

From: Anna-Maria Karjalainen
Sent: 16 August 2018 15:30
To: cmce@humbrophy.com
Subject: CMCE: Brexit WG call summary & next steps (13 August 2018)

Dear CMCE Member,

Please find below the summary of the Brexit WG call that took place on Monday. **A follow-up discussion on possible CMCE engagement with UK and EU policy-makers / regulators will take place at the CMCE Members meeting in Geneva on 12 September.**

Do not hesitate to contact us should you have any questions or comments.

Kind regards,
Anna-Maria

CMCE Brexit WG - update on recent UK statutory instruments (13 August 2018)

The advisory team gave an update, noting:

- The EU (Withdrawal) Act (**EUWA**) sets “exit day” at 29 March 2019. It will on that date convert into UK domestic law the existing body of directly applicable EU law (including EU Regulations) as at that date and will preserve UK laws implementing EU Directives (“**retained EU law**”).
- The UK and the EU have agreed the terms of a transitional arrangement, known as the “Implementation Period”, which would run from exit day until 31 December 2020. This Implementation Period is, however, contingent on a deal being reached, HM Treasury (and FCA) are therefore working on the basis that the financial services regulatory regime, under UK law, must be Brexit-ready as of exit day.
- HM Treasury has highlighted that there are “deficiencies” in the body of EU law to be converted on exit day, as the wording of each and every regulation will not translate neatly into the UK legal and regulatory environment: references to ESMA for example will need to be substituted with references to FCA or PRA; references to the EU may need to be substituted with references to the UK. But this is not a global “find and replace” exercise and HM Treasury has therefore published a draft SI (highlighted to the WG previously) which delegates authority to regulatory bodies, such as FCA, PRA and others, to amend technical standards under EU law so that the body of “retained EU law” will take effect as amended.
- Although HM Treasury will retain the final sign-off, FCA (and others) will effectively hold the pen on key items such as translating the MIFID2 RTSs/ITSs into UK law. As this is largely driven by a resourcing constraint at HM Treasury, it is likely that the FCA (and other regulators’) versions will go through unamended by HM Treasury.
- This means that FCA will hold the pen on key items for CMCE members, like RTS 20 and 21, where there are several interpretative and translation choices to be made.

- HM Treasury recently published 3 new SIs: The Central Counterparties (Amendment etc and Transitional) (EU Exit) Regulations 2018 (the **CCP Amendment Regulations**); the EEA Passport Rights (Amendment etc and Transitional Provisions) (EU Exit) Regulations 2018 (the **Passport Amendment Regulations**); and the Short Selling (Amendment) (EU Exit) Regulations 2018. HM Treasury expects to release many more draft SIs during Q3/Q4.
- The Passport Amendment Regulations (in broad terms) require EEA inwardly passporting firms to apply for and obtain authorisation (or variation of permission) from PRA or FCA, as appropriate, and provide for a transitional period of up to 3 years while their application is being processed. That transitional period allows those firms to operate on the basis of the scope of their passport as it existed immediately before exit day. The rules that will apply would be those applicable on exit day, so this does not take account of possible business extensions and changes during the grace period.
- The CCP Amendment Regulations takes a similar approach to EEA CCPs which are currently authorised by an EEA regulator under EMIR. Those CCPs will need to seek recognition by the Bank of England in order to do business “in the UK” and a 3 year transitional period is provided for under the draft regulations.
- In neither case, do the regulations mention the overseas persons exclusion. Further, HM Treasury’s explanatory communication indicates that it will look at “further specific transitional regimes for entities outside passporting / cross border licensing regime”. CMCE should keep this under close watch as (though it seems unlikely) it might signify an intention to reconsider aspects of the overseas persons exclusion.
- EEA firms seeking to take advantage of the transitional provisions under the Passporting Amendment Regulations will need to apply for FCA authorisation and notify intention to do so from January 2019. FCA indicates that it will assign a “landing slot” to each such firm, identifying a period (likely to be a 3 month period) during which its full application for authorisation (or variation of permission) must be submitted for approval by FCA. Landing slots will begin in Oct 2019 and run through into 2021. It seems that the FCA expects to receive lots of applications for authorisation or modification of permission, the timetable for firms applying for permissions is therefore likely to be longer because staff may be short.
- It was suggested that now is the moment to engage with the FCA on key RTS on the ancillary activity test and position limits for instance that will now be translated into English law. The FCA has asked another trade association to meet with it on this. Should the CMCE reach out to FCA to seek a meeting, to make sure that the FCA also hears the voice of the commodities industry on these key topics? There are a number of questions on how the AA test will be implemented in the UK, e.g. regarding geographic scope, EU vs UK market size, whether the 3 year retrospective rolling average will be of UK or EU volumes etc.

Discussion:

- A member asked whether this will make it more difficult for EEA firms to access UK trading venues. The advisors responded that if the overseas persons exclusion is not touched, this should not be impacted. However, while not likely, the UK could make the overseas persons exclusion harder to access for EEA firms.
- A member noted that individual CMCE members already had meetings with HM Treasury, facilitated by FCA, on these topics, and HM Treasury had seemed to understand what to do.

The advisors noted that the pen has now been handed to the FCA and it may be a risky strategy to rely on it remembering and correctly applying the conclusions from a previous meeting with HM Treasury. The member responded that their concerns were more acute on the EU side, e.g. on how the ancillary activity test and market size calculation may be changed, as previously discussed in the Brexit WG.

- The advisors noted that the previous CMCE Brexit WG discussion on the ancillary activity test and intelligence gathering had been put on hold given the ESMA letter asking the Commission to confirm whether RTS 20 should be interpreted at group or entity level, as members had agreed that no visible attention should be given to this issue while the Commission was preparing its response to ESMA. Now that this has been to a large extent resolved by the Commission's response, this issue could be brought up again.
- Another member noted that they needed some time to digest this information before deciding whether to take action.

Next steps:

- **It was concluded that another discussion of the CMCE Brexit WG will be scheduled once members will have had some time to reflect, in order to (1) agree whether CMCE should reach out to the FCA to provide input into the drafting of relevant SI's and (2) to discuss CMCE activity on the EU side.**

Anna-Maria Karjalainen
Account Director

Hume Brophy | 41 Rue de la Science | 1040 Brussels | Belgium
T +32 (0)2 234 6860 | DD +32 (0)2 792 0233 | M +32 (0)4 7333 5066
anna-maria.karjalainen@humbrophy.com



Brussels | Dublin | London | New York | Hong Kong | Singapore | Frankfurt | Paris

14 Herbert Street, Dublin 2, Ireland T +353 (0)1 662 4712
55 King William Street, London, EC4R 9AD, UK T +44 (0)20 7862 6399
295 Madison Avenue, 12th Floor, New York, NY 10017 T +1 646 791 1201
20/F, Central Tower, 28 Queen's Road, Central, Hong Kong T +852 3008 1967
250 North Bridge Road, #15-02A Raffles City Tower, Singapore 179101 T +65 3157 5290
An der Welle 4, 60322 Frankfurt am Main, Germany T +49 (0)69 7593 7030
27 Avenue de l'Opéra, 75001 Paris, France T +33 (0)1 70 38 51 62

www.humbrophy.com

This e-mail is from HUME BROPHY. The e-mail and any files transmitted with it are confidential and may also be privileged and intended solely for the use of the individual or entity to whom they are addressed. Any unauthorised direct or indirect dissemination, distribution or copying of this message and any attachments is strictly prohibited. Personal data is processed in accordance with applicable laws, for more information please see our Privacy Policy <http://humbrophy.com/privacy-notice>