

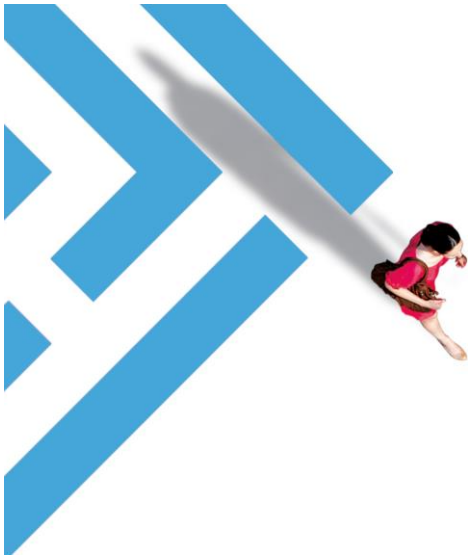
C L I F F O R D
C H A N C E



**BREXIT – THE IMPLEMENTATION AND
REPAPERING CHALLENGE**

30 January 2018

AGENDA



Introduction – Chris Bates

Panel 1

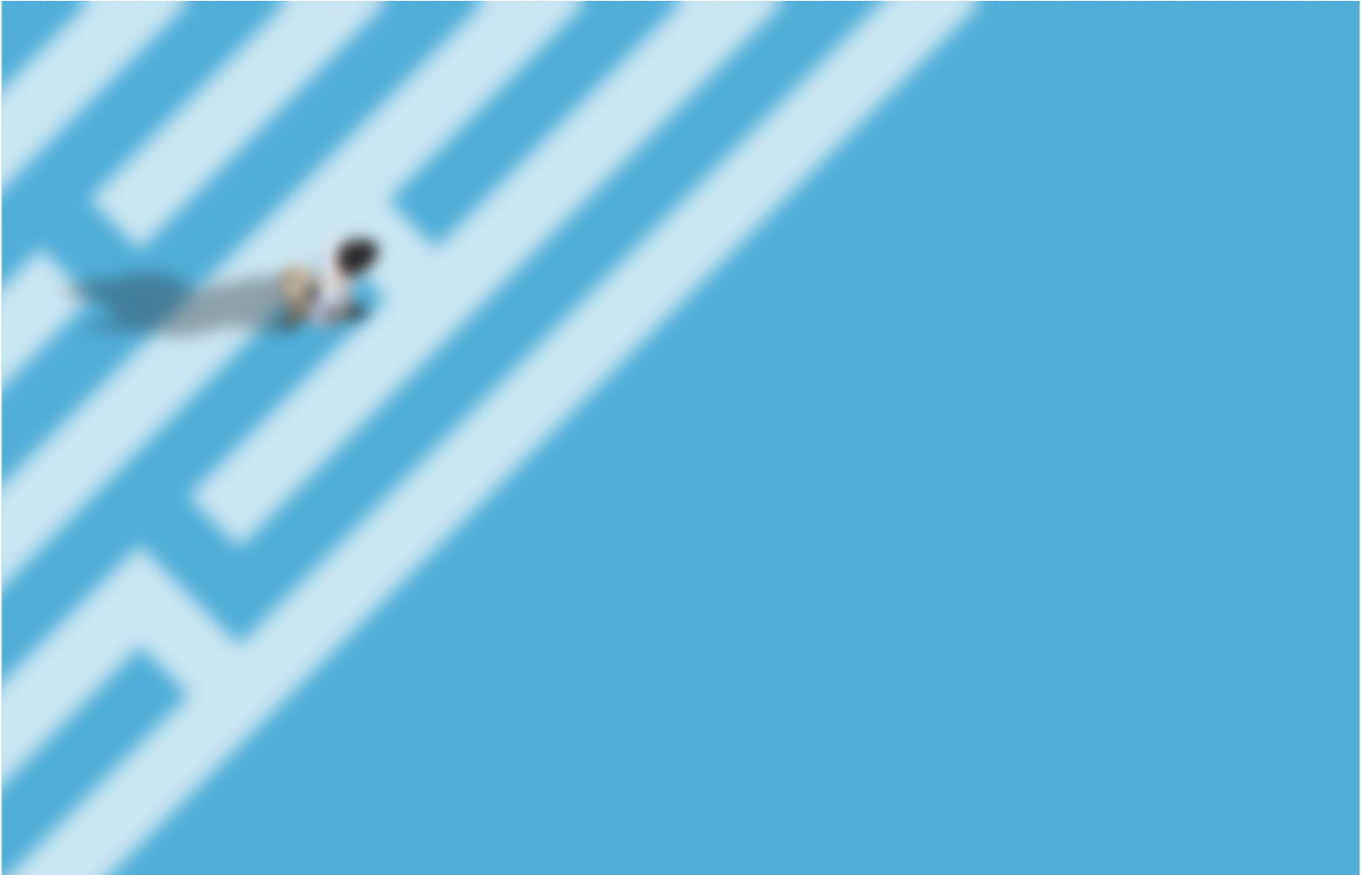
- The likely shape of a transitional period – Simon Crown
- The EU (Withdrawal) Bill – Owen Lysak
- The view from the continent – Frédérick Lacroix

