

# WILLIAM FRY

// ASSET MANAGEMENT & INVESTMENT FUNDS



## No-Deal 2.0 Checklist: A Q&A for Irish Investment Funds & Fund Management Companies

November 2020

A no-deal Brexit was narrowly avoided when the UK left the EU, on 31 January 2020, under terms set out in a withdrawal agreement entered into by the parties with only a week remaining. The withdrawal agreement provides for an 11-month transition period (terminating on 31 December 2020) during which EU laws continue to apply in the UK pending negotiation of a composite agreement governing the future relationship. However, as the end of this transition period draws near and with limited progress on the future relationship agreement, promoters of Irish funds and fund management companies must prepare for the possibility of, what has been referred to as, “No-Deal 2.0” on 31 December 2020. We have produced the below Q&A checklist tool to assist promoters and managers in conducting a health-check of existing arrangements if no agreement were in place by the end of the transition period. The Q&A, which has been revised and updated on several occasions since its initial publication on 15 March 2019, highlights the principal impacts of No-Deal 2.0 in various situations, including related mitigation measures or consequences where no mitigation measures are in place.

Asset Management

NO-DEAL 2.0 IMPACT	UCITS	UCITS MANCO	QIAIF	RIAIF	AIFM	CONSEQUENCES / MITIGATION MEASURES
Can asset management continue to be delegated to a UK licenced investment manager?	Yes	Yes	Yes	Yes	Yes	Memoranda of Understanding (MoU) between EU securities regulators and the UK Financial Conduct Authority (FCA) agreed on 1 February 2019. While the MoUs were to take effect in the event of a no-deal ESMA confirmed that these MoUs will come into effect at the end of the transition period on 31 December 2020.
Can a UK licenced investment manager be newly appointed to act as investment manager of an existing Irish fund?	Yes	Yes	Yes	Yes	Yes	UK licenced investment manager applicants will be subject to a regulatory review process by the Central Bank which requires the completion of the Central Bank’s Investment Manager Application Form.

## Fund Management

NO-DEAL 2.0 IMPACT	UCITS	UCITS MANCO	QIAIF	RIAIF	AIFM	CONSEQUENCES / MITIGATION MEASURES
Can a UK UCITS management company continue to act as fund manager of a UCITS?	No	N/A	N/A	N/A	N/A	UK UCITS management companies will no longer benefit from authorisation and will be treated as 'third-country' (non-EU) AIFMs.
Can a UK AIFM continue to act as AIFM of an Irish AIF?	N/A	N/A	Yes	No	N/A	Non-EU AIFMs, including a UK AIFM, can manage Irish QIAFs. Non-EU AIFMs cannot currently manage Irish RIAIFs.
Can UK subsidiaries (legally independent companies established in the EU controlled or affiliated to UK entities) continue to manage UCITS and AIFs?	Yes	N/A	Yes	Yes	N/A	These entities are EU companies and can continue to operate on the basis of their authorisation as UCITS managers or AIFMs in the EU.
Can branches of UK managers (permanent presences which are not legally independent from the AIF manager) continue to manage UCITS?	No	N/A	N/A	N/A	N/A	Branches of UK managers in the EU will be treated as branches of non-EU AIFMs.
Can branches of UK managers (permanent presences which are not legally independent from the AIF manager) continue to manage AIFs?	N/A	N/A	Yes	No	N/A	Non-EU AIFMs, including a UK AIFM, can manage Irish QIAFs. Non-EU AIFMs cannot currently manage Irish RIAIFs.
Can Irish management companies continue to manage UK UCITS which become non-EU AIFs?	N/A	No	N/A	N/A	Yes	UK UCITS become non-EU AIFs, the management of which requires the manager to have an AIFM licence.
Can a UCITS management company/AIFM second staff from the UK?	N/A	Yes	N/A	N/A	Yes	Applications for the use of secondees will be considered by the Central Bank on a case by case basis.
Will UK resident directors and designated persons be treated like EEA residents for the purposes of the Irish 'location rule'?	Yes	Yes	Yes	Yes	Yes	This is under consideration by the Central Bank of Ireland but in the meantime funds/fund managers will not be deemed non-compliant with the 'location rule' solely by virtue of having UK-based directors or designated persons.
Can the sale of UCITS across the EU continue to be undertaken by a UK licenced firm?	Local laws apply	N/A	N/A	N/A	N/A	Individual Member States' national marketing & distribution rules may preclude entities without a MIFID licence from selling funds in their jurisdiction.
Can an AIFM market units of a non-EU AIF in the EU?	N/A	N/A	Local laws apply	Local laws apply	N/A	UK AIFMs will be non-EU AIFMs and the marketing of AIFs by non-EU AIFMs in other Member States is subject to local laws.
Can a UK manager continue marketing an AIF in the EU?	N/A	N/A	Local laws apply	Local laws apply	N/A	UK managers will be non-EU AIFMs and the marketing of AIFs by non-EU AIFMs in other Member States is subject to local laws.
<b>Updated</b> Can the marketing of units of funds in the UK continue?	Yes	N/A	Yes	Yes	N/A	The UK Temporary Permissions Regime (TPR) will enable UCITS and EEA managed AIFs to continue to market in the UK upon notification to the FCA. The window for fund managers to notify the FCA that they want to use the TPR is open until 30 December 2020. After that date, new UCITS sub-funds of previously notified umbrellas may be added into the TPR regime. New AIF sub-funds may not be similarly added but may be marketed under the UK's NPPR.

