



Brexit Briefing

This special Brexit Briefing is an update to the note we sent to BVCA members on 16 January 2019 following the outcome of the vote on the Withdrawal Agreement in the UK Parliament. The UK is scheduled to leave the EU on 29 March 2019 and as negotiations are ongoing, this briefing is designed to update firms on the UK's no-deal preparations and the BVCA's work with policymakers.

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1. Introduction

The BVCA's view has always been that a no-deal or disorderly Brexit would be a significant issue for the private equity and venture capital industry - for fund managers as well the businesses they invest in and the people they employ. This is because a no-deal Brexit would mean there is no transitional period, effectively creating a "cliff edge" on 29 March 2019 whereby UK and EU firms may find that their levels of access to each other's markets are suddenly significantly reduced or, in certain situations, blocked entirely.

This briefing provides an update for firms preparing for Brexit, **including a no-deal scenario**. It covers the BVCA's work with UK policymakers such as HMT, HMRC and the FCA, and updates from the EU. This briefing looks at areas that are relevant for private equity and venture capital firms (and indirectly their investors) and considerations for portfolio companies.

2. Private equity and venture capital firms – regulatory and tax updates

2.1. The impact of a no-deal Brexit on private equity and venture capital firms

The November edition of the BVCA's Technical Bulletin (chapter 2, [available here](#)) covers the impact for firms and investors under AIFMD, MiFID and EuVECA:

- AIFMD:
 - UK AIFMs exercising a marketing passport into the rEEA
 - rEEA AIFMs exercising a marketing passport into the UK
 - AIFMD cooperation arrangements / MOUs
 - AIFs previously marketed under the AIFMD marketing passport with current UK/rEEA investors
 - Cross-border management of AIFs
 - Portfolio company transparency and anti-asset stripping rules
- MiFID:
 - UK MiFID firms providing cross-border services in the rEEA
 - rEEA MiFID firms providing cross-border services in the UK
- EuVECA:
 - UK EuVECA manager marketing under the EuVECA marketing passport into the rEEA
 - rEEA EuVECA manager marketing under the EuVECA marketing passport into the UK
 - UK EuVECA manager managing an rEEA EuVECA fund
 - rEEA EuVECA manager managing a UK EuVECA fund
- UK temporary permissions regime for inbound EEA funds and firms

2.2. UK updates, including FCA events

The **UK Government** is publishing statutory instruments (SIs) to “prevent, remedy or mitigate any failure of EU law to operate effectively” in the event of a no-deal Brexit. The BVCA has been in discussions with HMT and the FCA throughout this process and provided feedback. There is guidance on the AIFMD SI ([available here](#)) and the EuVECA SI ([available here](#)) and the Government has stated that there will not be any changes to existing policy; the changes will reflect the UK's new position outside the EU.

The **FCA** has published its [proposals](#) for how certain parts of the FCA Handbook and guidance should be amended to cover any no-deal scenario, and on the **Temporary Permissions Regime (TPR)** for EU firms. The BVCA has [commented](#) on these proposals and asked for clarity and consistency as regards the application of the rules to members firms, both on “exit day” and on an ongoing basis. We raised some practical concerns on the proposed TPR such as the allocation of “landing slots” for firms wishing to leave the TPR and apply for full FCA authorisation, and increasing clarity around the notifications that different firms will need to make.

The FCA is [now accepting notifications](#) from EEA-based fund managers currently passporting into the UK who want to continue business in the UK in the event of a no-deal Brexit. This will allow fund managers providing cross-border services into the UK to carry on operating for a limited period while seeking full FCA authorisation. It will also allow EEA-domiciled AIFs marketed in the UK under a passport (e.g. Lux or Irish AIFM) to temporarily continue to be marketed in the UK. **Firms planning to use this regime must notify the FCA before 28 March 2019.** Firms will then receive a 'landing slot' for moving to full FCA-authorisation. Alternatively firms may wish to consider using the UK national private placement regime (NPPR).

The **FCA** is inviting firms to attend **Brexit events** it is hosting on 11 March (2pm in London) and 14 March (2pm in Edinburgh) and both will have a live webcast. Firms can [register here](#) and the FCA will explain how it has been preparing for Brexit and its expectations of firms.

2.3. European Commission update

In December 2018, the European Commission concluded that a very **limited number of contingency measures** were necessary to safeguard financial stability in the EU27 (see Q&A 21 and 22 [available here](#)). These limited measures do not directly benefit venture capital and private equity firms and their fund marketing or management activities¹.

2.4. UK & EU regulatory cooperation agreements

The FCA and ESMA have announced the agreement of a **Multilateral Regulatory Cooperation Agreement (MMoU)** between the FCA and EEA regulators.

