SECOND BITE OF THE CHERRY: RETURNING TO THE UK'S TEMPORARY PERMISSIONS REGIME

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UK Asset Management and Investment Funds Alert

As discussed in our previous alert here, the United Kingdom (UK) established a temporary permissions regime (TPR) in preparation for a hard Brexit with no Brexit transition period. However, the UK and European Union (EU) did agree to a Brexit transition period and, accordingly, the TPR has now been re-purposed so that it will apply at the end of that period. At that time, it is expected that the European Economic Area (EEA) passporting rights will cease, whether a trade deal is reached between the UK and EU or not.

The TPR will apply for a limited period. It will ensure that affected EEA firms and EEA funds, which currently have the benefit of passporting rights (for example, under the Undertakings for Collective Investment in Transferable Securities Directive (UCITS), the Alternative Investment Fund Managers Directive or the Markets in Financial Instruments Directive) to operate in, or market EEA funds into, the UK, can continue their UK business with minimal interruption. A key action item for firms and funds (or sub-funds) looking to use the TPR, will be to ensure that relevant passporting rights into the UK have been secured first. This can take some time to achieve and is now urgent. All firms and funds (or sub-funds) wishing to use TPR will need to notify the FCA of their intentions between 30 September 2020 and 30 December 2020, if they have not already done so in a prior TPR application window. Ultimately, firms and funds that enter the TPR will need to regularise their UK licensing and/or regulatory position, and will need to cease to rely upon the TPR. EEA firms and funds should be considering their plans in this regard. In this alert, we examine the effect of the reopening of the TPR application window by the Financial Conduct Authority (FCA) on 30 September 2020 and some of the details of the TPR.

WHY ARE WE TALKING ABOUT THIS NOW?

EEA passporting rights have continued to apply in the UK during the Brexit transition period. However, on 31 December 2020 or, if later, when the Brexit transition period ends, those passporting rights will cease and the TPR will come into force. The TPR is not self-executing, and firms or funds wishing to obtain temporary rights need to notify the FCA of their intentions.

In readiness, the window for firms and funds to notify the FCA of their intention to use TPR reopened on 30 September 2020 and will close on 30 December 2020[1] (or, potentially later if the Brexit transition period were to be extended).

The new TPR notification window will allow affected EEA firms and funds to notify the FCA of their plans to continue carrying out services in the UK after 31 December 2020 under the TPR. Affected firms and funds which made a notification in the previous window between January and March 2019 need take no further action, as long as no change to their prior notification is required.

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If EEA firms or EEA funds have not fully notified the FCA of their intention to use the TPR by the end of the current TPR notification window, those firms and funds may need to cease some, or all, of their UK activities at the end of the Brexit transition period. We would therefore encourage early engagement with the process to avoid unnecessary disruptions to the UK-based activities of EEA firms and funds.

EEA fund managers should note that they will need to deal separately with their own licensing position and the position of funds that they may manage. Accordingly, fund managers will need to notify their intention to provide services in the UK, and notify the details of each of the specific funds they wish to market into the UK under the TPR.[2]

There may, however, be other alternatives to TPR for some firms and funds. For example, it may be possible to continue to market funds after the end of the Brexit transition period under the UK's national private placement regime, subject to the requirements and limitations of that regime. Affected firms will also have the benefit of the Financial Services Contract Regime (FSCR), discussed below.

WHAT DO I NEED TO DO?

To establish whether you are eligible for the TPR, please refer to our previous alert here.

EEA firms and EEA funds wishing to rely on the TPR need to notify the FCA of their intentions through the FCA's Connect system if they have not already done so. The FCA Connect notification window is now open until 30 December 2020. Firms and funds which made a TPR notification during the previous TPR window, and whose permissions and fund structure have not undergone any relevant change, will be able to rely upon their previous notification and need take no further action. However, given the inherent importance of proper notification prior to 30 December 2020, we would suggest that firms and funds wishing to rely on a previous notification re-check their Connect TPR notification. Any firms or funds which have submitted a TPR notification in the previous window, and are concerned by any information they see on Connect, may raise their concerns directly with the FCA on 0300 500 0597.

Firms and funds that had not made an application when the previous notification window closed in March 2019, but now wish to obtain temporary rights under the TPR, will need to register with Connect (if not already done) and make a notification through the Connect system in the new application window.

Please note that though firms may enter into new business under the TPR, they are only able to rely on the TPR to carry out regulated activities for which they currently have permission under passporting rights, treaty rights or as a result of UK top-up permissions. Firms or funds that do not currently have the benefit of passporting rights in relation to UK-based activities cannot enter the TPR. Accordingly, a key action item for firms and funds (or sub-funds) looking to use the TPR will be to ensure that relevant passporting rights into the UK have been secured first. This can take some time to achieve and is now urgent, as it needs to be completed in sufficient time to allow a TPR notification to be made before the TPR application window closes.

