

Brexit Contingency Planning in Financial Services: Have All the Angles Been Considered?

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The U.K. is due to leave the European Union on March 29, 2019, although it is proposed there is a transitional period for 18 months – 2 years after that whereby the U.K. effectively remains within the EU for the purposes of financial institutions.

However, the EU mantra of “nothing is agreed until everything is agreed” and the fact that agreements made in phase one, including any political commitment to transitional arrangements, are not truly binding means the final deal is likely to hang in the balance for some time to come.

Firms in the financial sector have been asked by regulators to plan for a wide range of possible outcomes, including the “hard Brexit” scenario, whereby the U.K. exits the EU in March 2019 without any new trade arrangement¹, withdrawal agreement or equivalence determinations in place.

¹ The U.K. is proposing an enhanced equivalence model for a U.K.-EU deal in financial services, along the lines set out in *A Template for Enhanced Equivalence: Creating a Lasting Relationship in Financial Services between the EU and the U.K.*, Barnabas Reynolds, available at http://www.shearman.com/~/_media/Files/NewsInsights/Publications/2017/07/LNDOCS011040030v16ConsolidatedAnEquivalenceRegulationFINAL02.pdf.

This briefing discusses the key areas for consideration in the contingency plans of U.K. financial institutions with cross-border activities between the U.K. and the rest of the EU. Our experience of advising in this area is that some U.K. firms have jumped straight to a “subsidiarization model” for EU client business, without properly considering other available and legally possible optimization structures. Here, we consider the relevant steps and structuring a firm can undertake to promote a firm’s and its clients’ compliance with legal and regulatory obligations with minimal dependence on political outcomes, legislative changes and/or government or regulatory approvals.

UK Negotiations: the State of Play

The negotiations have so far proceeded in phases, with phase one being concluded². It is expected that the transitional arrangements for Brexit will be formalized at a summit scheduled for 22 – 23 March. This is a pressing concern for the industry as it will give businesses, banks and investors more time to adjust to the post-Brexit environment and for the U.K. to make clear what that environment will look like. It also has the political benefit of bridging the EU’s budgetary gap created by the U.K. leaving the EU. It is possible the transitional period will run for longer than 20 months though, as at the time of writing, this looks likely to be the agreed length.

The European Commission has recently published a draft withdrawal agreement for discussion with the Council and the European Parliament’s Brexit Steering group³. The European Commission has also published a number of recent “Notices to Stakeholders” on the impact of Brexit for various sectors. A raft of financial services-related Notices was released on February 8, 2018⁴. The Notices pertaining to financial services present a high level summary of the potential impact of the loss of the financial services passports. These Notices, while carefully drafted and largely correct from a technical perspective, focus wholly on a bleak “no-deal” Brexit scenario and concentrate on disclosure and planning issues. A number of questionable sweeping statements are made in these publications concerning the inability of U.K. firms to do business with EU clients after Brexit—given that reverse solicitation laws, EU and national laws concerning place of performance, national regulatory perimeters and contractual continuity provided for under human rights laws are all essentially ignored. However, these publications at least highlight the need for robust contingency planning covering all scenarios.

Phase two of the U.K.-EU negotiations is expected to address the post-Brexit cross-border “access” arrangements. In financial services, this is likely to involve mutual recognition by way of an enhanced version of the EU’s existing

² The U.K. and EU negotiators published a Joint Report on progress made in phase one on December 8, 2017. See <https://www.gov.uk/government/publications/joint-report-on-progress-during-phase-1-of-negotiations-under-article-50-teu-on-the-uks-orderly-withdrawal-from-the-eu>.

³ Following discussion at EU27 level, the draft withdrawal agreement will be formally transmitted to the U.K. It is available at https://ec.europa.eu/commission/publications/draft-withdrawal-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community_en.

equivalence regime, broadly replicating the passport but on the basis of equivalent rather than identical rules. In her “Road to Brexit” address in London at the beginning of March, the U.K. Prime Minister Theresa May reiterated that the U.K. Government is aiming for an ambitious and comprehensive new trade relationship with the EU, outside the customs union and without reliance on single market passports. The U.K. has made clear that such a deal must include financial services. In a speech on March 7, 2018⁵ Chancellor of the Exchequer Philip Hammond challenged political assertions that financial services cannot be part of a free trade agreement and put forward arguments demonstrating that such inclusion would not only be possible but would also be of mutual benefit. Mr Hammond also stated that the financial services component of a future U.K.-EU partnership should be based reciprocal regulatory equivalence and close supervisory co-operation. And there should be proportionate and reasonable consequences should the U.K. seek to diverge from regulatory alignment with the EU in the future.