The FCA has stated that the agreements “should also minimise the potential for disruption, which we know is particularly important for the investment management sector...”. ESMA stated that the agreements “will allow certain activities, such as fund manager outsourcing and delegation, to continue to be carried out by UK-based entities on behalf of counterparties based in the EEA”. The FCA press release is [available here](#) and the ESMA press release is [available here](#).

Firms in our industry will want to ensure the MMoU covers the following activities: EU firms delegating portfolio management to UK firms; UK managers marketing to EEA investors under EU Member States' NPPRs (where possible); and the cross-border management of funds.

The text of the MMoU has not been published. The BVCA has been in discussions with the FCA on whether the MMoU covers all the areas we would expect or mirrors the bilateral agreements signed between EEA and third country regulators which cover these areas.

The FCA has confirmed that the MMoU is based on existing precedents and existing MoUs in place for AIFMD, and meets the requirements under Regulation 59 of the Alternative Investment Fund Managers Regulations 2013 (covering marketing into the UK under the UK NPPR). The FCA has entered into NPPR MoUs with a number of third country authorities, as set out on its [website here](#). These follow the [ESMA 2013 guidelines](#).

¹ The Commission adopted two temporary and conditional equivalence decisions prolonging the access of EU firms to UK central clearing counterparties (CCPs) and UK central security depositories (CSDs), for 12 and 24 months respectively. It is also preserving the regulatory treatment (for 12 months) of derivative contracts currently exempted from the clearing obligation and the bilateral margin requirements that EU law imposes, when such contracts are transferred from the UK to the EU27.

The ESMA statement notes that the MMoU covers delegation. Our discussions with the FCA are ongoing, including on cross-border management.

2.5. Individual EU Member State preparations

Regulatory and legal preparations across the EU to facilitate continuation of existing cross-border arrangements for fund management and marketing are generally less developed than in the UK, although in recent weeks some Member States have been looking at specific no-deal legislation that would cover certain types of financial services provision. As noted above, the European Commission has recommended a number of limited measures and it is these measures that some Member States are implementing.

Many of the proposed laws in Member States are in draft form and it is unclear whether private equity and venture capital firms will benefit. We would therefore recommend that firms obtain specific legal advice to understand the impact of the proposals on their structures.

Some initial observations on different Member States' regimes are provided below – again this cannot be relied on as legal advice.

- **Luxembourg:**
 - There is a proposal to give the CSSF temporary powers, for a maximum of 21 months, to apply the legal provisions on EU passports to UK firms carrying out licensable activities in Luxembourg under free provision of services or through a branch or a tied agent at the time of a no-deal Brexit. These powers relate only to contractual relationships that were entered into by UK firms before a no-deal Brexit and to contracts concluded thereafter where they are closely linked to these pre-existing contractual relationships.
 - The CSSF also issued a [press release](#) in January to confirm that delegation of portfolio management will be possible to the UK once the MoUs are entered into. The press release then provided further detail on the UK's TPR and asked firms to send the CSSF an email following notifications made under the UK's TPR.
- **Germany, France, Sweden, Italy, Ireland, Belgium, Czech Republic and Spain:** It is unclear whether the proposals in these countries cover AIFMD and MiFID activities that are relevant for private equity and venture capital firms, or whether they relate to the limited contingency measures announced by the European Commission in December 2018 (see above).
- **Netherlands:** There is a proposal to extend the exemption available for certain non-EU investment firms from the MiFID licensing requirement to UK firms until 1 January 2021. The UK firms need to be licensed in the UK for the services they want to provide into the Netherlands and make a filing with the Dutch regulator. This decision still needs to be approved.

2.6. Tax implications of Brexit structuring

HMRC has been in discussions with the UK investment management industry bodies about steps their members may need to take in the context of Brexit. The BVCA Taxation Committee has explained to HMRC that member firms that want to continue to use, or need to use, the AIFMD marketing passport are typically establishing or have established a new AIFM in an EU jurisdiction and this new AIFM will perform certain functions for new funds (i.e. those where marketing will not be completed by 29 March 2019).

The discussions with the various representative bodies have focused on whether a UK tax charge is triggered where firms establish a presence through a new entity established in an EU jurisdiction. In broad terms, HMRC's view is that if no value-generating functions or assets (which could include a fund or asset management contract) are transferred to the entity from the UK, then it is unlikely that a tax charge would be triggered by such arrangements.

On that basis, in the context of closed-ended funds, where any new EU entity will only be performing certain limited functions in relation to new funds and contracts etc. relating to existing funds will be undisturbed, it seems unlikely that there will be an exit tax charge, but each firm must perform its own fact-based analysis. Members may be asked for evidence of their own position by HMRC and are expected to retain this.