Panel 2

- Continuity of contract – Monica Sah
- Repapering your business – Caroline Meinertz
- Financial market infrastructure – Jeremy Walter

Concluding remarks – Chris Bates

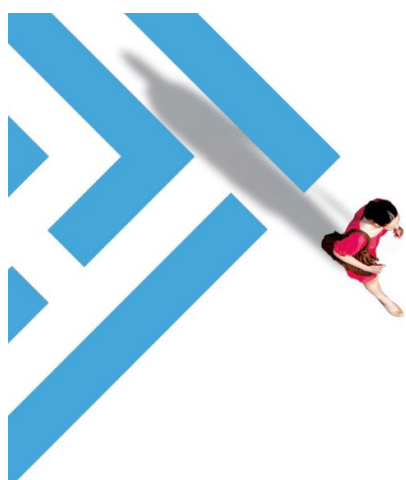
OPENING REMARKS



SPEAKERS' MATERIALS

OPENING REMARKS – CHRIS BATES

OPENING REMARKS AGENDA



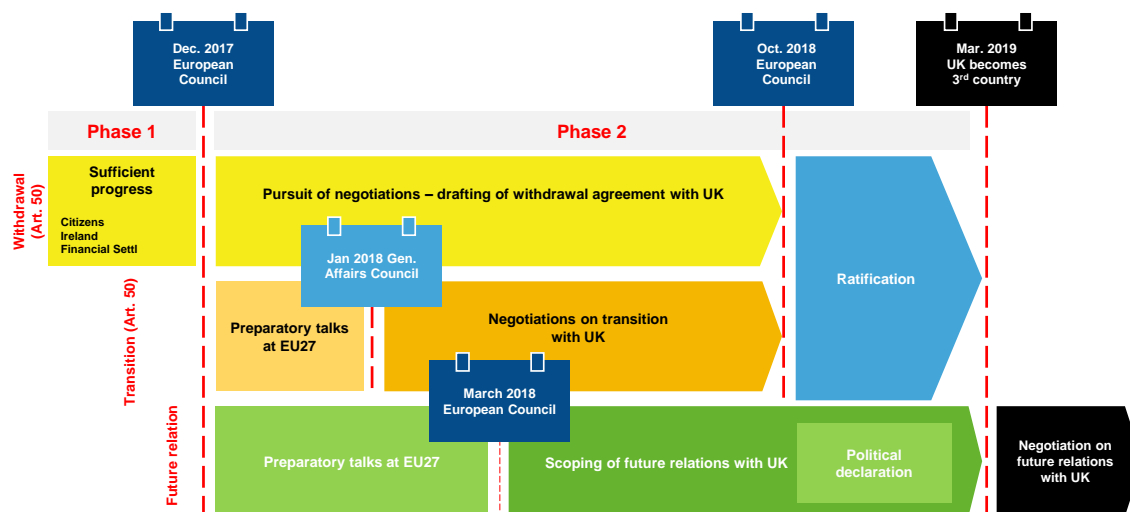
Where are we now?

