ALLEN & OVERY

Possible Brexit scenarios for asset managers who are managing a UCITS or AIF

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This note provides a high-level overview of the potential consequences post-Brexit for managers of a UCITS or an AIF, whether directly appointed as a UCITS Management Company (ManCo) or an AIFM or as a delegate.

It is based on a number of assumptions:

- When Brexit occurs pursuant to the Treaty on the European Union (i.e. at the end of the two-year period after the UK Government submits the Article 50(2) notice, assuming no extension) the withdrawal agreement (if any) will not deal with the UK ceasing to be an EEA member state. Rather, for these scenario-planning purposes, the UK will no longer be in the EEA following Brexit. As such, the scenarios are based on the straightforward (and likely) proposition that the UK becomes a third country following Brexit without any grandfathering arrangements in place.
- The EEA (and individual member states) do not take a retaliatory or punitive approach to cross-border activities involving the UK – e.g. prohibiting relevant EEA firms from delegating to UK firms.
- The UK has not managed to successfully negotiate any individual bilateral agreements with individual EEA member states – e.g. to introduce a mutual recognition or bilateral passporting regime for UK (former) UCITS or AIFs.

Other points to note:

- The UCITS Directive (UCITSD) and the AIFMD have application to the EEA member states (EU member states plus Iceland, Norway and Liechtenstein) and so, in the table below, we have simply referred to the EEA rather than the EU.
- In relation to marketing activities, we have not gone into great detail on the impact on regulated activities arising in relation to either "investment advice" or the "reception and transmission of orders". These are fact-specific in many marketing scenarios and beyond the scope of this note.
- We have assumed that the UK ManCo or AIFM does not have an affiliate EEA ManCo or AIFM that it can simply switch to. Having that option may be extremely helpful in practice.
- We have not gone through the scenario of an EEA ManCo appointed as manager of a UK UCITS or AIF. It is not overly common; however, further advice on any point can be provided on request.
- If you have a structure with a UK AIF as a 'master' and an EEA AIF as a 'feeder' with an EEA AIFM that 'feeder' may have issues with its marketing passport once the UK ceases to be in the EEA.
- It is beyond the scope of this note to consider any potential loss of mutual recognition for UK UCITS currently marketed outside the EEA, e.g. in Asia or South America.

No	Situation	Impact on Management/Delegation	Solution	Impact on Marketing	Solution
UCITS MANCOS AND UCITS					
1.	UK UCITS ManCo for a UK UCITS	No expected impact. UK CIS rules may be relaxed in part, particularly if the UK takes the position that former UK UCITS will only be publicly	N/A	No expected impact on UK marketing (assuming fall within the NURS regime or a grandfathering regime for UK UCITS), but for EEA	No solution for EEA retail investor marketing. For EEA professional investors, marketing under local private placement regimes

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		marketed in the UK and privately placed in the EEA		marketing the UK UCITS ManCo loses its Article 91 UCITS marketing passport. UK UCITS will become a non-EEA AIF. UK UCITS ManCo (and its distributors) will have to comply with local private placement regimes for marketing to retail investors (unlikely to be available) and professional investors (may be available)	will also need to comply with Article 42 AIFMD regime (transparency and non-listed company rules – latter unlikely to be applicable)
2.	UK Delegate of UK UCITS ManCo for a UK UCITS	No impact on delegation is expected	N/A	As above	As above
3.	EEA Delegate of UK UCITS ManCo for a UK UCITS	Impact on delegation is uncertain. If UK does continue current approach under the UCITSD then the EEA delegate (1) needs to be authorised/registered for the purpose of asset management [should be], (2) needs to be subject to prudential supervision [should be], and (3) must be in an EEA state where there is co-operation between UK FCA and the regulator in that EEA state [uncertain] (see Articles 13 and 102(3) UCITSD)	UK will need to ensure that a co-operation agreement is in place with relevant EEA states' regulators for this purpose	As above	As above
4.	UK UCITS ManCo for an EEA UCITS (structure not common, but it is used – see Article	As the UK UCITS ManCo will not be in the EEA, it loses its Article 16 UCITSD management passport	Establish/use an EEA ManCo for that EEA UCITS and have it delegate back to	Loss of Article 16 UCITSD management passport means loss of the Article 91 UCITSD	If put in a new EEA ManCo then could re-access the Article 91 UCITSD marketing passport for