The BVCA Taxation Committee has published [an example](#), which covers HMRC's position in more detail. While this document has not been formally endorsed, it has been reviewed by HMRC and they are comfortable with the position stated in the document. ***We recommend members review this document carefully and obtain the necessary advice where required.***

3. Portfolio companies – no-deal information

3.1. Considerations for portfolio companies

Transactions

Our members will be live to the commercial risks posed by Brexit when doing transactions. From a legal perspective, documentation is unlikely to be impacted hugely (e.g. there has been no mass adoption of Brexit material adverse change provisions) but there are a few points to bear in mind.

Where the European Commission has reviewed a merger and issued a decision prior to the Brexit date, the CMA will have no jurisdiction; however, for mergers that are subject to merger review by the Commission but where no decision has been forthcoming, the CMA will have jurisdiction (if the UK merger control thresholds are met). This could result in conflicting decisions as between the CMA and the Commission. Members transacting on deals during this period should therefore engage early with the CMA.

Currency volatility may impact not just valuations generally, but also provisions in transaction documentation such as liability caps, funding commitments and fee levels.

Advice should be taken over jurisdiction clauses to ensure judgments in EU Member States are enforceable in a no-deal scenario.

Employment

Continued access to talent is a priority for both asset managers and portfolio companies of the funds they manage. While employees resident in the UK before 29 March 2019 will be able to obtain settled or pre-settled status, a no-deal exit will nonetheless have an impact on the workforce. Businesses must check which EU nationals are working in the UK and whether they qualify for a work permit under the rules applicable to non-EU nationals. Similarly, businesses with UK nationals working in the EU will need to assess whether such nationals would qualify for work permits under the relevant EU rules. Businesses will need to update their processes to deal with visas and travel of their employees.

Supply chain and commercial arrangements

Businesses should review their supply chains and consider how they will manage the logistics of import and export declarations and procedures. Pricing and costs may be impacted by a no-deal Brexit as tariffs may apply. Existing commercial contracts may address the allocation of such cost (or not) and may make the contract too costly for the customer or too unprofitable for the supplier which may trigger a desire to terminate. The termination, “force majeure” and frustration provisions of material commercial contracts should be reviewed as it may be permissible for a counterparty to terminate the contract, impacting the security of supply if a customer or impacting revenue streams if a supplier. It is likely that being outside the customs union may cause delays and again the allocation of liability for such delays through the supply chain need to be considered. Similarly there are some provisions of contracts which may no longer apply as intended – such as a geographical restriction or exclusivity provision

referring to the EU, a contractual requirement to be licensed in the EU or a carve-out to restrictions in financing arrangements relating to acquisitions or disposals in the EU. While many businesses are not conducting a wholesale due diligence exercise on their commercial arrangements, material arrangements should be reviewed and the risks assessed.

Regulation/licensing

Portfolio companies will need to conduct a review of their licences, permits and regulation to which they are subject to ensure they continue to be covered by such licences post Brexit. Many may have relied on EU passporting or licensing rights allowing supply across the EU from the UK (or vice versa) which may no longer apply in a no-deal scenario. Restructuring may be required to ensure their activities continue to be permitted and any such restructuring may itself trigger other issues also requiring consideration. Specific sectors will have specific regulatory regimes to consider, for example: air transport regulation, environmental law, planning, health and safety laws, the REACH regime or financial services regulation. Import and export licences may be required and goods may be subject to different or additional certification regimes.

Data protection

The EU General Data Protection Regulation restricts transfers of personal data to countries outside the EEA which have not been determined by the European Commission to ensure an adequate level of protection for personal data. There is a risk that the UK will not benefit from an adequacy determination from the Commission (and in any event that determination process will only begin once the UK ceases to be an EU Member State) and in the long term the Commission may decide that aspects of the UK are not “adequate”. Businesses will need to identify the flow of data between the UK and the EU and non EU-members, to ensure that data flows to other jurisdictions that are determined to be “adequate” by the Commission may continue.

Intellectual property

Policies for filing and renewals in Europe will need to be reviewed and adapted. Certain rights under EU law do not have equivalents under UK law and registrations may not cover the UK. The UK Government has released a series of technical guidance notes concerning what will happen to current EUTMs and design rights, patents, copyrights and exhausted intellectual property rights. These make clear that rights in all registered EUTMs will vest into new equivalent UK-only rights but this will not be an automatic process and therefore businesses will need to work through this.

3.2. UK no-deal information

Over the past few weeks, the BVCA has been attending the EU Exit Business Readiness Forum, which is run by the EU Exit Business Intelligence & Readiness Directorate (EUXBIRD, part of BEIS). These weekly meetings are chaired by senior civil servants from a range of government departments, and are aimed at keeping business intermediaries up-to-date on the latest Brexit information and guidance for business, with particular focus on what to do in the event of a no-deal. Issues addressed so far have included importing & exporting; workforce & people; organisational compliance; and intellectual property. The BVCA will continue to attend these meetings and will keep members updated on the relevant content. Materials from the meetings can be provided on request.