- Next steps – process
- Sufficient progress
- Transitional arrangements
- Future relationship
- No deal

Firm strategy

- Outbound
- Inbound
- Key challenges

NEXT STEPS PROCESS



SPEAKERS' MATERIALS

OPENING REMARKS – CHRIS BATES

NEXT STEPS PROCESS

Withdrawal Agreement (incl. transition arrangements)

EU (Article 50 TEU)

- Approval by European Council (QMV)
- Consent of European Parliament.

UK

- Vote of both Houses on conclusion of negotiations
- Constitutional Reform and Governance Act 2010 process
- Proposed Withdrawal Agreement & Implementation Bill.

Future trade relationship

EU (Articles 207 and 218 TFEU)

- Approval by Council of EU (QMV but unanimity required in some cases)
- Consent of European Parliament (in some cases)
- Ratification by Member States (mixed agreements).

UK

- Constitutional Reform and Governance Act 2010 process
- Implementing domestic legislation.

Third country arrangements

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SUFFICIENT PROGRESS

“Both Parties have reached agreement in principle across the following three areas ... Under the caveat that nothing is agreed until everything is agreed, the joint commitments ... shall be reflected in the Withdrawal Agreement”



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Citizens' rights

- Specified date for rights is time of UK withdrawal (subject to transition)
- Rights of EU citizens living in UK will be protected by UK law
- Rights of UK citizens living in EU will also receive protection.

Financial settlement

- UK contributes to EU budget for 2019 and 2020 as if still in the EU
- UK contributes to outstanding commitments at end 2020 plus contingent liabilities
- UK estimates at £35-39bn (about four years of budget contribution).

Northern Ireland

- Avoiding a hard border.

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SPEAKERS' MATERIALS

OPENING REMARKS – CHRIS BATES

SUFFICIENT PROGRESS

OTHER



“Progress was also made in achieving agreement on...”

- Euratom (nuclear specific) issues
- Continuity of availability of goods placed on market before withdrawal
- Co-operation in civil and commercial matters
- Police and judicial cooperation in criminal matters
- Ongoing EU judicial and administrative procedures
- Privileges and immunities for EU and official secrecy.

Other issues

- Governance of the agreement, dispute resolution
- Negotiations with third countries (e.g., WTO tariff rate quotas)
- Gibraltar, Cyprus bases
- Ongoing government procurement, intellectual property rights, protection of data, customs issues.

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TRANSITIONAL ARRANGEMENTS

“[T]ransitional arrangements ... must be in the interest of the Union, clearly defined and precisely limited in time. In order to ensure a level playing field based on the same rules applying throughout the Single Market, changes to the *acquis* adopted by EU institutions, bodies, offices and agencies will have to apply both in the United Kingdom and the EU. All existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures will also apply, including the competence of the Court of Justice of the European Union. As the United Kingdom will continue to participate in the Customs Union and the Single Market (with all four freedoms) during the transition, it will have to continue to comply with EU trade policy, to apply EU customs tariff and collect EU customs duties, and to ensure all EU checks are being performed on the border vis-à-vis other third countries.”

