

Brexit – focusing on the goalposts: why it is business as usual over here at Elixium but even more so

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It may have been too close to call in some quarters, but as the astonishment or euphoria (depending upon how you see things) dies down, it's time to determine where the goalposts are likely to be moved to and by when.

1. Brexit the Brief Facts

- On 23rd June 2016 the UK voted to leave the European Union (“EU”). For the most part the simple announcement of Brexit itself is not expected to trigger great changes in the short term in relation to standard financial market documentation¹ or the applicability of EU Law and Regulation.
- The roadmap for the UK's withdrawal from the EU is set out at Article 50 of the Treaty on the European Union². Any Member State may decide to withdraw from the EU in accordance with its own constitutional requirements. Broadly, the process provides that a Member State that wishes to withdraw will need to provide an Art 50 Notice to the EU Council, notifying the EU Council of its intention to withdraw from the EU. The process then provides that the Union will negotiate and conclude an agreement with the withdrawing Member state (in this case the UK), setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the EU.
- There are rules which relate to the negotiation and approval of the withdrawal agreement and in short it will need to be concluded on behalf of the EU by the European Council acting by a qualified majority after having obtained the consent of the EU Parliament.
- The UK will cease to be bound by the EU Treaties from the date on which the withdrawal agreement takes effect, or if no withdrawal agreement can be reached, two years after the UK gives the EU Council the Art 50 Notice. Any extension of the two year negotiating period would need to receive the unanimous consent of the other Member States.
- On many levels it will be business as usual at least in the short term as the UK will remain in the EU until the date on which the withdrawal agreement takes effect or failing such an agreement 2 years.

¹ The exception to this would be if the parties had included a specifically tailored Brexit clause in their financial markets trading documentation. The author understands that most financial markets firms felt that Brexit was such a remote possibility, that they decided not to include such a provision in their documentation.

² The Authors are assuming that the UK will not act in breach of any of its Treaty obligations. In addition whilst there have been some discussions around the mechanics for triggering Art 50 as at the date of writing the Authors are assuming that any withdrawal will take place in accordance with Art 50.

2. The Known Unknowns

- At the time of writing it is not known when the UK will serve the Art 50 withdrawal notice. The time for withdrawal does not begin to run until the UK serves the notice.³
- The overriding issue is of course, how will the relationship between the UK and the EU or possibly even between the UK and the constituent Member States of the EU operate once the UK comes out of the EU?⁴ Will withdrawal take place by means of a big bang approach or will there be transitional arrangements? What will those transitional arrangements look like and how will they operate?⁵
- For financial markets, a core area of concern is whether those providing financial services from the UK into the EU will be entitled to continue to provide those and updated services to EU citizens and businesses post Brexit. If UK entities are entitled to provide such services, consideration will need to be given to the type of new rules which apply to the provision of those services (eg: a requirement to obtain a new EU wide license or new licenses in respect of each Member State). Certain pieces of EU financial services legislation already includes the concept of third- country equivalence, which allows certain qualifying non- EU countries that have equivalent legal and regulatory systems, provide reciprocal access to EU firms to the non- EU market and meet certain other tests to provide specific types of financial services in the EU to EU citizens and/or trading venues. It may be that this type of third-country (including the equivalence approach) could provide the basis for the roadmap going forward.⁶
- Whilst it is important not to underestimate the amount of political, economic and legal effort required to steer the UK onto a soft post Brexit landing, it requires very little crystal ball gazing to conclude that the UK legal and regulatory framework post Brexit will continue to be designed to underpin a first world financial centre and comply with the UK's G20 and other overarching high level regulatory commitments.

³ See HM Government paper "Alternatives to membership: possible models for the United Kingdom outside the European Union" March 2016. See Chapter 2 which notes that Art 50 has never been used and that it is not clear whether the legal process to create a new relationship with the EU should be separated from the process of withdrawing from membership.

⁴ See HM Government paper "Alternatives to membership: possible models for the United Kingdom outside the European Union" March 2016. See Chapter which looks at the pattern of existing relationships between the EU and third countries, (the Norway Model, a negotiated bilateral agreement such as Switzerland or Canada or WTO approach) and assess the degree to which those approaches would meet the needs of the UK.

⁵ There is of course an even larger known unknown and that is whether other Member States will also choose to exit the EU.

⁶ For example EMIR (Regulation (EU) NO 648/2012 of the European Parliament and of the Council of 4th of July 2012 on OTC derivatives, central counterparties and trade repositories) contains specific provisions in relation to the recognition of third- country CCPs. Those provisions are detailed but relatively straightforward. They set out a number of requirements, including the requirement that the non-EU CCP must be authorised in a third country that complies with legally binding requirements that are the equivalent of Title IV of EMIR and subject to effective supervision and enforcement in that third country, and that the third country itself must have an effective equivalent system for the recognition of CCPs authorised under third-country legal regimes. Provided that the third-country CCP complies with these and other requirements then it will be entitled to provide clearing services to clearing members or trading venues established in the EU.

3. Why it is business as usual after the Brexit announcement at Elixium but even more so?

- The Elixium Platform is an MTF: Elixium is a trading name of Tradition (UK) Limited which itself is authorised and regulated by the FCA. MTFs are currently regulated under MiFID (2004/39/EC).The Brexit announcement does not change Elixium's regulatory status. The financial markets in Europe are currently in the process of implementing MIFID2 (Directive 2014/65/EU) and MiFIR (EU) Regulation No 600/2014. These are complex pieces of legislation, their implementation has already been delayed until 3rd January 2018 and it will be interesting to note whether the Brexit announcement will cause MIFID 2 and MiFIR to be further delayed or whether the UK can negotiate some type of suspension of MIFID2 and MiFIR pending agreeing the terms of Brexit, or whether the UK will instead use the third- country equivalence route.
- Participant Eligibility: A wide variety of parties from both within the EU and elsewhere are eligible to become participants on the Elixium Platform. Elixium has no plans to restrict eligibility on the basis of the Brexit announcement.
- Elixium Rules: Elixium does not plan to change its Rules on the basis of the Brexit announcement.
- Prescribed Documentation: The Elixium GMRA is based on the SIFMA/ICMA Global Master Repurchase Agreement April 2011 version. Other Prescribed Documentation is largely based on similar standard market forms. To the extent that relevant trade bodies publish Brexit specific amendments then we would expect those to be incorporated into the Prescribed Documentation at the appropriate time.
- Liquidity Issues: Illiquidity in secured money-markets is an ongoing concern for many market participants. The regulatory drive to make markets safer and more transparent has not been affected by Brexit. In fact we see Brexit as an even stronger reason for market participants to engage with the Elixium Platform. Elixium's mutually inclusive documentation and platform offering provides for accelerated on –boarding and bespoke and targeted liquidity enhancement.

Questions

If you have any questions or comments in relation to the above please send an email to:

iona.levine@elixium.com in relation to legal or regulatory matters or roberto.verrillo@elixium.com in relation to market or trading issues.

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