BREXIT MANOEUVRES

Potential implications of a "hard Brexit" for fund managers: A UK perspective

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A. Introduction

This note sets out at a high level the potential impact of the United Kingdom's ("UK") exit ("Brexit") from the European Union ("EU") without a negotiated agreement on UK and European Economic Area ("EEA") (a) alternative investment fund managers ("AIFMs"), (b) UCITS management companies ("ManCos") and (c) investment management firms operating under a Markets in Financial Instruments Directive (2014/65/EU) ("MiFID") license.

These observations are subject to change – in fact, they may well do so, as the political and regulatory approach to Brexit continues to evolve.

Although the eventual outcome of the Brexit negotiations remains to be determined, this note assumes, for the purpose of forward planning (save as expressly noted) that:

- no specific terms are put in place for the UK financial services sector in connection with Brexit, in effect, a "hard Brexit" following which the UK will be treated by the remaining EU member states (the "EU 27") as a "third country";

- the UK will implement EU law "as is" into domestic law with effect from the date of exit, with the UK being the only "EEA state" for such purposes and all other states, including the EU 27 being, from the UK perspective, third countries; and

- the UK will continue to provide a level of access to the UK market for products or managers from the EU 27, including alternative investment funds or "AIFs" within the meaning of the alternative investment fund managers directive (2011/61/EU) ("AIFMD") and undertakings for collective investments in transferrable securities or "UCITS" with the meaning of Directive (2009/65/EC) (the "UCITS Directive"), and management entities including AIFMs and UCITS ManCos.

B. AIFs and AIFMs

1. Non-EEA AIF / UK AIFM

(a) Management

Generally speaking, a UK investment manager operating as an UK AIFM under its "managing an unauthorised AIF" permission should be able to continue to manage a non-EEA AIF from the UK in the same manner as before Brexit. See Section E. below for certain service provider and trading arrangement considerations.

(b) Marketing

A UK AIFM should not need to change its approach to marketing outside of the EU 27 (e.g. the UK and the rest of the world) after Brexit.

Currently, the marketing of non-EEA AIFs in the UK and the wider EU by a UK AIFM must be conducted on the basis of each country's national private placement regime under Article 36 of AIFMD, where

available. Following Brexit, UK marketing would continue on the basis of Article 36, however, in the EU 27, both the AIF and the AIFM would be considered non-EEA and therefore any marketing of the AIF in the EU 27 would need to be undertaken pursuant to Article 42 of AIFMD, assuming private placement of this kind is permitted in the relevant EU member state.

Access to the Article 42 regime would require a cooperation agreement to be in place between both (i) the competent authority of the relevant EU 27 member state and the UK FCA as the supervisory authority of the now third-country UK AIFM and (ii) the competent authority of the EU 27 member state and the competent authority of the non-EEA AIF's jurisdiction of establishment. There are indications that key fund jurisdictions, such as Ireland, have considered putting in place a cooperation agreement with the UK, although practically speaking these cannot be effective until the time that the UK exits the EU. There is no guarantee that one will be in place with any of the EU 27 member states that do permit Article 42 marketing, as the conclusion of such agreements ultimately depends on the political environment.

In its role as distributor, a UK AIFM may also need to comply with any relevant private placement restrictions and exemptions for the provision of investment services from non-EU countries into the member states of the EU 27 in which the AIF is being marketed. There is currently no EU regulatory harmonisation of these requirements (e.g. via an EU directive or regulation) and the positions of individual member states therefore differ. If the EU Commission were to grant "equivalence" status to the UK post Brexit under MiFID's third country regime, this would offer a harmonised process, akin to a MiFID passport, for a UK manager to continue to provide investment services to professional clients throughout the EU 27.

2. EEA AIF / UK AIFM

(a) Management

In principle, a UK AIFM should be able to continue to manage an EEA AIF to the same degree that, for example, a US investment adviser is currently permitted to manage an EEA AIF. As the AIFMD third country passport provisions have not been activated, the management of EEA AIFs by non-EEA AIFMs is outside the scope of the current AIFMD rules. Accordingly, whether such an arrangement is permitted will be determined on a jurisdiction by jurisdiction basis and the position is very unclear in some jurisdictions given the lacuna in AIFMD. Currently Ireland permits such arrangements, for example, for US investment advisers at least on a grandfathered basis for Irish AIFs established prior to the implementation of AIFMD, however the Central Bank of Ireland would need to approve any such arrangements in the Brexit context on a case by case basis and other jurisdictions may not permit it at all. While one would hope that the relevant member states will take a pragmatic view, this cannot be guaranteed.