The UK Government has a wide range of no-deal planning information and guidance on its Brexit webpage. Some of the key areas of concern for portfolio companies are listed below. Please note that this not an exhaustive list.

General business and transitions

HM Government guidance:

- [The professional and business services sector and preparing for EU Exit](#) (includes relevant links for visas, data protection and cross-border arrangements)
- [Operating in the EU after Brexit](#)
- [Merger review and anti-competitive activity if there's no Brexit deal](#)
- [Sanctions policy if there's no Brexit deal](#)
- [Accounting, corporate reporting and audit](#)
- [Structuring your business if there's no-deal Brexit](#)

Employment, immigration and travel

DExEU policy paper:

- [Employees' rights to live and work in the UK/EEA](#)

FCO guidance:

- [UK nationals travelling to the EU: essential information](#)

Home Office guidance:

- [EU Settlement Scheme public test phase: employer toolkit](#)
- [EU Settlement Scheme: employer toolkit](#)
- [European Temporary Leave to Remain in the UK](#)
- [EU immigration after free movement ends if there's no deal](#)
- [Government outlines no deal arrangements for EU citizens](#)

Cross-border trade and VAT

HM Government guidance:

- [Partnership pack: preparing for changes at the UK border after a no-deal EU Exit](#)
- [Letters on 'no-deal' Brexit advice for businesses only trading with the EU](#)

HMRC letter (this should have been sent all VAT registered companies in February 2019):

- [Leaving the EU: actions for your business to take now to be ready for no deal](#)

HMRC guidance:

- [Customs, VAT and Excise regulations: leaving the EU with no deal](#)
- [Preparing for a 'no deal' EU Exit: step-by-step guide to exporting](#)
- [Preparing for a 'no deal' EU Exit: step-by-step guide to importing](#)
- [Get a UK EORI number to trade within the EU](#)
- [Importing, exporting and transporting products or goods after Brexit](#)
- [HM Revenue and Customs simplifies importing from the EU as part of 'no deal' preparation](#)
- [VAT for businesses if there's no Brexit deal](#)
- [VAT IT system rules and processes if the UK leaves the EU without a deal](#)

BEIS guidance:

- [Consumer rights if there's no Brexit deal](#)
- [Appointing nominated persons to your business if there's no Brexit deal](#)

- [Trading under the mutual recognition principle if there's no-deal Brexit](#)
- [European Territorial Cooperation funding if there's no Brexit deal](#)
- [Using the UKCA marking if the UK leaves the EU without a deal](#)

DIT/FCO guidance:

- [Existing free trade agreements if there's no-deal Brexit](#)

Data protection

BEIS guidance:

- [Using personal data after Brexit](#)

Information Commissioners Office documents:

- [Leaving the EU – six steps to take](#)
- [Data protection and Brexit](#)
- [Data protection if there's no Brexit deal](#)

Intellectual property

HM Government guidance:

- [Intellectual property after Brexit](#)
- [Trade marks and designs if there's no Brexit deal](#)
- [Patents if there's no Brexit deal](#)
- [Copyright if there's no Brexit deal](#)
- [Exhaustion of IP rights if there's no Brexit deal](#)

Intellectual Property Office Guidance:

- [IP and Brexit: the facts](#)

EU programmes and state aid

HM Treasury guidance:

- [UK Government guarantee for EU-funded programmes if there's no Brexit deal](#)

CMA guidance:

- [The CMA's state aid role if there's no Brexit deal](#)

3.3. European Commission update

In December 2018, the European Commission published documents on its preparations for a no-deal Brexit. These cover citizens' rights, transport, financial services, customs and climate change and are discussed in the links below:

- [Policy position and implementation of the Commission's contingency plans](#)
- [Q&A document](#)
- [Commission press release](#)

The European Commission list of Brexit preparedness notices (published throughout 2018) can be found [here](#).

4. Other BVCA updates

Weekly political analysis from the BVCA's Director General can be [found here](#).

Please sign up to our monthly [Policy & Technical Update](#) if you would like to receive regular information on the items covered above. To update your communications preferences please login to the [BVCA website](#) and click on My Account.

Our monthly [Brexit Bulletin](#) is available online and tracks developments in the negotiations and surveys on deal activity, fundraising and other relevant matters.

Key considerations for the industry in a UK-EU trade deal post-Brexit (and after the end of the transitional period) are set out in November's [Technical Bulletin](#).

Please feel free to contact the [policy team](#) for further information on any of the matters raised in this update.

The policy team would like to thank the chairs (Amy Mahon, Tim Lewis and Mark Baldwin) and members of the Legal & Accounting, Regulatory and Taxation Committees for their continuing support on our Brexit-related work.