Separately, the European Commission has indicated that at the very least a unilateral declaration of equivalence across a number of areas is on the table. The EU’s own briefing papers for Brexit note that the equivalency regime under existing financial services directives should be sufficient to address most questions arising under Brexit⁶. The current different in negotiating position is that the U.K. wishes the gaps in the existing equivalence framework to be filled in and there to be a more formalized, two-way, binding arrangement to ensure predictability, avoiding any relocation costs (which would ultimately be put back on EU27 customers).

Some doomsday pronouncements and market assumptions about a no deal Brexit are overdone, since basic equivalence arrangements are almost certain to be put in place before Brexit. However, it is possible that no Brexit deal is reached on financial services. This has an effect on so-called “access.” If an arrangement with the EU or indeed the wider European Economic Area (EEA)⁷ is not reached, firms will need to navigate the more complex and less-understood means for delivering financial services to EU customers without any overarching framework. There are many such means since the EU is bound by its Treaty to be open for business to the outside world⁸. Further, the EU needs capital flows to continue after Brexit in order to avoid the massive shock to the Eurozone, more expensive financial services and deadening of growth that would be an unavoidable consequence of market fragmentation.

⁴ The most recent Notices to Stakeholders relate to markets in financial instruments, banking and payment services, post-trade financial services, asset management, credit rating agencies, insurance/reinsurance and statutory audit. They are available at https://ec.europa.eu/info/publications/180208-notices-stakeholders-withdrawal-uk-banking-and-finance_en.

⁵ See Mr Hammond’s speech, available at <https://www.gov.uk/government/speeches/chancellors-hsbc-speech-financial-services>.

⁶ See for example the Internal EU27 preparatory discussions on the framework for the future relationship: “Services,” published 6 February 2018. Available at: https://ec.europa.eu/commission/publications/slides-services_en.

⁷ The EEA consists of all of the EU member states, together with Iceland, Liechtenstein and Norway. These additional countries have entered into the EEA Agreement which, among other things, allows them to participate in the EU’s single market. Much of the EU single market legislation relating to financial services applies to the EEA, as it has been incorporated into the EEA Agreement. A list of EU legislation with EEA relevance is available at, http://www.efta.int/media/documents/legal-texts/eea/other-legal-documents/list-eu-acquis-marked-or-considered-eea-relevant/weekly_list.pdf. The term EU, where used in this note, includes EEA.

⁸ See Treaty on European Union, Title V, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2016.202.01.0001.01.ENG&toc=OJ:C:2016:202:TOC#C_2016202EN.01001301.

However, a deal would be preferable for the U.K., EU and the global financial markets, so long as it is on enhanced equivalence terms and—in accordance with the existing equivalence concept applied already to the U.S. and other countries—does not seek to render the U.K. a rule-taker. Such an outcome has been rejected not only by the U.K. but also its regulators as being too risky for the global markets. Regulation requires the ability to engage in dynamic regulation and supervision on the ground, close to the markets and in the language of the markets.

Contingency Planning: the UK Regulators' Approach to Incoming EU Firms

Contingency planning for Brexit by U.K. financial institutions should aim to mitigate the risk of unexpected breaks in the provision of financial services to EU customers. There is a risk that the safety and soundness of individual firms will be affected if they are insufficiently prepared, with potential impacts on the provision of services to customers.

While many firms are well advanced in their contingency planning, U.K. regulators have assessed that the level of planning is variable. In April 2017, the Prudential Regulation Authority wrote⁹ to the Chief Executive Officers of PRA-regulated banks, insurers and large investment firms undertaking cross-border activities between the U.K. and the EU. This included U.K.-headquartered firms passporting into the EU, U.K. subsidiaries of large groups passporting into the EU and U.K. branches from EU countries. The letter requested written confirmation that firms' senior management had considered the firm's contingency plans, a short summary of those plans and an assurance that the plans address a wide range of scenarios by July 2017. Firms were also required to provide the PRA with details of any proposed authorizations, business transfers or business restructuring activity that would involve regulatory engagement prior to Brexit. In other sectors, the Financial Conduct Authority has taken a more risk-based approach, informally asking more systemic or larger firms about their plans. Where EEA firms envisage that they will need to obtain U.K. authorization for branches or subsidiaries, the conditions for authorization, particularly for systemic entities, will include a certain degree of co-operation established between U.K. and EU regulatory authorities via a MOU or similar.