Assuming that UK AIFMs will be able to continue to manage EEA AIFs generally, there will be certain categories for which this will not work, for example, if the AIF in question is a Luxembourg RAIF (which requires an EEA AIFM) or where it may cause difficulties in pursuing the strategy of the AIF (for example, an AIF engaged in direct lending in Germany must be managed by an EEA AIFM to take advantage of exemptions from broader banking regulations).

(b) Marketing

There should be no change in marketing an EEA AIF outside of the EU 27 or the UK.

However, a UK AIFM will no longer be able to market an EEA AIF pursuant to Article 31 under the AIFMD marketing passport in the UK because for the purposes of the UK implementation of AIFMD, the

EEA AIF will be treated as a non-EEA AIF. As such, it would instead need to be marketed into the UK pursuant to Regulation 57 of the UK Alternative Investment Fund Managers Regulations 2013 (the "Regulations") implementing Article 36 of AIFMD. Any new arrangements to market in the UK should, therefore, require the making of an Article 36 national private placement regime ("NPPR") notification with the FCA. The FCA has indicated that if there is no transitional "implementation" period it may provide grandfathering arrangements for EEA AIFs marketing in the UK pursuant to an AIFMD marketing passport, provided that they provide notice to the FCA prior to the effective date of the UK's exit from the EU (expected to be before midnight on 29 March 2019). The notification process is anticipated to open in January 2019. Where such registration is not made in a timely manner, the Regulation 57 requirements are expected to apply. However, it is possible that the government will change its position for political reasons should similar concessions not be forthcoming from the EU 27. Please see Dechert alert "UK FCA announces temporary permissions regime for inbound passporting EEA firms and funds in the event of a 'no deal' Brexit" for further details.

When marketing in the EU 27, the EEA marketing passport under Article 32 of AIFMD will cease to be available because the UK AIFM from the EU 27 perspective will be considered a non-EEA AIFM and the UK AIFM will need to rely on private placement pursuant to Article 42 of AIFMD to market the AIF in the EU 27 (note the need for cooperation agreements discussed at Section B.1(b) above). A number of member states either do not permit or make it prohibitively complicated or costly to market under Article 42 and there is no reason at this time to expect this approach to change. To retain the AIFMD marketing passport, a replacement EU 27 AIFM would need to be appointed.

3. EEA AIF / EEA AIFM / UK delegate MiFID manager

(a) Management

In principle an EEA AIFM should be able to delegate to a UK investment manager operating under UK MiFID permissions. Such delegation will need to be notified to the regulator of the relevant EEA AIFM (and also the regulator of the relevant AIF where it is a regulated fund) and a written arrangement will also need to be in place between the FCA and the competent authority of the EU member state of the EEA AIFM. Note Section B.1(b) above regarding the implementation of cooperation arrangements.

It will be important that the delegation does not result in the EEA AIFM constituting a letterbox entity and therefore it will be essential that the AIFM (i) has sufficient substance and retains the "expertise and resources to supervise the delegated tasks effectively" and (ii) ensures that it does not delegate performance of the investment management functions (e.g. risk management and portfolio management) "to an extent that exceeds by a substantial margin the investment management functions performed by the AIFM itself". (See Article 82 of the Commission Delegated Regulation (EU) No 231/2013 supplementing AIFMD). What constitutes sufficient substance in the key fund jurisdictions is still evolving, with the European Securities and Markets Authority ("ESMA") pressing for greater substance and regulators taking different (and changing) approaches to the question. For example, items of consideration may include the nature of the manager, the strategies managed and the number of funds and quantum of assets under management.

(b) Marketing

There should be no change in the manner in which marketing is conducted outside of the UK and the EU 27.