Firms that provide MiFID services in the UK through tied agents, which submitted a notification in the prior application window, will now have the opportunity to update information regarding their tied agents in the UK, if appropriate. This updated information should be submitted to the FCA by email at TPQueries@fca.org.uk. The format of this notification should be in line with the Annex documents provided here. Firms which previously did

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not offer services through tied agents, but have introduced UK operations through tied agents since submitting their last notification, should also notify the FCA of this change in this manner.

Prior TPR notifications by firms may also be withdrawn by e-mail to the FCA, or by cancelling the firm's passport into the UK. In the case of fund managers notifying passported funds, the FCA has advised that firms wishing to make any amendments to information submitted in a prior application window should, before 9 December 2020, send an e-mail to recognisedcis@fca.org.uk requesting re-opening of their notification. The e-mail should include the fund manager's firm reference number. These fund managers should then be able to submit their updated notifications on Connect from the 14 December 2020 onwards.

The FCA has indicated that fund managers should refrain from submitting their notifications in relation to the marketing of funds until they are certain that the information included, specifically regarding funds for inclusion in their temporary marketing rights, will not be subject to any further change prior to 30 December 2020. Firms wishing to be proactive prior to obtaining such certainty, or wanting to keep track of their sub-fund population, may take advantage of in-built notification drafting facilities in the Connect window ahead of the final submission of their notification.[3] However, they will not be able to submit those changes until the FCA has reopened their Connect notification as discussed in the prior paragraph.

HOW LONG WILL A TEMPORARY PERMISSION LAST?

As stated in our previous alert, the TPR is currently scheduled to run for a maximum of three years, until the end of 2023, subject to possible extension. We understand, however, that industry insiders are expecting the TPR to be extended for use until 2025.

During this time, the FCA will contact those operating under the TPR to allocate individual “landing slots.” In their allocated landing slot, firms and funds will be expected to apply for the necessary UK-specific authorisations, or make the necessary notifications, to continue providing their services and/or undertaking UK-focused marketing activities on a permanent basis.

For firms operating under the TPR that will be applying for full UK licensing under Part 4A Financial Services and Markets Act 2000 (FSMA), the FCA intends to allocate landing slots at any time during the TPR lifespan. Failure of a TPR participant to complete a successful application during their allocated landing slot may result in the FCA cancelling their temporary permission.

For funds marketing into the UK under the TPR, the FCA similarly intends to allocate a landing slot any time during the three-year TPR lifespan.

In either case, the FCA has stated it plans to issue further directions regarding the allocation of landing slots in early 2021, and it will write to firms and funds directly regarding their specific slots.

Details of firms with temporary permissions will be shown on the FCA register.

TOP-UP PERMISSIONS DURING THE TPR

The FCA has made clear that firms will not be able to apply for top-up permissions (i.e. permissions to do things in the UK outside the scope of their passporting rights) on a temporary basis during their time operating under the

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TPR. Firms operating on a temporary permissions basis that wish to expand their regulated activities will need to apply for those extensions as part of their application for full FCA authorisation during their allotted landing slot.

Equally, firms currently operating with top-up permissions will need to submit a Variation of Permission application during their landing slot, rather than an application for full authorisation.

The FCA will supervise the UK business of firms in the temporary permissions regime as though they hold UK Part 4A permissions. This will bring those firms into the full scope of FCA supervision, without any of their current home-host state restrictions on UK regulatory action.[4] The FCA has provided guidance on the UK rules that will be applicable to firms in the TPR in its statement of transitional power.

INCLUDING UCITS SUB-FUNDS

UCITS sub-funds established and authorised by their home EEA state prior to the end of the Brexit transition period may only be marketed under the TPR if the sub-fund has already been passported into the UK. This means a UCITS sub-fund must have completed the passporting application process and be legally authorised for marketing in the UK under the UCITS passport prior to submitting a TPR notification to the FCA by the Connect system outlined above.

If a new UCITS sub-fund is authorised by its home EU state after the end of the Brexit transition period, it may, in certain circumstances, apply for temporary marketing rights under the TPR. This will only apply where at least one sub-fund of the same umbrella fund is already marketing under the TPR and the FCA is notified of the new sub-fund prior to the start of the relevant umbrella fund's landing slot. The FCA has said that it will publish further details regarding the process for these applications in due course.

Fund managers will not be able to enter new sub-funds of an EEA alternate investment fund (AIF) umbrella scheme into the TPR after the end of the Brexit transition period. These new AIF sub-funds will instead need to be marketed via the UK's national private placement regime.