In late December 2017, the Bank of England, the PRA and the FCA published consultations and planning considerations affecting international banks, large investment firms, insurers¹⁰ and CCPs¹¹ conducting cross-border activities into and from the U.K. Those consultations closed on February 27, 2018 and final policy is awaited. The PRA does not propose to change its current supervisory approach to U.K. subsidiaries of international banks (as stated in

⁹ http://www.bankofengland.co.uk/pru/Documents/about/letter070417.pdf?utm_source=Bank+of+England+updates&utm_campaign=1631555701-EMAIL_CAMPAIGN_2017_04_06&utm_medium=email&utm_term=0_556dbefcdc-1631555701-113379485.

¹⁰ The PRA's consultation on authorization and supervision of international insurers proposes some new factors to be considered alongside its current requirements for third-country branch authorization, namely: the scale of UK branch activity covered by the Financial Services Compensation Scheme and the extent to which the PRA is satisfied that the protected amount covered by the FSCS can be absorbed by insurers liable to contribute to the FSCS; and the impact of the failure of a firm with a UK branch on the wider insurance market and financial system.

¹¹ The Bank of England published a "Dear CEO" letter which it has sent to the Chief Executive Officers of non-UK CCPs, setting out how it envisages recognizing them for the provision of services in the UK following Brexit. The BoE invites the CEOs of non-UK CCPs to consider whether, based on its activities, the CCP will require UK recognition post-EU withdrawal and invites non-UK CCPs that will be seeking UK-recognized status to engage in pre-application discussions in early 2018. The "Dear CEO" letter is available at <https://www.bankofengland.co.uk/-/media/boe/files/letter/2017/letter-to-ccps.pdf>.

its current supervisory statement, SS10/14). However, the consultation paper¹² set out a new general approach, applicable to all branches, along with PRA's additional expectations for significant retail and systemic wholesale branches. Under the new approach, banks undertaking material retail activity above de minimis thresholds will (as now) need to establish a subsidiary. Other banks must satisfy the PRA's minimum expectations. Where the PRA deems the branch to be systemically important, there must be adequate means to enable the PRA to gain sufficient assurance over the supervisability of the branch. This includes enhanced co-operation with the home regulator and greater reassurance over resolvability. The PRA can also impose additional specific regulatory requirements at branch level¹³.

The U.K. Government has also announced¹⁴ that, if necessary, it will legislate to enable EEA firms and funds operating in the U.K. to obtain a "temporary permission" to continue their activities in the U.K. for a limited period after withdrawal. Alongside the temporary permissions regime, it stands ready to legislate, if necessary, to ensure that contractual obligations, such as insurance contracts, which are not covered by the temporary regime, can continue to be met. It will also bring forward secondary legislation to empower U.K. authorities to carry out functions currently carried out by EU authorities relating to CCPs, central securities depositaries, credit rating agencies and trade repositories.

Relocation of UK Business to the EU: Expectations of the EU Supervisory Authorities

The European Banking Authority issued an Opinion in October 2017¹⁵, dealing with a number of policy issues related to the expected relocation of certain businesses from the U.K. into other EU member states prior to Brexit. The EBA Opinion is based upon an assumption that the U.K. will become a third country following Brexit. It addresses a number of areas of relevance for national regulators, namely the authorization process, the prudential regulation and supervision of investment firms, internal models, outsourcing, internal governance, risk transfers via back-to-back and intragroup operations, and resolution and deposit guarantee scheme issues. The EBA Opinion stresses to EU national regulators that existing authorization standards should not be lowered and that the same procedures and standards that have always applied should continue to do so. Firms wishing to establish in EU member states should be ready to provide a clear explanation of the choices they are making in terms of the substance of the incoming entity and the EBA emphasises that "empty shell" or "letter-box" entities should not be authorized.