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	16(3) UCITSD)	and so cannot manage the EEA UCITS	the UK UCITS ManCo. However, then see Scenario 8 re the delegation by the EEA ManCo to a UK delegate and co-operation agreement issue	marketing passport	marketing to retail and professional investors in the EEA. For marketing into the UK, see Scenario 7
5.	UK Delegate of UK UCITS ManCo for an EEA UCITS (structure not common, but it is used – see Article 16(3) UCITSD)	See above. Delegate could not be appointed	Establish/use an EEA ManCo for that EEA UCITS and have it delegate back to the UK delegate. However, then see Scenario 8 below re the delegation by the EEA ManCo to a UK delegate and co-operation agreement issue	As above	Need to put in a new EEA ManCo
6.	EEA Delegate of UK UCITS ManCo for an EEA UCITS (structure not common, but it is used – see Article 16(3) UCITSD)	See above. Delegate could not be appointed	Establish/use an EEA ManCo for that EEA UCITS and have it delegate back to the EEA delegate	As above	Need to put in a new EEA ManCo
7.	EEA UCITS ManCo for an EEA UCITS	No expected impact	N/A	For marketing to the UK, the EEA UCITS ManCo will lose the Article 91 UCITSD marketing passport. Marketing to UK retail investors may be significantly restricted and the EEA UCITS ManCo may need to involve a UK FCA regulated firm. Such UK FCA firm may need to conduct any retail investor marketing within the limited exemptions set out in	(1) UK could introduce grandfathering to ensure that a UCITS passported into the UK before Brexit continues to be a Section 264 FSMA recognised scheme, capable of being sold to UK retail investors (2) UK FCA could amend COBS 4.12 (*restrictions on promotions of non-mainstream pooled investments*), so it does not apply to

No	Situation	Impact on Management/Delegation	Solution	Impact on Marketing	Solution
				COBS 4.12 (*restrictions on promotions of non-mainstream pooled investments*). Any marketing to professional investors may need to be under the UK private placement regime. Regulated activities by the EEA UCITS ManCo in marketing in the UK may need to be under the overseas person exemption. For marketing to the EEA, no expected impact	UCITS passported into the UK before Brexit, to make it easier for such UCITS to continue to be sold to UK retail investors (3) More broadly, the UK could unilaterally recognise UCITS from EEA states, and give passport rights to an EEA UCITS ManCo, enabling the sale of relevant UCITS to UK retail investors on a similar basis to the current regime (4) The relevant EEA UCITS ManCo could seek to rely on Section 272 FSMA (*Individually recognised overseas schemes*)
8.	UK Delegate of EEA UCITS ManCo for an EEA UCITS	Impact on delegation is uncertain. The EEA UCITS ManCo will need (1) the UK delegate to be authorised/registered for the purpose of asset management [should be], (2) the UK delegate to be subject to prudential supervision [should be], and (3) a co-operation agreement in place between its EEA home state regulator and the UK FCA [uncertain] (see Articles 13 and 102(3) UCITSD)	UK will need to ensure that a co-operation agreement is in place with relevant EEA states' regulators for this purpose	As above	As above