In respect of marketing in the UK, the AIF will not be a UK AIF and will not have a UK AIFM and therefore will be unable to continue to rely on the marketing passport under Article 32 of AIFMD but

would instead be subject to the requirements of Regulation 59 (AIFMD Article 42) and require an NPPR notification to the FCA.

Within the EU 27, the EEA marketing passport should remain available. However, the ability of the UK delegate MiFiD manager to market the AIF within the EU 27 may be curtailed as, subject to alternative arrangements being made (such as the establishment of an EU 27 MiFID firm) it will no longer be able to market in the EU 27 under its UK MiFID license. See further Section B.1(b) above.

C. UCITS and UCITS ManCos

1. UK UCITS / UK ManCo

(a) Management

There should be no change in the manner in which management is carried out.

(b) Marketing

There should be no change in the manner in which marketing is conducted outside of the UK and the EU 27.

There should also be no change in the manner in which marketing is carried out within the UK.

Marketing of the UK UCITS by a UK ManCo in the EU 27 on the basis of the UCITS marketing passport will no longer be possible as the UCITS would “default” to being a non-EEA AIF with a non-EEA AIFM from an EU 27 perspective, meaning that marketing in the EU 27 would be subject to Article 42 of AIFMD and, accordingly, the private placement rules of each member state. See further Section B.1(b) above.

2. UK UCITS / EU 27 ManCo / UK delegate MiFID manager

(a) Management

The UK implementation of the UCITS Directive does not envisage a UCITS scheme being managed by a third country ManCo (i.e. an EU 27 ManCo post Brexit). As such, a new UK ManCo would need to be appointed to act as the management company of the UK UCITS, which might be the MiFID manager if it varied its permissions (provided that it can do so within its current business profile). If the MiFID manager does not vary its permissions a new UK ManCo would be appointed, which then could delegate to the UK MiFID manager.

(b) Marketing

Assuming the UK UCITS would be managed by a new UK ManCo, see Section C.1(b) above. See also Section D. below regarding marketing in the EU 27 by the UK MiFID manager.

3. EU 27 UCITS / UK ManCo

(a) Management

The UCITS Directive does not envisage an EU 27 UCITS being managed by a third country ManCo (i.e. the UK ManCo post Brexit). As such, a new EU 27 ManCo would need to be appointed to act as the management company of the EU 27 UCITS or the EU 27 UCITS could be converted to self-managed status (where possible – this is increasingly difficult).

As regards delegation by the EU 27 ManCo back to the UK manager, please see Section 4 below.

(b) Marketing

Save for the change of ManCo noted at (a) above, there should be no change to marketing the EU 27 UCITS outside of the UK or EU 27.

Assuming an EU 27 ManCo is appointed as the management company of the EU 27 UCITS, the EU 27 ManCo can market the EU 27 UCITS in the EEA on the basis of its UCITS marketing passport.

If there is no transition period, the FCA has indicated that if the EU 27 ManCo notifies the FCA of the intention to continue to market the EU 27 UCITS in the UK prior to the effective date of exit from the EU, marketing can continue in the UK, although the permitted duration of this period is still to be confirmed by the FCA. See Section B.2(b) above.

For new EU 27 UCITS, UK retail marketing may be permitted under Section 272 of the UK Financial Services and Markets Act 2000 through the FCA approving the EU 27 UCITS as a "recognised scheme" (although, unless the FCA makes a blanket determination in this regard for EU 27 UCITS, the process could be time consuming). In the absence of a Section 272 approval, the EU 27 UCITS will likely be treated as an AIF and subject to private placement under Regulation 59 (Article 42 of AIFMD) and require an NPPR notification to the FCA. The scope to market the EU 27 UCITS to retail investors in the UK accordingly, would become limited.

4. EU 27 UCITS / EU 27 ManCo / UK delegate MiFID manager

(a) Management

The EU 27 ManCo can only delegate to the UK delegate MiFID manager if co-operation between the regulator of the EU 27 ManCo and the FCA (as the regulator of the UK delegate MiFID manager, as a "third-country undertaking") is ensured. To date, no such agreements exist. See further Section B.1(b) above.

Notification of the intention to delegate to a third country firm will need to be made to the regulator of the EU 27 ManCo.