The European Securities and Markets Authority has also issued a cross-sectoral Opinion¹⁶ aimed at fostering consistent authorization, supervision and enforcement action in relation to entities, activities and functions relocated to the EU from the U.K. The ESMA Opinion warns national regulators not to authorize entities in the EU that amount to

¹² The consultation on authorization and supervision of international banks is available at <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/consultation-paper/2017/cp2917.pdf>.

¹³ The PRA consultation was accompanied by a "Dear CEO" letter summarising its proposals, available at <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/letter/2017/firms-preparations-for-uk-withdrawal-from-the-eu.pdf>.

¹⁴ The announcement by HM Treasury is available at <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-12-20/HCWS382>.

¹⁵ Available at <http://www.eba.europa.eu/documents/10180/1756362/EBA+Opinion+on+Bretxit+Issues+%28EBA-Op-2017-12%29.pdf>.

¹⁶ Available at https://www.esma.europa.eu/sites/default/files/library/esma42-110-433_general_principles_to_support_supervisory_convergence_in_the_context_of_the_uk_withdrawing_from_the_eu.pdf.

“letter-box” entities that outsource or delegate substantial amounts of their business back to London. It sets out nine general principles that national regulators should apply when handling authorization requests in their member states:

- a. There is no automatic recognition of existing U.K. authorizations;
- b. Authorizations granted by EU27 national regulators should be rigorous and efficient, involving strong scrutiny of governance structures, human and technical resources and the geographical distribution of a firm’s activities as well as outsourcing and delegation arrangements;
- c. National regulators should be able to verify objective reasons for relocation in their member state, including ensuring that the member state was not selected for the purpose of evading stricter standards in another member state;
- d. Outsourcing and delegation to third countries is only possible under strict conditions, including in some cases the existence of co-operation agreements signed between the national regulator and the third country authority;
- e. National regulators should ensure that substance requirements are met;
- f. National regulators should ensure sound governance of EU entities—key executives and senior managers of EU authorised entities should be employed in the member state of establishment and should work there to a degree proportionate to their envisaged role;
- g. National regulators should be in a position to effectively supervise and enforce European Union law; and
- h. National regulators should coordinate with each other regarding market participants seeking to relocate—ESMA proposes to put in place a Supervisory Coordination Network in order to promote consistent decision-making.

ESMA built on its cross-sectoral Opinion in July 2017 with the publication of three sector-specific Opinions covering investment firms¹⁷, investment management¹⁸ and secondary markets¹⁹.

The European Insurance and Occupational Pensions Authority has also made an announcement to similar effect on this topic²⁰.

Key Issues for Contingency Plans

There are a number of considerations that affect firms to a greater or lesser extent, depending on their activities and U.K./EU presence and customer base. Properly developed contingency planning will enable a firm to utilise resource- and capital-efficient structures that avoid unnecessary costs. It should be possible for a firm to establish relevant

¹⁷ Available at <https://www.esma.europa.eu/document/opinion-support-supervisory-convergence-in-area-investment-firms-in-context-united-kingdom>.

¹⁸ Available at <https://www.esma.europa.eu/document/opinion-support-supervisory-convergence-in-area-investment-management-in-context-united>.

¹⁹ Available at <https://www.esma.europa.eu/document/opinion-support-supervisory-convergence-in-area-secondary-markets-in-context-united-kingdom>.

steps and structures to promote the firm's and its clients' compliance with legal and regulatory obligations and that rely as little as possible on political outcomes, legislative changes and/or government or regulatory approvals.

Firms should be considering the questions below.

1. In which EU jurisdictions does the firm have offices?
2. In which EU jurisdictions does the firm have customers?
3. In which EU jurisdictions does the firm have suppliers?
4. How would relevant permissions and rights change as a result of a "hard" Brexit without mutual recognition or equivalence?
5. Does the firm envisage that it will need to restructure and/or relocate in order to continue to service its client base?
6. Are there any acceptable adjustments clients could be assisted in making which would reduce the cost?
7. Are there other methods available to recharacterize or adjust business delivery to minimize cost implications?
8. How does the firm anticipate its business model changing as a result of a hard Brexit? Do the costs of restructuring exceed the benefits of EU access?
9. Is the firm considering whether to withdraw from business lines that may be rendered less economically viable were EU access to be lost?
10. What additional regulatory approvals are likely to be required, either in the U.K. or in the EU?
11. Will existing EU or U.K. branches operated by the firm be required to subsidiarize?
12. Will the PRA require its U.K. branches to subsidiarize (including taking into account the PRA's approach to the supervision of international banks, which includes consideration of whether the business conducted through the branch exceeds de minimis thresholds of £100m in retail and SME deposits and/or 5,000 retail/SME customers)²¹?
13. For firms currently operating through EEA branches in the U.K., how will operating in the U.K. as a PRA-regulated branch or subsidiary differ from operating as an EEA branch? What governance-related and contractual steps should the firm be taking into account in order to transition from an EEA branch to a U.K. regulated entity?
14. What changes to IT systems will be required?

