



Matheson

## Brexit Checklist for Fund Managers

December 2020

The end of the transition period, 31 December 2020, is now very clearly on the horizon. The likelihood of any agreement in respect of financial services, whether as part of an overall free trade agreement or as one of a suite of agreements covering various sectors, seems increasingly remote as each day passes.

Preparations should therefore be underway for a no-deal outcome and previously prepared Brexit contingency plans should be reviewed and refreshed with this mind. In order to assist our clients, we have prepared a checklist of the relevant items / actions to be considered in the coming weeks in order to ensure that they are best prepared to deal with the a no-deal outcome and experience as little disruption as possible to their businesses in terms of factors that are within their control.

**Potential Issue**

**Status / Action Item**

	<b>Potential Issue</b>	<b>Status / Action Item</b>
Corporate Governance	Brexit contingency plan should be reviewed and updated in light of the likelihood of no-deal being agreed and having regard to the items below.	While most clients have previously adopted Brexit contingency plans since the UK voted in favour to leave the EU, these contingency plans should be reviewed and updated as necessary, noting the items which we have flagged for consideration below, in order to ensure that they remain up to date and sufficient to deal with a no-deal outcome on 31 December 2020.
Investments	Review of fund investment policies and updates to fund documentation to prevent any inadvertent breaches.	<p>While it is likely that the majority of asset managers, together with fund boards, have already reviewed their offering documents along with the investment policies of the funds and incorporated the necessary updates to prevent any inadvertent breaches upon a no-deal Brexit, we wanted to flag this as a reminder in case any new funds have been approved since these updates occurred. Fund documentation may need to be amended if it was not future proofed for such new funds at the time they were approved or where these updates did not occur in the first place.</p> <p>By way of reminder, clients should ensure that the UK is specifically listed in the list of recognised markets (if previously covered by reference to EU member states) and also that any reference to investments in the EU in an investment policy is updated to specifically refer to the UK. Consideration should also be given to any investments in UK UCITS in the coming months pending an update from the Central Bank of Ireland (“<b>Central Bank</b>”) (which is discussed below in further detail).</p>

Investing in UK funds

UK UCITS will become non-EU AIFs in a no-deal Brexit and subject to an aggregate limit of 30% for investment in all AIFs.

UCITS funds will need to review their current investments in any underlying UK UCITS. However, for the immediate future, the Central Bank has **confirmed** that it will regard UK UCITS as being equivalent so there is no need to change any existing holdings in underlying UK UCITS. It is not clear how long this determination will remain in place so future action may be needed in due course.

Deposits and ancillary liquid assets held in UK credit institutions

UK credit institutions will be non-EEA “third country” credit institutions post transition period. The European Commission (“**Commission**”) has not as yet adopted an equivalence decision under the Capital Requirements Regulation (“**CRR**”) in respect of the UK. Therefore, the UCITS eligibility of any UK credit institution will depend on it continuing to be “*a credit institution authorised within a signatory state, other than a Member State of the EEA, to the Basle Capital Convergence Agreement of July 1988*”.

It will therefore still be permitted from an Irish perspective to invest in UK banks as the UK is a Basle signatory state, however, clients should ensure that the definition of permitted credit institutions in their offering documents is broad enough to cover signatures to the Basle Convention to ensure that UK credit institutions remain in scope post 31 December 2020.

Money market funds – eligibility of deposits with UK credit institutions

Under the Money Market Funds Regulation, EU money market funds (“**MMFs**”) can only invest in deposits with credit institutions where such credit institutions have their registered office in a member state or where a third country credit institution is subject to prudential rules considered equivalent to EU rules under the CRR. The Commission has not adopted an equivalence decision in respect of UK in this regard. In the absence of such a decision by the Commission, EU MMFs will not be permitted to invest in the deposits of UK credit institutions.

OTC derivative counterparty with UK investment firms authorised under the Markets in Financial Instruments Directive (“**MiFID**”).

UK investment firms will lose their MiFID licence post 31 December 2020 and therefore would not be permitted to be a counterparty to an OTC derivative transaction. However, the CBI has indicated that it will continue to permit such counterparties, although this will be kept under review and may change in the future.

Delegation	<p>Delegation of portfolio management to UK entities – a memorandum of understanding (“<b>MoU</b>”) will come into effect from 31 December 2020 to allow UK investment managers to continue to be appointed to provide such services to UCITS.</p>	<p>Given the MoU which has been agreed between the European Securities and Markets Authority (“<b>ESMA</b>”), national securities regulators and the Financial Conduct Authority which will come into effect upon a no-deal Brexit, there is no immediate action required and delegation of portfolio management to UK entities can continue.</p>
Benchmarks	<p>Use of a UK benchmark index.</p>	<p>UK administrators of benchmarks and third-country benchmarks recognised or endorsed in the UK will be removed from the ESMA register of administrators and third-country benchmarks. From 31 December 2020, UK benchmarks become third country benchmarks under the Benchmarks Regulation. However, under transitional provisions in the Benchmarks Regulation, third country benchmarks may continue to be used up to 31 December 2021.</p> <p>From 1 January 2022, the use of third country benchmarks will be subject to the adoption of an EU equivalence decision (which is not expected to be available before the end of the transition period) or the benchmark / its administrator being endorsed / recognised under the Benchmarks Regulation.</p>
Clearing	<p>UK Central Clearing Counterparties (“<b>CCPs</b>”) will need to be recognised by ESMA in order to continue to service EU clearing members.</p>	<p>UK CCPs will require either permanent or temporary equivalence decision and UK CCPs will need to be recognised by ESMA in order to continue to service EU clearing members.</p> <p>However, on 21 September 2020, the Commission adopted a time-limited temporary equivalence decision to give financial market participants 18 months to reduce their exposure to UK CCPs. While there is no immediate action required, this will need to be monitored to see what decision is reached (if any) over the 18 month period.</p>
Credit Rating	<p>UK credit rating agencies (“<b>CRAs</b>”) will become third-country agencies and their registration under the EU CRA Regulation will be withdrawn.</p>	<p>Unless a credit rating issued by a UK CRA has been endorsed in accordance with the endorsement regime under the CRA Regulation, it will not be possible to use such credit ratings to comply with EU law requirements requiring the use of a credit rating. As there is no resolution yet to this issue, we would advise that funds consider the extent that rely on such credit ratings for investment purposes to determine if any changes need to be made.</p>