## Marketing

NO-DEAL 2.0 IMPACT	UCITS	UCITS MANCO	QIAIF	RIAIF	AIFM	CONSEQUENCES / MITIGATION MEASURES
Will deposits and ancillary liquid assets held with UK credit institutions continue to be UCITS eligible investments?	Yes	N/A	N/A	N/A	N/A	As UK credit institutions will be non-EEA, 'third-country' credit institutions and the Commission has not adopted an equivalence decision under CRR in respect of the UK, 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".
Will UK UCITS continue to be eligible investments for Irish UCITS and RIAIFs?	Yes	N/A	N/A	Yes	N/A	UK UCITS will become non-EU AIFs. They will continue to be eligible investments for Irish UCITS and RIAIFs subject to applicable investment restrictions.
Will it be possible to continue to use UK Central Counterparties (CCPs) to meet EMIR central clearing obligations?	Yes	N/A	Yes	Yes	N/A	UK CCPs have been granted an 18-month equivalence decision (from 1 January 2021) under EMIR. EU entities will, therefore, be able to access UK CCPs' clearing services until 30 June 2022.
<b>Updated</b> Will it be possible to satisfy the MiFIR share trading obligation by trading dual (UK&EU) listed UK shares or EU shares traded in GBP on UK markets?	Yes	N/A	Yes	Yes	N/A	In a public statement dated 26 October 2020, ESMA confirmed that UK shares (with GB ISINs) and EU shares traded in GBP on a UK trading venue are not subject to the EU share trading obligation requiring investment firms to conclude transactions in shares admitted to trading on a MiFID regulated market or traded on an EU trading venue on (i) MiFID regulated markets, (ii) MTFs, (iii) SIs or (iv) third-country venues assessed as equivalent by the EU.
Will it be possible to satisfy the MiFIR share trading obligation by trading EU shares on UK markets?	No	N/A	No	No	N/A	Shares with EU ISINs must be traded on an EU regulated market unless shares are traded in the EU on a non-systemic, ad-hoc, irregular or infrequent basis.
Where EU law necessitates the use of credit ratings, will it be possible to use a credit rating issued by a UK CRA?	No	N/A	No	No	N/A	UK CRAs will become third-country agencies and their registration under the CRA Regulation will be withdrawn. 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 stipulating the use of a credit rating. On 26 October 2020, ESMA confirmed that all but one of the UK-based CRAs have taken steps to ensure that an EU CRA is willing and able to endorse its credit ratings at the end of the transition period. Any decision to endorse however, is at the sole discretion of the relevant endorsing EU CRA.
For derivatives subject to the EMIR reporting obligation, can I continue to report to a UK trade repository?	No	N/A	No	No	N/A	UK trade repositories currently registered with ESMA will lose their EU registration and no longer be eligible entities to whom derivatives reporting may be made under EMIR.
<b>Money Market Funds</b> - will deposits with UK credit institutions be eligible assets under the MMFR?	No	N/A	No	No	N/A	UK credit institutions will be 'third-country' credit institutions and the Commission has not adopted an equivalence decision in respect of UK rules and supervision for EU regulatory purposes.

Depository Delegation

Personal Data

NO-DEAL 2.0 IMPACT	UCITS	UCITS MANCO	QIAIF	RIAIF	AIFM	CONSEQUENCES / MITIGATION MEASURES
Will UK markets continue to qualify as regulated markets under MiFID II?	No	N/A	No	No	N/A	UK markets will be third-country markets and no equivalence decision has been adopted by the Commission under MiFID II in respect of UK markets.
<b>Funds that use a benchmark as defined under the Benchmarks Regulation (BMR)</b> Can funds subject to BMR continue to measure performance against/define their asset allocation/track a UK benchmark index?	Yes	N/A	Yes	Yes	N/A	UK administrators of benchmarks and third-country benchmarks recognised or endorsed in the UK will be deleted from the 'ESMA register of administrators and third-country benchmarks'. From 31 December 2020, UK benchmarks become third country benchmarks under the BMR. The use of third country benchmarks, where such use commences prior to 31 December 2021, may continue indefinitely. Any new use of third country benchmarks post 31 December 2021 is subject to the adoption of an EU equivalence decision or the benchmark/its administrator being endorsed/recognised under the BMR.
Can a UCITS or AIF depository delegate safekeeping functions to a third party in the UK?	Yes	N/A	Yes	Yes	N/A	Where safekeeping functions are delegated to a UK entity, depositories need to demonstrate objective reasons for delegation and obtain a legal opinion from an independent party as to the adequacy of the insolvency laws of the UK. Depositories should also ensure that such a third party complies with their national laws securing the benefits of asset segregation and communicates to the depository any changes to the applicable insolvency laws and its effective application.
Will the use of the UK Central Securities Depository (CSD) continue to be permitted?	No	N/A	No	No	N/A	To continue servicing EU members after the end of the transition period, the UK CSD will require either permanent or temporary equivalence and the UK CSD will need to be recognised by ESMA. Previous no-deal Brexit EU mitigation measure (2018/2030) providing for temporary equivalence (up to 30 March 2021) for the UK was contingent on a no-deal Brexit.
Will it continue to be possible to transfer personal data to the UK?	Yes	Yes	Yes	Yes	Yes	As the UK will be a third country for GDPR purposes, measures may need to be put in place (e.g. standard contractual clauses) to permit the transfer of personal data by an Irish fund/management company to the UK from the EEA.

## Contact Us

The Q&A is intended as a “ready-reckoner” only and is not a comprehensive list of all implications for Irish fund management companies /Irish funds of no-deal at the end of the transition period on 31 December 2020. If you have any queries in relation to this or would like to know more about the services we are offering, please contact any of our Asset Management and Investment Funds partners below or your usual contact at William Fry.



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