The EU 27 ManCo must still have sufficient substance to not be viewed as a "letterbox" following the delegation – this obligation applies regardless of the domicile of the delegate.

(b) Marketing

Please refer to B.3(b) generally above. The ability of the UK delegate to market the UCITS within the EU 27 may be curtailed as, subject to alternative arrangements being made (such as the establishment of an EU 27 MiFID firm), it will no longer be able to market in the EU 27 under its UK MiFID license. See also further Section D. below.

D. Managed Accounts and MiFID Services

1. UK MiFID manager / EEA managed account client

(a) Management

A UK MiFID manager would be considered a "third country" (i.e. non-EEA) firm after Brexit, and would therefore need to comply with any relevant restrictions and exemptions for the provision of investment

services from third countries into the EU 27. There is currently no EU regulatory harmonization of these requirements (e.g. via an EU directive or regulation) and the positions of individual member states therefor differ. Moreover, there are a number of categories of clients in the EU 27 that are prohibited, either by applicable law or by their own constitutions, from directly appointing a third country investment manager. Analysis of the third country firm restrictions and exemptions applicable in a particular member state of the EU 27, and the particular client type in that member state, would therefore be required post Brexit. We maintain information in this regard via our "World Compass" platform.

However, if the EU Commission were to grant "equivalence" status to the UK post Brexit under the MiFID third country regime, this would offer a harmonized process, akin to a MiFID passport, for the UK MiFID manager to continue to provide portfolio management and other investment services to professional clients throughout the EU 27. While such equivalence will actually exist at Brexit as a matter of fact, whether such an equivalence determination will be made for regulatory purposes is very much a political issue.

(b) Marketing

After Brexit, marketing of the portfolio management services of a UK MiFID manager within the EU 27 would need to comply with the same relevant restrictions and exemptions for the provision of investment services and jurisdiction specific requirements relating to marketing by a third country manager in the relevant EU 27 member state as noted above. This information is also available on "World Compass".

E. Service Providers and Trading Arrangements

1. Non-trading service provider relationships

In principle there should not be any changes to relationships with service providers that are not providing custody / brokerage/ collateral management services or are part of the existing investment management structure. Whereas, EEA established AIFs / UCITS generally require local administrative, audit and depositary service providers, there are no such local service provider requirements for non-EEA AIFs, and this is unlikely to change. Because UK AIFs / UCITS will continue to be subject to the equivalent requirements of AIFMD and the UCITS Directive, UK AIFs / UCITS will continue to need local UK service providers, whereas non-UK AIFs may make use of alternative service providers as permitted by the jurisdiction of the AIF's establishment.

Notwithstanding the foregoing, where the relevant service provider is a UK firm making use of an EU 27 branch or an EU 27 service provider operating out of a UK branch, the relationship will be subject to change with the relevant service provider either seeking to establish a new entity in the EU 27 member state / UK, as applicable, or withdrawing from providing the service in the relevant jurisdiction. Please see further Section E.2 below, in the context of trading relationships.

2. Trading relationships

Trading relationships raise a number of potential issues in relation to Brexit and exact effects must be considered in the context of a given entity or group's existing trading relationship set-up. The key questions that will need to be considered are:

- as a counterparty, which dealers is the counterparty facing?
- what UK nexus does the counterparty have?
- how does the counterparty currently satisfy its trading related regulatory requirements?

The application of similar rules in EU 27 countries and the UK may give rise to perverse results, where each treats the other as a third country. Set out below are some key considerations, both generally and with respect to specific EU regulation.

(a) Choice of Governing Law

Where English law is the choice of governing law in trading documentation:

(i) Rome I and II (EC Regulations 593/2008 and 864/2007) will continue to apply in the EU 27, meaning that clauses in contracts specifying English law as the governing law of contractual and non-contractual obligations should continue to be recognised by the EU 27 courts; and

(ii) the UK government has confirmed its intention to incorporate Rome I and Rome II into domestic law.

Accordingly, while ISDAs subject to Irish or French law are available, it is not clear that there is any advantage to be obtained by moving to an Irish or French-law governed ISDA.

That being said, after Brexit, EU 27 institutions using English law trading documents may need to draft into the contract certain additional clauses. For example, because post Brexit, English law will become “third country” law, agreements may require amending to include contractual recognition of bail-in provisions in order to be compliant with the Bank Recovery and Resolution Directive (2014/59/EU).

