers whose contracts or services may be affected, as soon as that information becomes available to them, and in any event no later than the end of 2018. The EBA lists certain areas to be covered at a minimum. Competent authorities should also be informed of the communications to customers.

Conclusions

Irish firms with a current or proposed future UK customer base, or which outsource or have other connections to the UK, must now prepare for a hard Brexit if they have not done so already. In light of the Opinion, we expect the Central Bank of Ireland (the “CBI”) to turn some focus to the plans put in place by the firms it regulates.

Interestingly, the UK Government has stated that, if necessary, it will legislate for a temporary permissions regime to enable relevant EEA firms and funds passporting into the UK to undertake new business within the scope of their passporting permission. The proposed regime would also allow firms to continue meeting their existing contractual rights and obligations and manage existing business in the UK. The FCA has asked EEA firms and funds that passport into the UK to complete a short online survey to help it identify relevant firms (available [here](#)). On the basis of the Opinion, we believe that the EBA would not anticipate the temporary permissions regime to form too significant a role in firms’ plans until it is a legally binding commitment.

Similarly, UK firms with EEA (including Irish) business or connections with the EEA should accelerate plans. This may mean assessing what business that can be carried out on an unregulated basis in the EEA, moving business to already regulated EEA entities or establishing new regulated entities in the EEA. We understand that some firms are even preparing to cease trading in the EEA.

How we can help

Walkers Ireland has one of the largest and most experienced dedicated financial services regulatory groups. We are currently assisting a number of domestic institutions and global groups on Brexit preparedness and related Irish authorisation projects.

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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