²⁰ In July 2017, EIOPA issued its Opinion on supervisory convergence in light of the United Kingdom withdrawing from the European Union. The Opinion is available at https://eiopa.europa.eu/Publications/Opinions/EIOPA-BOS-17-141%20Opinion_Supervisory_Convergence.pdf.

²¹ The PRA's published approach to international banks is set out in PRA Supervisory Statement SS10/14: Supervising international banks: the Prudential Regulation Authority's approach to branch supervision, available at: <http://www.bankofengland.co.uk/pr/Documents/publications/ss/2014/ss1014.pdf>. See footnote 7 above for details of the PRA's proposals for revisions to SS10/14.

15. Will the firm need to make changes to its outsourcing arrangements? How will third party outsourcing controls need to be amended? Will changes to outsourcing arrangements give rise to new third party dependencies?
16. Will the firm's group structure bring it within the scope of the proposed requirement to establish an intermediate EU parent undertaking²²?
17. How many EU employees in the U.K. does the firm have? How many U.K. employees in the EU? Does the firm anticipate changes to its headcount or immigration issues for its employees?
18. Has the firm identified the key personnel that will hold senior roles and/or significant management functions? Has the firm considered the reporting lines within the group?
19. Which EU financial market infrastructure is accessed from the U.K. and vice versa?
20. Are there workarounds to market infrastructure access, eg by encouraging U.K. providers to offer lookalike precedents?
21. Can the firm amend its contracts with customers to facilitate future service provisions using reverse solicitation or similar techniques (as discussed below under "Minimizing the need for relocation")?

Consideration of these initial questions allows more granular planning to be instigated based on a firm's own circumstances and those of its group. Any planning must also take into account the impact of relevant forthcoming legal and regulatory changes affecting the firm, given that the U.K. remains an EU member state until the point of exit from the EU and, as a member state, remains bound by EU law and regulation. The U.K. is also committed²³ to implementing "pipeline" EU reforms that come into effect prior to EU withdrawal.²⁴ Firms will need to engage with the shape of this legislation in a post-Brexit U.K. in terms of cost savings whilst remaining in conformity with any enhanced equivalence deal that may transpire.

Options for Not Moving

With a little ingenuity, it is possible for firms to avoid moving meaningful business to the EU-27. There are a number of workarounds²⁵. The City of London has been a global financial centre for centuries. Current methods of service provision, contractual terms and product sales to EU customers might need to be adjusted to match more closely those used for rest-of-world customers. As evidenced by the levels of non-EU business in the City and substantial

²² See proposed new Article 21b, Capital Requirements Directive. We discussed the implications of these proposals in our Client Note, *Implications for Non-EU Banking Groups of the EU's New Intermediate Holding Company Proposals*, available at <https://www.shearman.com/perspectives/2016/12/implications-non-eu-banking-groups-of-new-proposal>.

²³ See FCA Statement following UK referendum result, June 24, 2016, available at: <https://www.fca.org.uk/news/statements/statement-european-union-referendum-result>.

²⁴ A non-exhaustive list of recent and forthcoming legal and regulatory obligations arising from EU membership includes: MiFID II/MiFIR; PRIIPs Regulation; Securities Financing Transactions Regulation; NIS Directive; General Data Protection Regulation; UK Financial Services (Banking Reform) Act; CRD V/CRR II package; the Securitisation Regulation; the IFRS 9 Regulation; the potential prudential regime for smaller investment firms; the BRRD reforms; Proposed amendments to EMIR; and proposals relating to clearing euro-denominated assets.

