

First Details of Brexit Temporary Permissions Regime Published — Key Questions Answered

UK regulators expand on plans to smooth the transition for inbound passporting firms in the event of a “no deal” Brexit.

Overview

HM Treasury published [draft legislation](#) on 24 July 2018 to establish a temporary permissions regime. As previously announced, the regime is being put in place to enable European Economic Area (EEA) financial services firms operating in the UK via a passport to continue their UK operations for a limited period without undue disruption in the event of a “no deal” Brexit.

On the same day, both the [PRA](#) and the [FCA](#) published statements on their websites outlining the way in which the temporary permissions regime will operate. HM Treasury plans to lay the legislation before Parliament in the autumn, and the UK regulators intend to consult on the detail of the regime at the same time. HM Treasury will also be publishing further pieces of legislation relating to the regime in due course.

Although full details about the regime are not available at this stage (and the FCA has provided more substantive detail than the PRA), affected firms will want to get up to speed with the proposals as part of their Brexit preparations. This *Client Alert* sets out answers to some key questions about the regime.

1. Why is the UK introducing a temporary permissions regime?

Subject to the ultimate outcome of negotiations, the EU passporting regime will fall away when the UK leaves the EU. If this happens on 29 March 2019 with no transitional period, there could be major disruption, as EEA firms would suddenly no longer be able to operate in the UK without UK authorisation. Therefore, the temporary permissions regime is designed to mitigate the “cliff-edge” effects of a no deal Brexit, and would only be introduced if required due to a no deal scenario.

The regime will allow EEA firms to operate in the UK for a limited period post-Brexit while they seek authorisation in the UK. The fact that plans for this regime are being set out now means that EEA firms can plan on the assumption that full UK authorisation will not be needed by 29 March 2019 in the event that there is no formal transitional period for Brexit.

2. Does this help UK authorised firms?

The temporary permissions regime is designed to assist inbound passporting EEA firms. It is not in the UK regulators' power to provide similar relief for UK firms passporting outwards into the EEA. Although the UK regulators have made clear their hopes that EEA regulators will reciprocate, there have not been any indications yet that they plan to do so.

3. Who is eligible for the regime?

EEA firms authorised to carry on regulated activities in the UK by virtue of the EU passporting regime will be able to use the temporary permissions regime. This includes EEA firms passporting under EU single market directives who qualify for authorisation under Schedule 3 to the Financial Services and Markets Act 2000. "Treaty firms" (EEA firms exercising EU treaty rights to do business on a cross-border basis in the absence of passporting rights) who qualify for authorisation under Schedule 4 to the Financial Services and Markets Act 2000 will also be able to make use of the regime.

Although the draft legislation does not cover EEA payment institutions and electronic money issuers, or EEA-domiciled UCITS schemes and alternative investment funds, HM Treasury plans to provide for similar transitional regimes under separate pieces of legislation.

Only firms that have either informed the relevant regulator of their intention to enter the regime before Brexit, or submitted an application for UK authorisation before Brexit, will be eligible to enter the temporary permissions regime.

4. What happens if an incoming EEA firm does not enter the temporary permissions regime, or does not subsequently obtain authorisation?

If an incoming EEA firm does not notify the relevant regulator of its intention to use the temporary permissions regime before the cut-off date (or has not already submitted an application for authorisation), that firm will not be able to use the regime and may lose its ability to do regulated business in the UK.

Firms within the regime will have their temporary permissions cancelled if they decide to withdraw from the regime, they do not apply for authorisation by the relevant deadline, they withdraw an application for authorisation before it is determined, or their authorisation application is unsuccessful. HM Treasury plans to make further legislation to provide for such firms to wind down their UK regulated activities in an orderly manner.

5. What about incoming firms with top-up permissions?

Incoming EEA firms with top-up permissions (firms with UK regulatory permissions in addition to their passported activities) will be able to continue to operate under their current scope of permissions during the temporary permissions regime. As they already have some UK regulatory permissions, they will need to submit a Variation of Permissions application rather than an application for authorisation.

6. How long will the regime last?

The draft legislation indicates that the regime would be put in place for a three-year period, beginning when the UK leaves the EU. HM Treasury would have the power to extend the regime by up to one year at a time if, having received an assessment from the PRA and FCA of the effect of not extending the regime, HM Treasury considers it necessary to do so.

