

A blue-toned background image featuring a financial line chart with multiple data series and a grid. The chart shows various trends, including a sharp decline followed by a recovery and another decline.

LATHAM & WATKINS^{LLP}

12 September 2018

Financial Regulation Monthly Breakfast Seminar

Overview



Brexit Update: recent publications from the UK and the EU and practical take-aways for Brexit planning projects

AFME's guidance on the selection of unconnected analysts for IPOs

MAR Update: the impact of the ESMA "golden source" register

Recent developments in relation to financial crime

A blue-toned background featuring a financial line chart with multiple data series and a grid. The chart shows various peaks and troughs, with some lines appearing more prominent than others. The overall aesthetic is professional and data-oriented.

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Brexit Update

Axel Schiemann and Anne Mainwaring

UK's proposed framework for the UK-EU Partnership in financial services

Principle of autonomy

Each party to determine its own rulebook and assess whether access to its market is maintained

Equivalent at the outset

- UK and EU start with the same rulebook and entwined supervision
- **Initial reciprocal recognition** agreed for all third country regimes

Expanded scope of activities permitted cross-border

- Currently insufficient for breadth of interconnectedness between UK-EU markets
- Prioritising most **mutually beneficial activities for the economy**, ensuring no unintended consequences/arbitrage

Common principles

- Agree **principles** for governance of relationship between parties
- Include commitments to global norms, and that equivalence is an evidence-based judgement on the **equivalence of outcomes**

Regulatory & supervisory co-operation

- **Formalised regulatory and supervisory cooperation**
Encourages:
 - Regulatory coherence
 - Effective market surveillance
 - Effective co-operation

Structured withdrawal

- Consultation and discussion before loss of access to either market
- Ability to try and find solutions
- Clear **timelines and notice-periods**
- Time for businesses/supervisors to adapt on either side
- Address acquired rights, safeguarding existing obligations to customers if equivalence is withdrawn

UK government guidance for banking, insurance and other financial services if there is no Brexit deal

- “Under EU legislation it is possible for fund managers to delegate portfolio management services to a third party in another country, including countries outside the EU. In relation to funds and managers authorised under the relevant EU legislation, there are requirements for co-operation between the supervisory authorities in the relevant EU member state and the non-EU country concerned. The UK authorities are ready to agree co-operation agreements with their EU counterparts as soon as is possible...Unless the EU confirms it does not intend to put such arrangements in place, asset management firms can continue to plan on the basis that the delegation model will continue”

UK government guidance for banking, insurance and other financial services if there is no Brexit deal

- EU market operators that currently passport into the UK do not have to be recognised by the FCA in order to have UK firms participate in their market
- EU market operators who undertake regulated activities in the UK should seek recognition as a Recognised Overseas Investment Exchange

FCA Dear CEO Letter: Cross-border Booking Arrangements

- FCA confirms it is not seeking to restrict market access but wishes to ensure firms with a UK presence structure themselves to enable effective supervision and on-going compliance with the threshold conditions
- The FCA confirms it is open to a broad range of legal entity structures or booking models including those making use of back-to-back and remote booking, providing their associated conduct risks are effectively controlled and managed

FCA Dear CEO Letter: Cross-border Booking Arrangements

- Firms therefore need to demonstrate how they have complied with the following principles in relation to their booking models:
 - Firms should set out a clear rationale for their booking arrangements, document them and have them approved by the board
 - Risk management should be appropriate for the firm's booking activities including hedging arrangements
 - There is a broad alignment of risk and returns at the entity level
 - Firms should have adequate systems and controls in place to ensure that booking arrangements are followed
 - Firms should consider whether responsibility for oversight of booking arrangements should be explicit in statements of responsibilities
 - Booking arrangements should not be an impediment to the firm's recovery and resolution