²⁵ See, for example, those set out in *A Blueprint for Brexit, A: the future of global financial services and markets in the UK*, Barnabas Reynolds, available at <http://www.shearman.com/~media/Files/NewsInsights/Publications/2016/11/Barnabas-Reynolds--A-Blueprint-for-Brexit.pdf>.

business done by U.S. institutions with EU customers, the recent EU innovation of the passport, which has effectively been in place properly only since 2007 for investment business, is by no means essential for the servicing of EU customers.

Talk of a cliff edge for financial services contracts has been exaggerated. As we explained in our previous [client note](#) on continuity of contracts on a “hard” Brexit, performance under most the terms of financial instruments in existence on Brexit, including derivatives and insurance contracts, should be protected as “property under human rights laws,” placing the onus on EU regulators to demonstrate why rendering such contracts unlawful could be justified in the public interest. Using techniques such as reverse solicitation, it should be possible to adjust existing contractual arrangements so as to future-proof those arrangements for quite some time after Brexit.

The likelihood of some form of mutual recognition or enhanced equivalence deal between the U.K. and EU after Brexit should also be considered. This would preserve the status quo in terms of U.K.-EU access. It could also allow for some improvement and refocusing of U.K. regulation so as to permit more judgement-based supervision, high standards and fewer rules, which is the U.K.’s traditional style of regulation²⁶.

It should also be considered, when deciding future business structures and strategy, whether the U.K. is likely to remove regulatory red tape and lower taxes in the event of a no deal outcome. The likely future nature of EU regulation should be considered as well.

It is important to ensure any legal structures adopted are properly tested in law and not driven by political assertions of what the law is or might be.

Minimizing the Need for Relocation

Market and media commentary since the U.K.’s EU referendum has made clear that most international (particularly non-EU) institutions currently based in the U.K. have a preference not to move any meaningful business to the EU-27. Financial sector firms need to identify the practical steps they can take in order to avoid costly and risky relocations²⁷.

Practical steps to take will vary from firm-to-firm, but any firm should consider undertaking the following exercise:

1. Make a robust and thorough assessment of any perceived cliff edge issues for existing client relationships.
2. Make enhancements to existing client and counterparty relationships where possible (for instance, by considering appropriate assignment clauses to enhance property right-based protections and adding reverse solicitation provisions where desired by clients who wish to continue the relationship), allowing for future optionality—by amendments to contracts or side letters.

²⁶ For discussion of a possible expanded or enhanced framework for equivalence decisions see *A Template for Enhanced Equivalence: Creating a Lasting Relationship in Financial Services between the EU and the UK*, Barnabas Reynolds, available at <http://www.shearman.com/~media/Files/NewsInsights/Publications/2017/07/LNDOCS011040030v16ConsolidatedAnEquivalenceRegulationFINAL02.pdf>.

²⁷ For a detailed discussion of the steps that financial services firms should take now to avoid the expense of moving operations out of the U.K., see *The Art of the No Deal—How Best to Navigate Brexit for Financial Services*, Barnabas Reynolds, available at <http://www.shearman.com/en/newsinsights/publications/2017/11/the-art-of-the-no-deal>.

3. Ensure that any business which comes in through reverse solicitation is properly documented and accepted, to ensure a robust compliance framework and documentary trail.
4. Ensure a thorough analysis is made of what business is truly cross border in law, so that non-U.K. regulatory provisions are applied only when necessary, and consider whether, with adjustments, the EU's regulatory perimeter need be invoked at all.
5. Consider solutions for assisting customers in coming to the U.K. in a low-cost way to receive services, for instance by establishing a U.K. subsidiary such that all future provision of financial services is purely domestic U.K., and EU-facing activities are intragroup.
6. Consider other techniques for ensuring that regulatory provision takes place in the U.K., for instance, the establishment of a trust to receive insurance policies and hold the benefit on trust for EU-27 customers.
7. Consider in detail individual business areas and the laws surrounding those areas to allow business moves to be minimized, for instance, indirect clearing, agency arrangements, give-up agreements, delegation, outsourcings, branching back and reinsuring back into the U.K. from the EU-27.
8. Consider market-driven and infrastructure-based solutions, for instance U.K. infrastructure offering derivative or lookalike products which permit trading to continue in the U.K. in spite of any issues found in trading on EU-27 platforms.
9. Liaise with U.K. Government on the introduction of possible tax incentives and regulatory improvements so as to optimize business models, whilst ensuring they are safe for the U.K., the global markets and the U.K. taxpayer.
10. Take steps to retain talent and jobs by assisting staff with any immigration approvals or other support needed to allow them to stay in the U.K.

