
08 October 2019

Communication of the European Banking Authority on the UK withdrawal from the EU

Introduction

Further to its previous Opinions and Communication¹ on financial institutions' preparedness for the United Kingdom's (UK) withdrawal from the European Union (EU), the European Banking Authority (EBA) today urges continued progress on contingency planning. Whilst significant progress has been made in the implementation of contingency plans for the event that the UK withdraws from the EU without a ratified withdrawal agreement on 1 November 2019², financial entities and competent authorities must guard against complacency in their preparations. Notably, effective contingency planning efforts must continue, to ensure that assets, appropriate staff and data are in place to support relevant authorisations and to ensure that adequate customer communications are made.

Background

On 29 March 2017, the UK notified the European Council of its intention to withdraw from the EU pursuant to Article 50 of the Treaty on European Union. The UK's decision to withdraw from the EU includes the UK leaving the Single Market. Several UK-based financial services firms provide regulated financial services in other Member States of the EU, which to continue will need to be undertaken by using establishments that were already present in the remaining Member States ('EU27') or are recently authorised in the EU27.

The EBA's October 2017 and June 2018 Opinions focused on the risks posed by the seeming lack of adequate contingency preparations by financial institutions with a view to ensuring that they (1) establish whether they have direct or indirect exposures to the UK, and (2) consider the risks concerned, and put in place associated mitigating action and contingency plans. The October 2017 Opinion contained detailed principles regarding: (i) authorisations; (ii) internal models (iii) internal

¹ <https://eba.europa.eu/documents/10180/1756362/EBA+Opinion+on+Brex+Issues+%28EBA-Op-2017-12%29.pdf>, <https://eba.europa.eu/documents/10180/2137845/EBA+Opinion+on+Brex+preparations+%28EBA-Op-2018-05%29.pdf>, <https://eba.europa.eu/-/the-eba-calls-for-more-action-by-financial-institutions-in-their-brex+related-communication-to-customers>, <https://eba.europa.eu/-/eba-recommends-maintaining-protection-of-depositors-in-case-of-a-no-deal-brex>

² 11.00pm UK time 31 October 2019

governance, outsourcing, risk transfers and ‘empty shell’ companies (iv) resolution and deposit guarantee schemes.

In its June 2018 Opinion, the EBA also asked competent authorities to engage with financial institutions to ensure those institutions had carefully assessed their obligations to existing and prospective customers, and taken any necessary actions to ensure the continuity of services in the light of their continuing contractual commitments.

Since the publication of the June 2018 Opinion, the EBA has continued, through its engagement with competent authorities, to monitor the level of contingency planning, customer communication and other preparations undertaken by financial institutions. The EBA observes that there has been progress by financial institutions in a number of areas. For example, most institutions that are monitored have contingency plans that are in a late stage of implementation. In particular, institutions are receiving necessary licences and claim to have made progress in areas such as diversifying access to funding and dealing with contractual issues, including in derivatives. Contingency planning has also been facilitated by legislative initiatives, legal acts and other preparedness activities undertaken³. Nonetheless, care should be taken to ensure that all relevant contingency measures are in place, including for firms which consider themselves already prepared, and competent authorities have identified some specific areas that merit heightened attention, notably the need to operationalise relocation plans and to ensure effective communication to customers.

Operationalisation of relocation plans

The EBA, in its October 2017 Opinion published general principles around authorisation as well as specific issues relevant for different types of entities. A key point for credit institutions was that “the application file contains sufficient information to assess whether or not the envisaged structure is commensurate to the size, nature and complexity of the activities (no ‘empty shells’).”

More specifically, in its October 2017 Opinion, the EBA published a detailed set of principles around governance to avoid the risk of empty shells. The EBA notes that it is imperative that these principles are adhered to. Institutions are therefore reminded that those principles are:

- i. competent authorities should assess whether or not institutions have sound and effective governance and that the members of the management body are suitable;
- ii. competent authorities should not allow institutions to outsource activities to such an extent that they operate as ‘empty shell’ companies, and all institutions should have the substance to identify and manage the risks they generate;
- iii. risk management is an important function of credit institutions and investment firms which goes hand in hand with the extension of business. Local risk management needs to be commensurate to the business extended. With respect to outsourcing, institutions should be able to monitor and manage the outsourcing arrangements, and ensure that authorities have full access to all information that they need to fulfil their supervisory function;

³ https://ec.europa.eu/info/publications/communication-4-september-2019-finalising-preparations-withdrawal-united-kingdom-european-union-1-november-2019_en. See also the Commission’s preparedness notice in the field of banking and payment services of 8 February 2018, available at https://ec.europa.eu/info/sites/info/files/file_import/banking_services_en.pdf.

- iv. EU27 authorities should have regard to the likelihood that after Brexit the UK will be a third country and thus activities outsourced to institutions in the UK prior to Brexit should be assessed with regard to the ability of the institution to adapt to this possible scenario;
- v. institutions engaging in back-to-back or intragroup operations to transfer risk to another entity should have adequate resources to identify and fully manage their counterparty credit risk, and any material risks that they have transferred in the event of the failure of their counterparty.

In this regard the EBA notes that whilst competent authorities report that the general principles for ensuring effective review of all authorisation requests have been largely adhered to, they remain concerned about the practical implementation of the authorisation and associated relocation decisions. They note in particular that in some cases authorisations have been granted, but that it is not clear that the associated transfer of assets, skilled staff and risk functions associated with the newly authorised business have been implemented to their fullest extent. It is imperative that they have the capability to manage the risks they generate from the first day after the withdrawal of the UK, as the EBA made clear in its October 2017 Opinion⁴.

In addition, the EBA notes that if the UK becomes a third country on 1 November it is imperative that financial institutions have already assessed whether the personal data of their clients need to be transferred from the EU27 to the UK and, if so, that they have taken appropriate mitigating actions under the EU's General Data Protection Regulation⁵ (GDPR), such as using appropriate safeguards e.g. standard data protection clauses, or exploring whether derogations would apply⁶.

Customer Communication

National Competent Authorities (NCAs) have made significant efforts to inform relevant regulated financial institutions of the need to communicate effectively to their customers on how they may be affected by the UK withdrawal and on any relevant actions undertaken by such institutions as part of their contingency planning that may affect those customers' contractual or statutory rights.

Whilst such calls appear to have been heeded to some extent, the EBA is nonetheless reminding all regulated financial institutions affected by the UK withdrawal from the EU, directly or indirectly, to ensure that they have taken the EBA's Opinions and December 2018 Communication into careful consideration, and can satisfy themselves that they have engaged with all their relevant customers and have provided clear and adequate information on the risks and mitigating measures being taken. The EBA also notes that, should any customers have concerns about whether they may be impacted by the UK withdrawal from the EU and have not yet been contacted by their financial service provider, they should contact their financial institutions directly.

Next steps

⁴ See in particular paragraphs 16, 23, 102 and 114-119

⁵ See Chapter V of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016, p. 1
<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1569402837915&uri=CELEX:32016R0679>

⁶ See the Commission preparedness notice of 9 January 2018 in the field of data protection, available at
https://ec.europa.eu/info/sites/info/files/file_import/data_protection_en.pdf.

Whilst there has been significant progress, the EBA and competent authorities will continue to monitor the final stages of contingency planning and customer communication by financial institutions and how they and their customers may be affected by the UK withdrawal from the EU in the absence of the ratified Withdrawal Agreement.