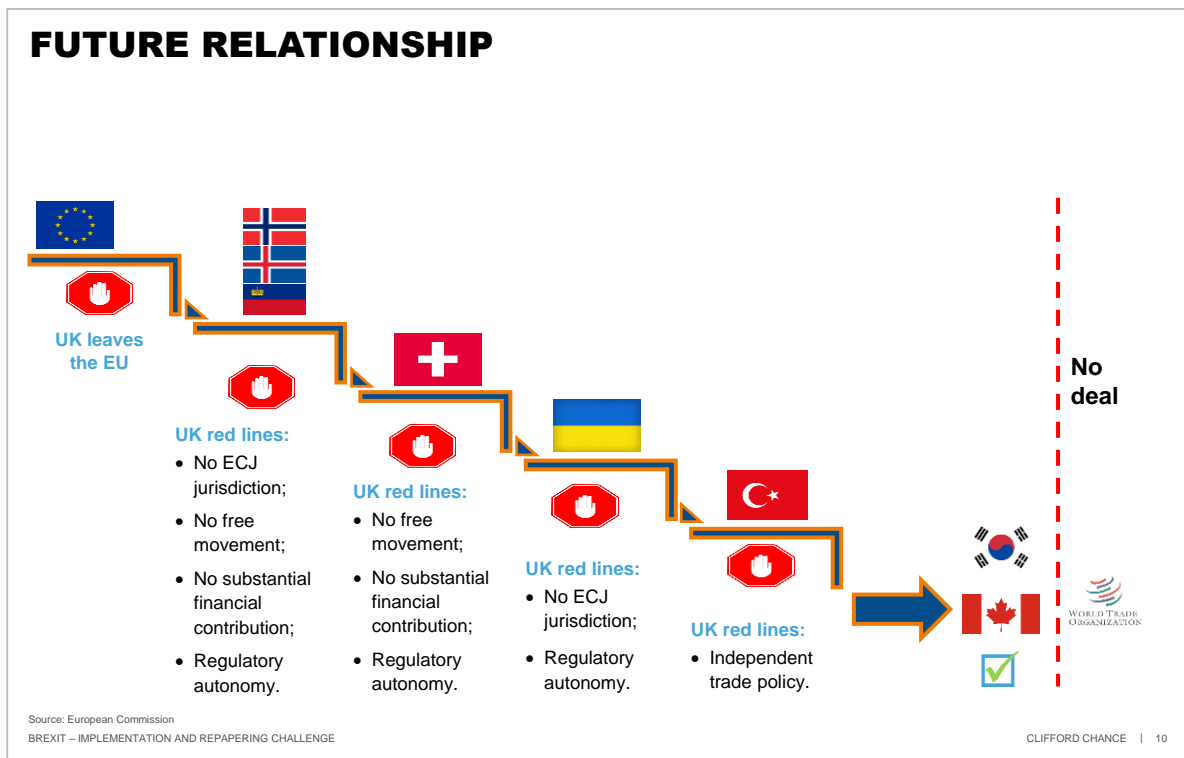
European Council negotiating guidelines adopted 15 December 2017

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SPEAKERS' MATERIALS

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FUTURE RELATIONSHIP

The Canada-EU Comprehensive Economic and Trade Agreement (CETA) includes very limited EU commitments on cross-border trade in banking and capital markets services.

Mode 1 (cross-border services)

- Generally limited to financial information, data processing and advisory and auxiliary services (except some smaller Member States)
- Plus portfolio management services to professional clients after 4 year transition (subject to European Commission equivalence assessment)
- Limited to national treatment, MFN, market access and subject to right to impose authorisation or registration requirements (no mutual recognition).

Mode 2 (consumption abroad)

- Purchase abroad permitted but EU not required to allow suppliers to do business or solicit within the EU.

Mode 3 (commercial presence)

- National treatment, MFN, market access and investment protection.

Subject to 'prudential carve out'

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NO DEAL

UK

European Union (Withdrawal) Bill

- Retained EU law continues to be part of UK law
- Government powers to address 'inoperables' by secondary legislation
- E.g. proposed revised policy for UK branches of EU27 banks (and interim authorisation regime).

Other legislation

- Trade Bill, Taxation (Cross-border Trade) Bill, Sanctions and AML Bill, etc.

EU

UK becomes 'third country'

Timing of activation of existing 3rd country regimes

Action to restrict 3rd country regimes

- Recognition of CCPs (EMIR 2.0)
- Omnibus 3 (delegation, outsourcing, risk transfers)
- MiFIR cross-border services (via investment firm proposals).

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FIRM STRATEGY OUTBOUND

UK firms' loss of outbound passport triggers restructuring of business

'Mix and match'

New or scaled-up EU27 entity or entities

- Central hub
- Plus EU27 branches – sales or trading
- UK branch for trading activity or other support.

New or existing EU27 branch of UK or other non-EU entity

- Serve local customers in selected state
- Booking business locally.

Continued cross-border business from UK

- Rely on national regimes
- Apply for cross-border licences or exemptions.

Discontinue or limit EU27 business

Implementing business transfer

Universal succession or similar techniques

- Cross-border merger
- Part 7 FSMA transfer
- Convert to Societas Europea and relocate HQ.