Legal Structure of Business Transfers

Having assessed their existing legal entity structure, client base, and options for remaining in the U.K., firms wishing to maintain current delivery methods to EU customers may still identify the need to transfer certain of their business lines to an existing or newly established EU affiliate after Brexit. There are a number of methods by which business may be transferred.

Novation of Existing Contracts

Novation is a means by which rights and obligations of a U.K. entity can be transferred to an EU entity. Under a novation, the existing or newly established EU entity would take on the rights and obligations of the U.K. entity. Novation can also be used to transfer rights and obligations from EU entities to U.K. entities. Since novation involves the replacement of an existing contract with a new contract and the extinguishment of the old contract, it is also only valid if express consent to the novation is obtained from the counterparty. Novation can, therefore, be impractical and costly where multiple contracts are involved, as it would require individual novation agreements for each client.

FSMA Part VII Transfer to Non-UK Entity or UK SPV

Where banking business is to be transferred, Part VII of the Financial Services and Markets Act 2000 sets out a statutory scheme for the transfer of banking business (in whole or in part) to another legal entity via court process²⁸. The procedure under Part VII of FSMA is a well-established mechanism for transferring banking business with a deposit-taking element and of insurance businesses. The Part VII transfer does not involve the negotiation of individual novation agreements and does not require the transferor to solicit consent.

There is no precedent in banking for an entire business transfer to an entity outside the U.K., but such a transfer is contemplated by FSMA. It is possible, however, at least in theory, to transfer banking business to an entity established in another EU member state under the Part VII procedure. For insurance, cross-border transfers between EU member states under Part VII are supported by the Solvency II directive, so should also be feasible.] Furthermore, if the transfer is done prior to the date of the U.K.'s withdrawal from the EU, the courts of the member state in which the transferee is established must recognise the transfer under the recast Brussels Regulation²⁹.

Cross-Border Merger

U.K. firms wishing to transfer operations into the EU, or EU firms wishing to transfer operations to the U.K., could conduct a merger under the Cross Border Mergers Directive³⁰ provided that the merger is between at least two companies incorporated in different EEA states. The effect of a cross-border merger is that one or more of the companies is dissolved, leaving one surviving entity post-merger. The cross-border merger can therefore be effected in order to leave the surviving entity in the jurisdiction of choice.

Societas Europaea

Traditional U.K.-incorporated companies cannot be re-domiciled into the EU. However, it is possible to re-domicile the head office of a Societas Europaea (SE) from one EEA state to another without resulting in the winding up of the SE or the creation of a new legal person. SEs can be registered in any EU member state and can exercise free movement rights within the EU to change their corporate domicile. It is open therefore for U.K. firms which are public companies to convert to SE status or establish a SE while the U.K. remains an EEA state and then re-domicile the head office of the SE to another EU member state prior to the U.K.'s withdrawal from the EU. Similarly, prior to Brexit, EU-based firms may relocate to the U.K. using this structure.

Under the SE Regulation³¹, an existing public limited company formed under the law of a member state and which has its registered office and head office in an EEA member state, may convert into an SE provided that for at least two years it has had a subsidiary governed by the law of another member state. An SE can also be formed by (i) merger of two or more public limited companies incorporated in different EEA states; (ii) formation of a holding SE by two or

²⁸ Part VII, FSMA, can also be used to effect transfers of insurance business. Cross-Border transfers of insurance business are governed under the EU Solvency II regime, which has been incorporated into Part VII, FSMA.

²⁹ Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

³⁰ Directive on Cross-Border Mergers of Limited Liability Companies (2005/56/EC), implemented in the UK by the Companies (Cross-Border Mergers) Regulations 2007.

³¹ Regulation (2157/2001) on the Statute for a European Company.

more private or public limited companies incorporated in different EEA states; or (iii) formation of a subsidiary SE by two or more companies, firms or other legal bodies in different EEA states subscribing for the shares of the subsidiary.