(b) Defaults / Termination Events

In its Brexit Q&A (April 2018 version), ISDA has confirmed that it believes it is unlikely that Brexit would trigger a force majeure termination event. What would seem more likely is the potential triggering of an impossibility / illegality termination event for existing trades where a UK dealer is providing regulated services to an EU 27 counterparty giving rise to a continuity issue. It is expected, however, that dealers may restructure their trading services prior to Brexit. Where a UK dealer contracts with an EU 27 counterparty, it is possible that some or all of the relevant contracts and transactions may be novated to either a US or EU 27 group member. Similarly, an EU 27 dealer with a UK counterparty may novate its contracts across to a UK or US group member. Such novations are already happening and counterparties have started to receive novation agreements from dealers.

In addition, trading relationships will also need to be restructured where an EU 27 dealer is currently providing services through a UK branch, or where a UK dealer is currently providing services through an EU 27 branch. It is possible that such a restructuring could affect a counterparty’s economics or legal terms or the availability of particular trading lines.

Market volatility post-Brexit could also lead to greater margin calls, breaches in position limits, the occurrence of hedging disruption events and / or breaches in net asset value decline triggers.

(c) EMIR / SFTR

Under the UK’s Withdrawal Act 2018, Regulation (EU) 648/2012 on OTC derivatives, central counterparties and trade repositories (“EMIR”) and Regulation (EU) 2015/2365 on transparency of securities financing transactions and of reuse (“SFTR”) and the associated delegated regulations will be implemented into UK law. The status of related requirements that take effect following exit (e.g. SFTR reporting, initial margin rules for certain firms under EMIR and changes following the EMIR review) will depend on the final transitional period agreed, if any. If there is no transitional period, these

requirements are not expected to apply, whereas if the proposed transitional period to the end of 2020 applies, it is expected these requirements will apply. Currently, there is limited transparency on this.

Assuming the position stated in connection with the Withdrawal Act stands, after Brexit:

(i) UK dealers will continue to classify UK counterparties and AIFs with UK AIFMs as "Financial Counterparties" or "FCs" for the purposes of the (UK) EMIR and (UK) SFTR implementing legislation and these entities will continue to be subject to the clearing and margining rules.

(ii) UK dealers will also continue to classify counterparties which are both non-EEA and non-UK as "third country entities". These counterparties will generally continue to be out of scope of the clearing and margining rules unless they are trading a very high volume of derivatives, or one of a limited number of other exceptions apply.

(iii) UK dealers will classify EU 27 counterparties and AIFs with EEA AIFMs as "third country entities". However, this may ultimately be largely irrelevant depending on the extent of the restructuring of EEA / UK trading relationships that takes place.

(iv) To the extent that UK counterparties and AIFs with UK AIFMs continue to face EU 27 dealers, those EU 27 dealers will classify such counterparties as "third country entities". This will bring many of these entities out of the scope of the (EU) EMIR margining and clearing rules although they would be brought in scope of the (UK) EMIR provisions.

(v) In order for UK counterparties to report trades under (UK) EMIR to a non-UK trade repository or to clear trades through a non-UK central counterparty clearing house ("CCP"), there would need to be an equivalence decision in relation to any such non-UK CCP and non-UK trade repository. Currently the only formal steer comes from the draft CCP related statutory instrument ("SI"), which anticipates that current EU 27 equivalence determinations (for CCPs) will be "carried over" to the new UK regime. The same concern would apply in reverse if an EU 27 counterparty wished to report to a UK trade repository or clear through a UK CCP – ESMA would need to deem such UK CCP equivalent and formally "recognise" the relevant UK trade repository. There is also no formal steer on this position. The draft CCP SI does, however, refer to two additional SIs relating to EMIR and expressly references trade repositories.

(vi) For those UK or US counterparties who currently rely on the EU-US position to satisfy their regulatory requirements, for example, in relation to clearing, in the same way as currently applies for EU CCPs, UK CCPs would need to be deemed compliant with the US Dodd-Frank regime in order to benefit from substituted compliance in the US and the UK would need to grant an equivalence determination for UK counterparties to continue to rely on use of US arrangements to satisfy their (UK) EMIR requirements. Except in relation to CCPs (see above) it is uncertain whether such determinations will be made or, if so, what the timing would be.