Bilateral transfer

- Individual novation or assignments.

Intra-entity transfer of business

- Transfer from head office to branch within entity.

Roll-on, roll-off

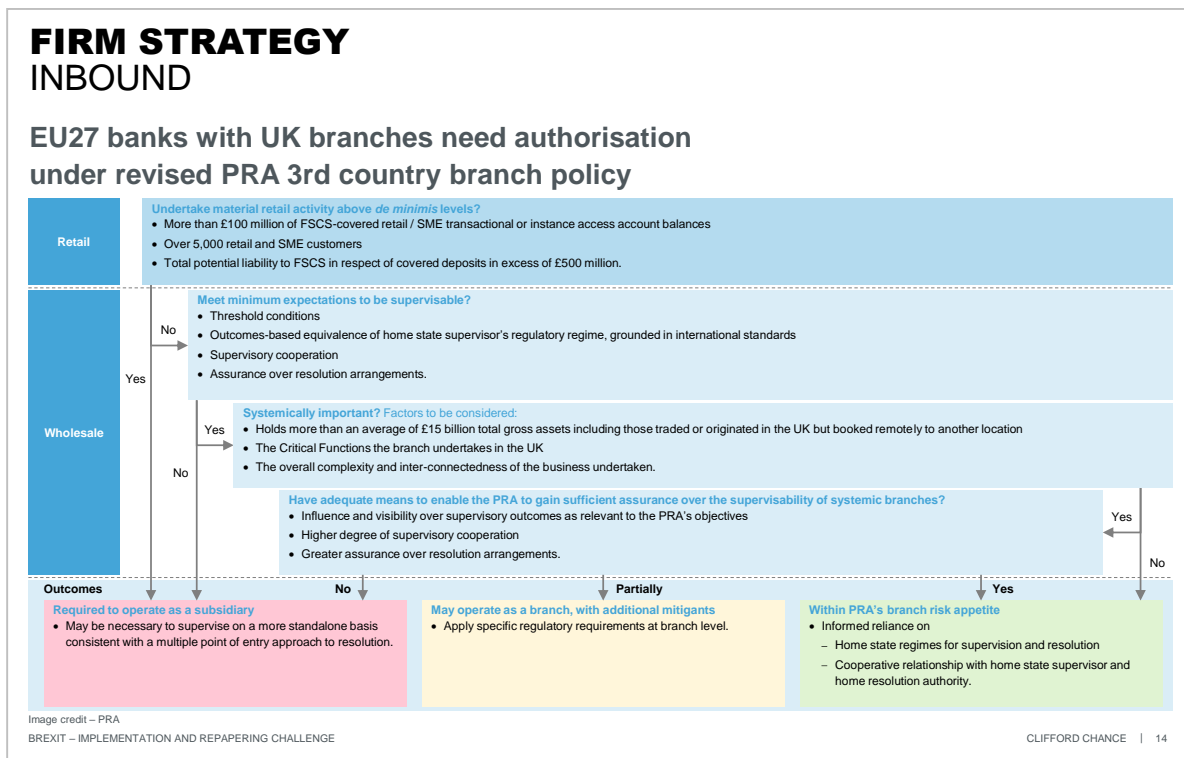
- Depends on availability of grandfathering of existing contracts.

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FIRM STRATEGY INBOUND

EU27 firms also lose

Passport for cross-border services into UK

- Rely on authorisation for UK branch
- Rely on 'overseas persons' exclusion and territorial application of UK licensing
- Rebook other business, e.g., consumer credit.

Passport for cross-border services from UK branch into EU27

- Plus ECB and ESMA statements that proper role of non-EU branches does not include providing services into EU27.
- Restructuring of existing business
 - Intra-entity transfer of business from branch to EU27 offices
 - Roll-on, roll-off.

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SPEAKERS' MATERIALS

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FIRM STRATEGIES KEY CHALLENGES



Legal readiness

- New or extended licences
- Substance, dual-hatting, model approval
- Outsourcing, back-to-back booking, delegation.