Annex: Forthcoming and Recent Legal and Regulatory Obligations Arising From EU Membership

Any planning must take into account how relevant forthcoming legal and regulatory changes are likely to affect the firm. The U.K. remains an EU Member State until the point of exit from the EU and, as a Member State, remains bound by EU law and regulation. The U.K. is also committed to implementing “pipeline” EU reforms that come into effect prior to EU withdrawal³².

Depending on its particular activities, a firm’s contingency planning must take into account the impact of key pipeline reforms, including those outlined in the table below.

REGULATORY REFORM MEASURE		IMPLEMENTATION TIMING
MiFID II/MiFIR	Wide-ranging overhaul of MiFID, affecting MiFID investment firms and credit institutions.	January 2018.
PRIIPs	Introduction of new pan-European key information documents (or KIDs) for packaged retail and insurance-based investment products.	January 2018
SFTR	A new EU regulation which will require all securities financing transactions to be reported to trade repositories. Additional reporting and risk disclosure requirements.	2018 – 2019
NIS Directive	Part of the EU’s cyber-security strategy, the directive will impose requirements on member states to ensure a secure and trustworthy digital environment throughout the EU. Various new requirements on operators.	May 2018
GDPR	For U.K.-EU data transfer, the European Commission must deem that U.K. protection of personal data will be adequate post-Brexit.	May 2018
U.K. Financial Services (Banking Reform) Act	This domestic legislation brings in bank ring-fencing and depositor protection.	January 2019
CRD V/CRR II package	Proposed amendments to CRR for Basel III implementation and implementation of the FSB’s TLAC ³³ standard.	2019 – 2021 (precise implementation dates to be confirmed).

³² See FCA Statement following UK referendum result, June 24, 2016, available at: <https://www.fca.org.uk/news/statements/statement-european-union-referendum-result>.

³³ FSB published Principles on Loss-absorbing and Recapitalisation Capacity of G-SIBs in Resolution: Total Loss-absorbing Capacity (TLAC) Term Sheet in November 2015, available at: <http://www.fsb.org/wp-content/uploads/TLAC-Principles-and-Term-Sheet-for-publication-final.pdf>.

REGULATORY REFORM MEASURE		IMPLEMENTATION TIMING
	Proposed amendments to CRDIV include a new requirement for non-EU groups with two or more entities in the EU to have an EU intermediate parent undertaking , where either the group is identified as a G-SIBs or the assets of the EU entities amount to EUR 30 billion ³⁴ .	No implementation timing yet—must be considered by the EU institutions.
Securitisation Regulation	A regulation on securitisation applying to all EU securitisation products. Includes due diligence, risk retention and transparency rules and criteria to identify “simple, transparent and standardized” (STS) securitisations. Linked amendments to CRR cover capital requirements.	2019 (precise implementation dates to be confirmed).
IFRS 9 Regulation	Replaces the incurred loss model under IAS 39 with an expected loss model for recognition of credit losses.	January 2018
Potential prudential regime for smaller investment firms	EBA recommendations on a new prudential framework for investment firms, with capital requirements focused on the risks that investment firms pose to customers and to market integrity and liquidity.	No implementation timing yet—must be considered by the EU institutions.
Recovery & Resolution—BRRD II reforms	A range of reforms relating to: implementation of TLAC and amendment of MREL ³⁵ ; amendments to provide exclusions to application of the bail in tool; a new “in-resolution” moratorium tool; and provisions to reflect new reforms on CCP recovery and resolution.	January 2019 and later
Proposed EMIR amendments on CCP supervision	A proposed Regulation to amend EMIR to give new supervisory powers to ESMA for EU and third-country CCPs, including a power for ESMA to recommend that a third-country CCP of “substantial systemic importance” should be EU authorised (which will require it to establish itself in the EU).	No implementation timing yet—must be considered by the EU institutions.
Proposed ECB oversight of CCPs clearing euro-denominated assets (CCP location)	ECB has published a recommendation that Article 22 of the Statute of the European System of Central Banks (ESCB) and of the ECB should be amended to empower the ECB to make regulations relating to clearing systems for financial instruments.	No implementation timing yet—the recommendation must be considered by the EU institutions.

³⁴ The draft proposals for amendments to CRDIV were published by the European Commission in November 2016, available at: <http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/COM-2016-854-F1-EN-MAIN.PDF>.

³⁵ Minimum Requirement for own funds and Eligible Liabilities.

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