Brexit Update

UK triggers countdown to hard Brexit

26 January 2017

The recent speech made by the UK Prime Minister on 17 January has set out the most unequivocal statement on the UK's stance on Brexit to date. Theresa May has now confirmed that the UK "*cannot possibly*" remain within the EU Single Market or within the existing EU Customs Union.

This is the clearest statement provided so far from the UK government on its intentions in the upcoming negotiations and has been interpreted by many commentators as signalling a 'hard Brexit' will now come to pass.

Subsequently, the ruling delivered by the UK Supreme Court on 24 January has confirmed that the UK Government cannot trigger Article 50 without an Act of Parliament. However, it appears this will not impact the Government's 31 March deadline to formally begin the two year process of withdrawing from the EU.

This update assesses the implications of these recent developments for UK-based credit institutions, MiFID firms and other regulated financial service providers (**RFSPs**). For those RFSPs who were established in the UK specifically for the purpose of gaining access to the EU Single Market, it very much appears that a timeline has been imposed on their current business model and that post-Brexit options must now be explored.

'Wait and see' no longer an option?

UK RFSPs are now faced with having to take some difficult decisions in the imminent future, based on imperfect and incomplete information. It has been prudent so far for UK RFSPs to adopt a 'wait and see' approach to the outcome of the UK's negotiations with the EU – given the cost and time involved in establishing, staffing and capitalising an RFSP elsewhere in the EU, this is not a decision that should be rushed or taken lightly. Notwithstanding this, it now appears highly likely that UK RFSPs may find themselves operating outside of the EU Single Market in just over two short years, assuming Article 50 is triggered at the end of March, as promised.

Theresa May has offered some hope for UK RFSPs with references to a "*phased approach*" and holding out hope for retaining "*elements of current Single Market arrangements.. ..the freedom to provide financial services across national borders*".

Indicative Timelines for Authorisation in Ireland

The actual timelines to authorisation in Ireland are dependent on a range of factors, not least of which include the applicant's own preparedness along with type and complexity of business model.

This table sets out, at a high level, indicative authorisation turnaround times that might be expected from receipt by the Central Bank of Ireland (**CBI**) of an initial application for authorisation where the application proceeds without problems or interruptions. Applicants should bear in mind that a significant investment of time and resources will be required to prepare a 'complete' application pack and that incomplete applications will be rejected without the 'clock starting' on these timelines.

Type of Institution	Approximate Timeline for CBI approval
Credit Institution	10 – 18 months
MiFID Firm (large/complex)	6 months
MiFID Firm (small/non-complex)	3 months
E-Money Firm	4 – 5 months
Payment Institution	4 – 5 months

However, this situation places those UK RFSPs that are heavily (or wholly) reliant on cross-border passports to access EU markets in a difficult situation. Given the unavoidable timeframes involved in obtaining a financial services authorisation or licence in another EU Member State, 'wait and see' becomes an increasingly risky strategy as time continues to tick by without clarity on the future passporting ability of UK RFSPs. In short, for those RFSPs who rely on their UK regulatory approval for passporting into the single market, it is no longer an option to postpone fully exploring and implementing a Brexit strategy.

Mutual relationship

Conversely, EU firms, funds and consumers that are reliant on UK RFSPs to provide financial services will also have to monitor developments closely to ensure that the UK's exit from the EU does not have a detrimental impact if a sudden withdrawal of UK RFSP services comes to pass. The reliance of customers in the wider EU on the products and services provided by UK RFSPs is likely to be one of the strongest arguments for ensuring that there is some kind of transitional deal for financial services – as hinted by the European Commission's Brexit negotiator Michael Barnier that "*agreement on an orderly exit*" is a priority.

Outlook of the Central Bank of Ireland

The CBI has been consistent to date in the messages it has been sending to the market on its approach to new Irish authorisation applications and has recently restated some of its expectations in light of the "material number of inquiries" it has received from UK RFSPs looking to relocate from the UK to Ireland.

In a recent publication[1], the CBI's director of policy and risk, Gerry Cross, helpfully outlined some of the CBI's views on new authorisation applications, including:

a) restating the CBI's commitment to be engaged, efficient, open and rigorous while adopting a structured, robust and risk based process that seeks to ensure that only those firms that demonstrate compliance with EU and Irish authorisation requirements are authorised;

b) an expectation that firms will be well-prepared before seeking to engage with the CBI pre-application;

c) re-iterating that the CBI expects certain substance requirements to be met – namely that the Board and the management of the entity are located in Ireland such that the business is run from Ireland. The CBI wants to be satisfied that the mind and management of the entity are located, and decisions taken, in Ireland; and

d) confirming that for new applicants intending to rely on outsourcing arrangements, an appropriate level of outsourcing is both acceptable and forms a part of many business models and will not be considered problematic in and of itself.

Irish Perspective

The loss of access to UK markets poses a range of challenges to the Irish economy and the news of a 'hard Brexit' with a full UK withdrawal from the EU Single Market is going to pose challenges to every sector of the Irish economy. Some good news comes from Mrs. May's commitment to maintain the common travel area with Ireland and seeking to avoid a hard border with Northern Ireland.

Narrowing the focus to the financial services sector, while risks still exist, it is clear Ireland has a lot to offer those UK RFSPs that feel their business model and/or consumer base requires an EU RFSP, including:

a) being the only native English speaking and common law jurisdiction within the EU;

b) many close similarities between the Irish and UK regulatory environments;

c) an established and thriving financial services sector; and

d) Ireland's favourable (12.5%) corporation tax on trading income.

Conclusion

Both the EU and the UK face an enormous task over the coming two years to negotiate the unwinding of the UK's relationship with the EU. Given the (at least publicly apparent) slow progress to date, interim arrangements of some form would seem to be a likely part of any deal if, in Mrs. May's words, a "*disruptive cliff edge*" is to be avoided. That said, nothing about Brexit to date has been easy to predict.

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Walkers have been assisting UK RFSPs with queries and contingency planning in relation to establishment and engagement with the CBI for Irish authorisation purposes. Common queries have focused on minimum local establishment requirements, timeframes to authorisation and the CBI's attitude to new entrants.

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.

Eoin O'Connor
Partner, Regulatory & Compliance
T: +353 1 470 6664
E: eoin.oconnor@walkersglobal.com

Shane Martin
Director, Regulatory & Compliance
T: +353 1 470 6673
E: shane.martin@walkersglobal.com

Garry Ferguson
Partner, Finance & Capital Markets
T: +353 1 470 6659
E: garry.ferguson@walkersglobal.com

Andrew Traynor
Partner, Finance & Capital Markets
T: +353 1 470 6632
E: andrew.traynor@walkersglobal.com

Noeleen Ruddy
Partner, Finance & Capital Markets
T: +353 1 470 6650
E: noeleen.ruddy@walkersglobal.com

Jonathan Sheehan
Partner, Tax
T: +353 1 470 6639
E: jonathan.sheehan@walkersglobal.com

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