Temporary Permissions

- EEA firms currently operating in the UK via an EEA financial services passport are granted UK authorisation for a limited time until the PRA and the FCA determine their applications for UK authorisation
- To enter the regime, prior to exit day, eligible firms will either need to submit an application for UK authorisation or a notification of their intent to enter the regime
- Firms in the regime will be treated as though they have UK authorisation meaning that the regulators will have the same supervisory powers over them as they would with any other UK authorised firms

Temporary Permissions

- The relevant SI extends the deadlines which the PRA and the FCA have to make a determination on an application for authorisation (including for a variation of permission) from EEA firms operating in the UK via a passport to up to three years after exit day
- Note this affects 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

Practical Take-Aways for Brexit Planning Projects

- “Goldplating” analyses
- Interpretive guidance by industry associations
- Audit of EU 27 subsidiary/branch
- Role of management of EU 27 subsidiary/branch
- License applications



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AFME's guidance on the selection of unconnected analysts for IPOs

Rob Moulton

Background

- FCA's rules now require that a range of unconnected analysts have the chance to write pre-IPO research
- Option 1: unconnected analysts join connected analysts (circulation of connected research permitted one day after publication of the relevant offering document)
- Option 2: unconnected analysts are separately given the same information (circulation of connected research permitted after seven days)
- No interaction until role in syndicate confirmed

How does the selection of unconnected analysts work?

- AFME has issued guidance
- European Association of Independent Research Providers keeps a list (12 firms at present)
- Other associations may be added
- All firms sign a standard NDA, agree geographical restrictions etc.
- Option 1: issuer emails the list and all requests to provide coverage will be approved
- Option 2: both email as above and statement in registration document – all requests will be approved

What written materials do unconnected analysts get?

- Management's slide deck
- Written note of Q&A session with connected analysts
- Q&A from other unconnected analysts
- Registration document or prospectus
- Guide to communicating with management

Prohibition on analyst interaction during pitch phase

- Easy to identify e.g. if analyst has seen RfP, potential deal has been announced, analyst has been wall-crossed etc.
- Less easy if firm discussing prospective transaction with the company – “heightened risk”
- Key consideration – “actual knowledge of the analyst”
- Firms should develop “reasonable decision making processes to make these judgements”
- Onus will be on firm to justify “continuing ordinary course conversations” if a deal is also possible and known about by analyst

When are the “firm’s obligations...confirmed in writing”?

- Analyst interaction can only begin after this occurs
- Final role in syndicate (so underwriting and economics can still be open)
- If role might change, interaction with analyst only restricted if the analyst knows this

Territorial Scope

- Unusual (in COBS terms) because it specifically applies to analysts in EEA branches
- Applies to UK IPOs if:
 - Analyst employed by UK firm where UK firm is underwriter
 - Analyst employed by UK firm where an overseas affiliate is underwriter (AFME interpretation)
- Does not apply if:
 - Analyst employed by non-EEA branch or non-UK firm even if UK firm is underwriter
 - Analyst employed by UK branch of EEA Firm

A blue-toned background featuring a financial line chart with a grid. The chart shows two data series: a solid blue line and a dotted blue line. The solid line starts high on the left, dips, rises, dips again, and then rises sharply towards the right. The dotted line starts high, dips, and then trends downwards. The overall aesthetic is professional and data-oriented.

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MAR Update: the impact of the ESMA “golden source” register

Nicola Higgs

MAR Update: ESMA 'golden source' (FIRDS) register



Hi, just a quick sanity check: I have a US listed issuer, selling to US investors on a deal with no EU nexus. I can ignore MAR right?

MAR only applies where something is traded (or admitted to trading) on a European venue – note this extends beyond primary listings to any type of trading on a EU MTF (for example). Any evidence of that?



Not that I know of, the banker just sent me a screen shot of the stock being traded on a German MTF, but she says that is just a quote and there is no evidence of trading. Is there any way to know for sure?

We could run a search of the ESMA FIRDS register, that should pull up any involuntary listings on a EU venue.



Great, thanks.