(vii) The UK will, of course, have the flexibility to make changes to UK regulation as it applies to trading activity. This could, for example, include a move to one sided reporting under EMIR and SFTR, although such a change is not expected to be a priority.

F. Additional Considerations

1. Investor relations and documentation changes

Investor interest in Brexit – and how fund managers are dealing with its implications – will no doubt increase as March 2019 nears. In addition, the ramifications of Brexit on any given manager are very likely to require changes to fund documentation and other materials. In planning investor communications, managers will need to strike the right balance between waiting until matters are sufficiently certain as to be properly articulated, while not leaving it too late to obtain any required investor consents in good time.

In a fundraising context, firms may also need to consider the extent to which the role of any UK based investor relations professional amounts to the MiFID service of 'receiving and transmitting orders' on a cross-border basis in the EU 27. See further subsections (b) in Section B above.

2. Deal activity

Investment professionals at private equity and other private assets firms may currently use a MiFID or AIFMD passport to facilitate cross border EU deal activity. Even where the asset being bought or sold is not a security or other regulated financial instrument (such as a derivative), the transaction may involve holding companies and other structures for that asset which may still involve the issue or transfer of shares and/or other financial instruments. Structuring and consummating such transactions may therefore involve one or more 'regulated activities' in the relevant EU 27 member state, in which case firms will need to consider the basis on which their UK based investment professionals are involved. Solutions may involve secondment or 'dual hat' arrangements for investment professionals with an EU 27 regulated firm in order to obtain regulatory coverage; utilising alternative group or third party entities; or structuring transactions and deal processes in order to avoid the issue arising in the first place.

3. Regulatory liaison

Brexit has prompted a whole range of enquiries directed at UK based managers by regulators in the EU 27. The enquiries may lead to more substantive regulatory interaction with the relevant regulators or other ramifications. Such interaction also needs to be consistent with any other regulatory processes that may be necessary in the context of Brexit; for example, changes to approved persons or variations of permission.

4. Taxation issues

Although each firm's response to a hard Brexit may be different in the light of that firm's own particular circumstances, it will often mean that functions previously carried out in the UK will henceforth be carried out in one or more of the EU 27 jurisdictions. Accordingly, careful consideration should be given to the potential UK and EU 27 taxation issues arising both as a consequence of any transactions implementing a change in the firm's business structure and contractual arrangements (including issues relating to fee flows, employment, governance and substance) as well as the ongoing taxation consequences of the post Brexit arrangements. In particular:

(a) avoiding any risk of UK exit taxes arising as a result of transactions implementing changes to the jurisdiction in which functions are carried out;

(b) the transfer pricing implications of the new operating arrangements between the UK and EU 27 entities and the respective tax rates in the relevant EU 27 jurisdictions; and

(c) the potential VAT implications of any transactions implementing changes to the jurisdiction in which functions are carried out or arising as a result of the new post Brexit contractual arrangements.

5. Other matters

This note focuses on regulatory matters specific to fund managers, but it is worth bearing in mind that a range of other Brexit-related issues will also be relevant to fund management businesses and need to be considered side by side. For example:

- Employment matters, with attention to immigration issues, 'dual hatting' arrangements, amendments to employment terms as well as consideration of relocation, retention and incentive arrangements.
- Data protection considerations, especially bearing in mind that the management and operation of funds almost invariably involves personal data issues.
- Intellectual property considerations.
- Sanctions, tariffs, and other compliance matters affecting portfolio companies or investment opportunities.

G. Conclusion

The analysis and conclusions above are subject to change. This document is not legal advice and should not be relied on as such. Firms should seek advice on their particular circumstances. Brexit is a fast moving, highly political event and the approach of member states and regulatory bodies continues to evolve. We are monitoring developments and, together with our European colleagues, are advising our clients on the practical implications of Brexit on their particular circumstances and approaches to effective Brexit planning.

For further information, please do not hesitate to get in touch with a member of Dechert's financial services team or your usual Dechert contact.

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