No	Situation	Impact on Management/Delegation	Solution	Impact on Marketing	Solution
9.	EEA Delegate of EEA UCITS ManCo for an EEA UCITS	No expected impact	N/A	As above	As above
AIFMS AND AIFS					
10.	UK AIFM for UK AIF	Although it becomes a non-EEA AIFM with a non-EEA AIF, and so moves from Article 31/32 regime into current Article 42 regime, no impact on management is expected. Will be subject to UK FCA FUND rules and UK AIFMD Regulation (unless amended, but see Impact on Marketing). Level 2 AIFMR will no longer have direct effect unless UK incorporates by legislation	N/A	No expected impact on UK marketing. For EEA marketing, the UK AIFM having lost its Article 32 passport and by coming under Article 42 regime (as implemented by each EEA state, and so may have varying requirements), will have to use EEA local private placement regimes (to the extent available or as implemented by each EEA state) and comply at AIFMD level with transparency and non-listed company rules	The UK may seek to be recognised as a third country under Articles 37 to 41 (assuming implemented) and the UK FCA may then seek to retain the current FCA FUND 3 rules and UK AIFMD Regulation, together with legislating into UK law the Level 2 AIFMR, so as to reduce the burden on UK AIFMs of dual authorisation under the AIFMD EEA member state of reference regime. This may make it desirable for the UK to avoid repealing unpopular aspects of the AIFMD regime, at least in the short- to medium-term and bring in the Level 2 AIFMR. Again, appropriate co-operation arrangements will need to be in place between the UK FCA and regulators in EEA states
11.	UK Delegate of UK AIFM for UK AIF	No expected impact on delegation. UK FCA could seek to relax some aspects of FCA FUND rule 3.10 and Regulation	N/A	As above	If UK AIFM seeks to market as a third country under Article 40 (assuming implemented), the

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		26 of the UK AIFMD Regulation re delegation, but see Scenario 10 as to why that may not happen			existing AIFMD and AIFMR rules on delegation will have to be complied with by the UK AIFM
12.	EEA Delegate of UK AIFM for UK AIF	Impact on delegation is uncertain. Unless UK relaxes UK regime (but see Scenario 10 as to why that may not happen), there will need to be a co-operation agreement between UK FCA and the regulator in the delegate's relevant EEA state (see FCA FUND rule 3.10.2(2)(d)). EEA delegate will continue to be subject to EEA laws	UK will need to ensure that a co-operation agreement is in place with relevant EEA states' regulators for this purpose	As above	As above
13.	UK AIFM for EEA AIF	Structure becomes a non-EEA AIFM with an EEA AIF, and so UK AIFM no longer has an Article 33 AIFM management passport (and, for marketing, moves from the Article 31/32 regime into the Article 42 regime). Will be a matter of the domestic laws of EEA AIF whether it can appoint a non-EEA AIFM (often is permissible). Those domestic laws may impose requirements on the UK AIFM regarding how it manages the EEA AIF. The UK AIFM will be subject to UK FCA FUND rules and UK AIFMD Regulation (unless amended, but see	If Article 40 is implemented, then, due to the fact that UK AIFM will have to get authorised in an EEA member state of reference, the UK FCA may seek to retain the current FCA FUND 3 rules and UK AIFMD Regulation, together with legislating into UK law the Level 2 AIFMR, so as to reduce the burden on UK AIFMs of dual authorisation under the AIFMD EEA member state of reference regime, i.e. the UK may be better off to continue the	By being under the Article 42 regime, UK AIFM will have to use local private placement regimes (to the extent available or as implemented by each EEA state) and comply when marketing to professional investors with the AIFMD level rules on transparency and non-listed companies	The UK may seek to be recognised as a third country under Articles 37 to 41 (assuming implemented) and the UK FCA may then seek to retain the current FCA FUND 3 rules and UK AIFMD Regulation, together with legislating into UK law the Level 2 AIFMR, so as to reduce the burden on UK AIFMs of dual authorisation under the AIFMD EEA member state of reference regime. Again, appropriate co-operation arrangements will need to be in place between the UK FCA and regulators in