ETFs	ETFs listed in Ireland but admitted to trading in London.	These ETFs will need to use a UK primary information provider from 1 January 2021 to meet their LSE ongoing obligations and additional filing requirements may be imposed. There is no immediate action required as awaiting a further update from the London Stock Exchange.
Data Protection	General Data Protection Regulation (“ <b>GDPR</b> ”) and transfer of personal data to the UK.	<p>Given that the UK will be considered a third country for GDPR purposes in the event of a no-deal Brexit, existing contracts may need to be reviewed to ensure they have the standard contractual clauses required to transfer the data to a “third country”, commonly referred to as “model clauses”. Under these clauses, any UK entity in scope would agree to apply equivalent protections to the personal data that is being transferred from the fund to the UK entity. Taking this approach is relatively straightforward and involves the entry into an amendment agreement to the existing agreement(s) in place between the fund (or on behalf of the fund) and the UK entity.</p> <p>For group entities where there are significant transfers of personal data across EU borders, you can consider entering into binding corporate rules between the relevant entities but the former option is more straightforward given the time constraints.</p>

Please get in touch with your usual Asset Management and Investment Funds Department contact or any of the contacts listed in this publication should you require further information in relation to the material referred to in this update.

Full details of the Asset Management and Investment Funds Department, together with further updates, articles and briefing notes written by members of the Asset Management and Investment Funds team, can be accessed at [www.matheson.com](http://www.matheson.com).

---

## Contacts



**Tara Doyle**

Partner

**T** +353 1 232 2221

**E** tara.doyle@matheson.com



**Michael Jackson**

Managing Partner

**T** +353 1 232 2000

**E** michael.jackson@matheson.com



**Anne-Marie Bohan**

Partner

**T** +353 1 232 2212

**E** anne-marie.bohan@matheson.com



**Shay Lydon**

Partner

**T** +353 1 232 2735

**E** shay.lydon@matheson.com



**Philip Lovegrove**

Partner

**T** +353 1 232 2538

**E** philip.lovegrove@matheson.com



**Elizabeth Grace**

Partner

**T** +353 1 232 2104

**E** elizabeth.grace@matheson.com



**Dualta Counihan**

Partner

**T** +353 1 232 2451

**E** dualta.counihan@matheson.com



**Liam Collins**

Partner

**T** +353 1 232 2195

**E** liam.collins@matheson.com



**Michelle Ridge**

Partner

**T** +353 1 232 2758

**E** michelle.ridge@matheson.com



**Barry O'Connor**

Partner

**T** +353 1 232 2488

**E** barry.oconnor@matheson.com



**Oisín McClenaghan**

Partner

**T** +353 1 232 2227

**E** oisín.mcclenaghan@matheson.com



**Donal O'Byrne**

Partner

**T** +353 1 232 2057

**E** donal.o'byrne@matheson.com



**Bronagh Maher**

Professional Support Lawyer

**T** +353 1 232 3757

**E** bronagh.maher@matheson.com

# Matheson

This document is confidential and commercially sensitive and is submitted to you on a confidential basis, solely to facilitate the decision whether or not to appoint Matheson to provide legal services to you. It is not to be copied, referred to or disclosed, in whole or part (save for your own internal purposes in connection with the consideration of this submission), without our prior written consent. Matheson retains ownership of the document and all rights in it, including ownership of copyright.

**DUBLIN**

70 Sir John Rogerson's Quay,  
Dublin 2  
Ireland

T: +353 1 232 2000  
E: dublin@matheson.com

**CORK**

City Gate  
Mahon Point, Cork  
Ireland

T: +353 2 1240 9100  
E: cork@matheson.com

**LONDON**

1 Love Lane  
London EC2N 7JN  
England

T: +44 20 7614 5670  
E: london@matheson.com

**NEW YORK**

200 Park Avenue  
New York, NY 10166  
United States

T: +1 646 354 6582  
E: newyork@matheson.com

**PALO ALTO**

530 Lytton Avenue  
Palo Alto, CA 94301  
United States

T: +1 650 617 3351  
E: paloalto@matheson.com

**SAN FRANCISCO**

156 2nd Street  
San Francisco CA 94105  
United States

T: +1 650 617 3351  
E: sf@matheson.com