THE OVERSEAS FUNDS REGIME (THE OFR)

In March 2020, the UK government launched a consultation to revise the process by which overseas (and particularly EEA) retail funds and money market funds (MMFs) can gain permanent permission to market to retail investors in the UK, so as to ensure the process is fit for its long-term purpose following the end of the Brexit transition period. The current onshoring process, under s.272 FSMA, is not considered a viable option for processing the high number of anticipated applications expected from EEA funds during their TPR landing slots.

The proposals for the new overseas fund regime envisage an outcomes-based equivalence structure for both retail funds and MMFs, the former focusing on equivalent standards of investor protection and the latter on regulations equivalent to those imposed on UK MMFs. In addition, HM Treasury must be satisfied there are adequate supervisory cooperation arrangements between the FCA and the relevant national competent authority.

Under this framework, HM Treasury will make equivalence determinations based on the advice of the FCA. Once a country in which a given fund is domiciled is determined as equivalent, retail funds (including MMFs marketing to retail investors) will be able to register with the FCA to become recognised. MMFs which market solely to professional investors will need to follow the notification procedure under the UK's existing national private

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placement regime. MMFs which are structured as retail funds and wish to market to both retail and professional investors must either (i) be located in a country with equivalence determinations for both MMFs and retail funds and register for recognition under the OFR, or (ii) be located in a country with an equivalence determination for MMFs and be recognised under s.272 FSMA.

The Consultation closed in May 2020, and the proposals are expected to gain legislative effect in the proposed Financial Services Bill. It is currently unclear when the OFR will finally become live and operational, although we assume that the intention is for it to be available for use in relevant landing slots under the TPR.

THE FSCR: WINDING DOWN FOR UNAUTHORISED FIRMS

There is a risk that EEA firms that do not enter the TPR, or that exit the TPR without full authorisation, may not be able to meet existing contractual obligations, as performing regulatory activities in the UK without appropriate permissions could be a criminal activity. However, to reduce the impact of the end of the Brexit transition period and the temporary nature of the TPR, the UK government has introduced the FSCR. This regime will ensure that unauthorised firms outside the cover of the TPR are able to wind down their UK regulated activities in an orderly manner, without taking on any new business in the UK.

The FSCR will take effect from the end of the Brexit transition period and will provide limited permissions for firms to perform pre-existing contracts for a limited period of time (Fifteen years for insurance contracts and five years for all others). The FSCR will not allow a firm to carry out regulated activities in new contracts, and it is designed to allow firms to run-off, close out or transfer obligations arising from contracts that exceed the time frame of the regime. For example, this regime would assist a UK branch of an EEA firm which, up to the end of the Brexit transition period, carries out a regulated activity in the UK under passporting or treaty rights, if that firm is unsuccessful in obtaining full UK authorisation during its landing slot or if it fails to join the TPR at all. Under the FSCR, this UK branch will be able to continue servicing pre-existing contracts for which it would usually need permission in the UK, although only for the period of time allowed by the FSCR. An exception to the FSCR is that it will not permit an EEA firm to continue managing any UK authorised funds.[5] EEA firms in that position will need to make a notification to enter the TPR to benefit from the transitional period.

Under the FSCR, firms will engage in a regime of contractual or supervised run-off ("CRO" and "SRO", respectively). CRO will apply to firms operating in the UK on a cross-border services basis without a UK branch and will work as a limited exemption to the general prohibition, under s.19 FSMA, for the purposes of winding down the activities in an orderly manner. Firms operating under the SRO, such as those with UK branches that do not enter the TPR, will, in summary, be permitted to carry out regulated activities that are necessary to perform pre-existing contracts.

Further details on the FSCR can be found here.

NEXT STEPS

We anticipate further communication from the FCA regarding Connect notifications, landing slots and the TPR generally in the coming weeks, and firms should watch out for relevant developments.

In preparation for making a TPR notification in the new TPR window, affected firms and funds should first register for the FCA's Connect system, unless they have done so previously. Those firms and funds should then promptly

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address the process of making their TPR notification, if they have not made a notification already. Firms and funds which have previously made a notification in 2019 should revisit their Connect portal to ensure all information remains correct and will need to e-mail the FCA as noted above if changes are required.

Any firms and funds looking to use the TPR in circumstances where they have not yet secured relevant passporting rights into the UK need to attend urgently to the process of obtaining those rights before the TPR notification window closes. They will then need to make a TPR notification via the Connect system.

Firms and funds that plan to enter the TPR will, before long, need to regularise their UK licensing and/or regulatory position and cease to rely upon the TPR. Firms and funds should be considering their plans in this regard.

FOOTNOTES

[1] Temporary Permissions Regime, Financial Conduct Authority, 10 July 2020

[2] Temporary Permission Regime for Inbound Passporting EEA Firms, Financial Conduct Authority, September 2020

[3] *id*

[4] Rules that will Apply to Firms and Fund Operators in the TPR, Financial Conduct Authority, 30 September 2020

[5] Financial Services Contracts Regime, Financial Conduct Authority, 30 September 2020

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