No	Situation	Impact on Management/Delegation	Solution	Impact on Marketing	Solution
		Impact on Marketing). Level 2 AIFMR will no longer have direct effect unless UK incorporates by legislation; however, if Article 40 is implemented then UK AIFM will be required to get authorised in an EEA member state of reference by virtue of managing an EEA AIF. See Impact on Marketing	AIFMD and AIFMR regime in the UK to best position UK AIFMs		EEA states
14.	UK Delegate of UK AIFM for EEA AIF	Unless domestic EEA laws of the AIF, where it is being managed by a non-EEA AIFM, have an impact, no impact on delegation is expected. UK FCA may relax FCA FUND rule 3.10 and Regulation 26 of the UK AIFMD Regulation re delegation, but see Impact on Marketing	N/A	As above	If UK AIFM seeks to market as a third country under Article 40 (assuming implemented), the existing AIFMD and AIFMR rules on delegation will have to be complied with in full. See above
15.	EEA Delegate of UK AIFM for EEA AIF	Unless domestic EEA laws of the AIF, where it is being managed by a non-EEA AIFM, have an impact, no impact on delegation is expected. However, there must be co-operation between UK FCA and the regulator in the relevant EEA state (see current FCA FUND rule 3.10.2(2)(d)). EEA delegate will continue to be subject to EEA laws	UK will need to ensure that a co-operation agreement is in place with relevant EEA states' regulators for this purpose	As above	As above

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16.	EEA AIFM for EEA AIF	No expected impact	N/A	UK professional investors will not be accessible through Article 32 marketing passport. No impact on marketing to UK retail investors as that is a matter of UK law	Will have to use UK private placement regime (which would be expected to be available) to access UK professional investors
17.	UK Delegate of EEA AIFM for EEA AIF	Impact on delegation is uncertain. The EEA AIFM will need (1) the UK delegate to be authorised/registered for the purpose of asset management [should be and if not, the EEA AIFM will need prior approval from its regulator], and (2) a cooperation agreement in place between its EEA home state regulator and the UK FCA [uncertain] (see Article 20 AIFMD)	UK to ensure that a co-operation agreement is in place with relevant EEA state for this purpose	As above	As above
18.	EEA Delegate of EEA AIFM for EEA AIF	No impact on delegation is expected	N/A	As above	As above
19.	UK AIFM for non-UK non-EEA AIF	Although the UK AIFM becomes a non-EEA AIFM with a non-EEA AIF, and so moves from Article 36 regime into current Article 42 regime, no impact on management is expected. Will be subject to UK FCA FUND rules and UK AIFMD Regulation (unless amended, but see Impact on Marketing). Level 2 AIFMR will no longer have direct effect unless UK incorporates by	N/A	No expected impact on UK marketing. For EEA marketing, the UK AIFM will move from the Article 36 EEA private placement regime to the Article 42 EEA private placement regime (to the extent available or as implemented by each EEA state) and continue to comply at AIFMD level with transparency and non-listed company rules. UK could relax	The UK may seek to be recognised as a third country under Articles 37 to 41 (assuming implemented) and the UK FCA may then seek to retain the current FCA FUND 3 rules and UK AIFMD Regulation, together with legislating into UK law the Level 2 AIFMR, so as to reduce the burden on UK AIFMs of dual authorisation under the AIFMD EEA

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		legislation		rules on UK AIFMs with non-EEA AIFs, but may create dual regulatory burden for those UK AIFMs who want to market into EEA under third country Articles 37 to 41 regime (assuming implemented) because such EEA access will require them to also comply with AIFMD regime and AIFMR if they want to access a third country marketing passport to EEA professional investors	member state of reference regime. This may make it desirable for the UK to avoid repealing unpopular aspects of the AIFMD regime, at least in the short- to medium-term and bring in the Level 2 AIFMR. Again, appropriate co-operation arrangements will need to be in place between the UK FCA and regulators in EEA states
20.	UK Delegate of UK AIFM for non-UK non-EEA AIF	Unless domestic laws of the non-UK non-EEA AIF, where it is being managed by a UK AIFM, have an impact (unlikely), no impact on delegation is expected. UK FCA may relax FCA FUND rule 3.10 and Regulation 26 of the UK AIFMD Regulation re delegation, but see Impact on Marketing	N/A	As above	If UK AIFM seeks to market as a third country under Article 40 (assuming implemented), the existing AIFMD and AIFMR rules on delegation will have to be complied with in full. See above.
21.	EEA Delegate of UK AIFM for non-UK non-EEA AIF	See above	N/A	As above	As above

Key contacts

This note provides guidance as to possible scenarios and impacts only, and should not be relied upon without seeking specific legal advice. If you do require legal advice in respect of a specific matter mentioned in this note, please do not hesitate to contact us.

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