Operational readiness

- Accessing market infrastructure
- Systems and controls
- Staff relocation and hiring.

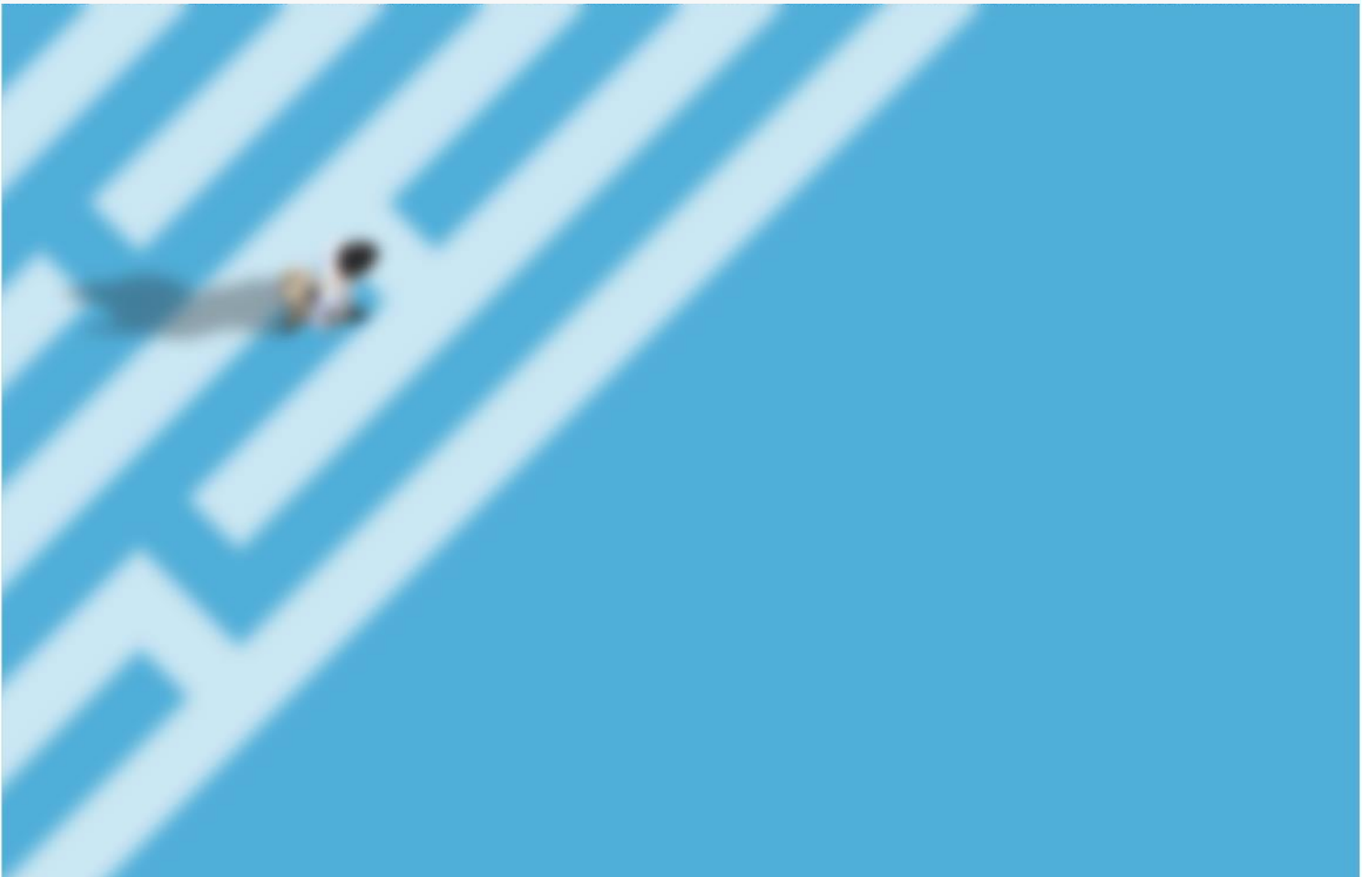
Client readiness

- Repapering and operationalising client relationships.