7. Which regulator should firms approach?

Incoming EEA credit institutions and insurers should liaise with the PRA, which is the lead regulator for such firms. However, materials published by the FCA will also be relevant to such firms as they are dual-regulated by both the PRA and the FCA. The exception to this is incoming EEA credit institutions that do not accept deposits in the UK; such firms should approach the FCA. All other incoming EEA firms should approach the FCA.

8. How long will it take to get authorised?

The UK regulators usually work to a statutory deadline for processing authorisation and Variation of Permissions applications. The deadline is six months for a complete application, and one year for an incomplete application. The legislation would extend these deadlines temporarily to three years from Brexit in relation to all applications from EEA passporting firms, in order to help the regulators deal with the increased volume of applications resulting from Brexit. HM Treasury would have the power to extend this deadline by up to one year at a time in certain circumstances.

This would affect both existing and pending applications from EEA passporting firms, meaning that firms that have already submitted an application could be subject to this extended timing. It would not affect the statutory deadlines relating to routine authorisation and Variation of Permission applications by other firms.

The FCA has indicated that it would allocate firms “landing slots” — prescribed three-month periods within which they must apply for authorisation. The FCA would confirm these slots after Brexit, with the first slot likely to be late 2019. This would allow the FCA to deal with authorisation applications on an orderly basis.

9. What will change for firms within the temporary permissions regime?

The FCA explains that firms within the regime would be treated as fully authorised firms. The scope of their regulatory permissions would be limited to the scope of regulated activities they are permitted to carry on under their passport immediately before Brexit.

Treatment as fully authorised firms means that the division of supervision between home and host state regulators that exists under the EU passporting regime (and which restricts the FCA’s supervision of incoming EEA firms in areas reserved to the home state regulator) would fall away, and incoming firms would be subject to full UK supervision.

The FCA states that it would seek to preserve the status quo for incoming EEA firms as much as possible. The FCA’s starting point (which addresses only FCA Handbook requirements) is that incoming firms would need to:

- Continue to comply with all FCA Handbook rules and guidance that currently apply to them.
- Comply with all FCA Handbook rules that implement requirements in EU Directives that are reserved to home state regulators. The FCA indicates that it intends to accept “substituted compliance” in this regard (that is, firms will only need to demonstrate that they continue to comply with the equivalent home state rules). The FCA is not, however, proposing to apply requirements that relate to regulatory

capital, as the regulator considers it inappropriate to supervise an overseas firm's worldwide capital position.

- Comply with certain additional Handbook rules. In particular, the FCA explains its proposed position in relation to Financial Services Compensation Scheme coverage, the Financial Ombudsman Scheme, the Senior Managers and Certification Regime, and the protection of client money and assets.

HM Treasury intends to give the regulators power to grant transitional relief so that the regulators could phase in their post-Brexit requirements to give firms some flexibility.

10. Will the regime be an effective solution?

The FCA used a similar regime when taking on responsibility for the regulation of consumer credit firms. It granted firms with pre-existing consumer credit licences "interim permissions" and gave them landing slots in which they had to apply for FCA authorisation. This regime enabled the FCA to deal with thousands of applications within a short space of time, and resulted in a reasonably smooth transition.

Although this exercise will be more complex, incoming EEA firms should take some comfort from the fact that the FCA has dealt with a similar venture in recent years.

11. What are the next steps?

The FCA and the PRA plan to consult in the autumn on the detail of the regime for relevant firms, including which rules they propose to apply to firms while using the temporary permissions regime, and the level of fees to be paid by firms during the regime. The FCA indicates that it intends to publish final rules in early 2019, and would expect to open its notification window for firms indicating that they wish to use the regime at this time.

12. What do EEA firms need to do now?

The FCA states that EEA firms do not need to do anything at this stage, other than read the FCA's statement and complete the [FCA's online survey](#) for EEA firms passporting into the UK. The survey is meant to help the FCA understand which firms might need to make use of the temporary permissions regime. Firms for which the PRA is the lead supervisor should contact the PRA.

However, now is a good time for EEA firms sensibly to be considering their options — including how they wish to operate in the UK going forwards, and whether they will need to restructure.

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