MAR Update: ESMA 'golden source' (FIRDS) register

FIRDS Register: Results for General Motors

https://registers.esma.europa.eu/publication/details?core=esma_registers_firds&docId=1193559

Results: 20,412

Items : 1-10 / 20412 Results per page: 10

Instrument identification code	Trading venue	Instrument full name	Instrument classification	Issuer or operator of the trading venue identifier	Date of admission to trading or date of first trade	Termination date	More Info
BRGMCBDR008	UBSI	GENERAL MOTORS COMPANY BDR	EDSXP	54930070NSV60J38I987	2017-11-04 00:00:00.0		
BRGMCBDR008	UBSY	GENERAL MOTORS COMPANY BDR	EDSXP	54930070NSV60J38I987	2017-11-04 00:00:00.0		
BRGMCBDR008	UBSY	GENERAL MOTORS COMPANY BDR	EDSXP	54930070NSV60J38I987	2017-11-04 00:00:00.0		
BRGMCBDR008	UBSI	GENERAL MOTORS COMPANY BDR	EDSXP	54930070NSV60J38I987	2017-11-04 00:00:00.0		
CH0319023203	STUB	Call Optionsschein auf General Motors Co.	RWSNCA	BFM8T61CT2L1QCEMIK50	2016-03-15 09:00:00.0	2017-12-14 21:00:00.0	
CH0319023203	STUB	Call Optionsschein auf General Motors Co.	RWSNCA	529900O14DCZLCKHET54	2016-03-15 09:00:00.0	2017-12-14 21:00:00.0	
CH0319023203	STUB	Call Optionsschein auf General Motors Co.	RWSNCA	529900O14DCZLCKHET54	2016-03-15 09:00:00.0	2017-12-14 21:00:00.0	
CH0319023203	STUB	Call Optionsschein auf General Motors Co.	RWSNCA	BFM8T61CT2L1QCEMIK50	2016-03-15 09:00:00.0	2017-11-03 21:00:00.0	

MAR Update: ESMA 'golden source' (FIRDS) register

Key takeaways:

- ESMA FIRDS (Financial Instrument Data System) now up and running
 - identifies involuntary listings
 - not necessarily a comprehensive source
- Difference between “quotes” and “trading”?
 - MAR applies to *“financial instruments traded on an MTF, admitted to trading on an MTF, or for which a request for admission to trading on an MTF has been made”*
- A search of the ESMA register rarely produces “no results”
- Query whether the issuer has an LEI



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Recent developments in relation to
financial crime
Jon Holland

Financial Crime

What's new from the FCA?

- Key points from Mark Steward speech – July 2018
 - MiFID II
 - 30 million transaction reports a day – and rising
 - Looking for anomalous activity
 - AML
 - Capital markets
 - Criminal prosecutions under ML Regs

Financial Crime (cont.)

- Enforcement annual performance report – July 2018
 - Penalties down . . .
 - . . . cases up
 - Areas of focus
 - Financial crime, including insider dealing, market abuse and AML
 - Unauthorised business
 - Retail conduct

Financial Crime (cont.)

- Law Commission review of UK SARs regime – July 2018
 - The regime isn't working – on any basis
 - Proposals to fix it include
 - Revisiting the “all crimes” approach for reporting (not primary money laundering)
 - Raising the threshold for reporting (to avoid reports based on “mere suspicion”)
 - Ringfencing dirty money from clean money
 - Maybe, criminal liability for firms if employees fail to report
 - Responses by 5 October 2018

ESMA - patrolling the perimeter

- Five banks fined (€495k each) for breaching the CRA Regulation by publishing “shadow ratings” in investment research reports
- Shows that ESMA:
 - Is patrolling its perimeter
 - Takes a (very) purposive approach to interpreting the relevant law
 - Is willing to use enforcement action pour encourager les autres

SFO v ENRC

- Court of Appeal judgment – 5 September 2018
- Key points:
 - Litigation privilege is back on a sensible footing, especially where investigations are concerned
 - Legal advice privilege is still a bit tricky – but there may be light at the end of the tunnel
- Twist or stick . . . ?



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Questions?