Uncertainty and timing

- Impact of new regulatory regimes, e.g., IPU requirements
- Availability of transitional arrangements, grandfathering.

PANEL 1





THE LIKELY SHAPE OF A TRANSITIONAL PERIOD



SPEAKERS' MATERIALS

THE LIKELY SHAPE OF A TRANSITIONAL PERIOD – SIMON CROWN

TRANSITION THE COUNCIL GUIDELINES

The EU's opening position was set out in the Council's December 2017 negotiating guidelines...

"3. As regards transition, the European Council notes the proposal put forward by the United Kingdom for a transition period of around two years, and agrees to negotiate a transition period covering the whole of the EU acquis, while the United Kingdom, as a third country, will no longer participate in or nominate or elect members of the EU institutions, nor participate in the decision-making of the Union bodies, offices and agencies.

4. Such transitional arrangements, which will be part of the Withdrawal Agreement, must be in the interest of the Union, **clearly defined and precisely limited in time**. In order to ensure a level playing field based on the same rules applying throughout the Single Market, **changes to the acquis adopted by EU institutions, bodies, offices and agencies will have to apply both in the United Kingdom and the EU. All existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures will also apply, including the competence of the Court of Justice of the European Union**. As the United Kingdom will continue to participate in the Customs Union and the Single Market (with all four freedoms) during the transition, it will have to continue to comply with EU trade policy, to apply EU customs tariff and collect EU customs duties, and to ensure all EU checks are being performed on the border vis-à-vis other third countries.

5. **The European Council calls on the Commission to put forward appropriate recommendations to this effect, and on the Council to adopt additional negotiating directives on transitional arrangements in January 2018.**"

...In short, a full extension of the status quo (with the exceptions of the UK's political rights) for a specified period.

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NEGOTIATIONS ON TRANSITION BEGIN NOW

EU27

General Affairs Council approved supplementary negotiating directives on 29 January 2018

UK

UK government has set out more detail on its position

- 19 January: Brexit Secretary, David Davis evidence to the House of Commons Brexit Committee
- 26 January: David Davis' Teesport Speech: Implementation Period – A bridge to the future partnership between the UK & EU
- 26 January: Chancellor, Brexit Secretary and Business Secretary open letter to business on implementation period.

Negotiation process

UK aims to reach agreement for approval at European Council on 22-23 March

But transition is part of Withdrawal Agreement and nothing is agreed until everything is agreed

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SPEAKERS' MATERIALS

THE LIKELY SHAPE OF A TRANSITIONAL PERIOD – SIMON CROWN

EVOLVING SHAPE OF THE TRANSITION

Topic	EU negotiating directives	UK Government position
Name	Transitional period	Implementation period
Article 50 TEU as legal basis	Yes	Yes
Duration	Until 31 December 2020 (expiry of multiannual financial framework)	About two years ("21 months to 27 months", e.g., link to expiry of UK grace period for EU citizens in March 2021)
UK ceases to participate in EU institutions	Yes	Yes
CJEU jurisdiction applies	Yes	Yes
UK participates in the customs union and all sectors of single market (with four freedoms)	Yes	Yes, but UK will require registration of EU citizens coming to UK
Treatment of citizens' rights under Withdrawal Agreement	'Specified date' should be end of transition period (i.e., citizens relying on freedom of movement during the period protected in same way as those at exit day)	No position stated
UK must apply existing and new EU law as if a Member State	Yes with specific provision to deal with UK opt outs under Freedom, Security and Justice Chapter	Yes but each side should commit not to undermine the other and there should be a mechanism to resolve UK concerns
Consultation of UK on new legislation	UK to cease to participate in consultation mechanisms (except in exceptional circumstances)	To be negotiated
Existing EU third country agreements	UK bound by obligations but UK cannot participate in bodies created under agreements (no specific arrangement for UK to benefit from rights under agreements)	Existing agreements should continue to apply (all parties should agree that UK treated as a party until new arrangements made)
UK able to conclude third country trade agreements	UK can only become bound by new agreements with EU authorisation	UK free to negotiate and sign third country trade agreements (with entry into force at end of period)
Possibility of extending period	No position stated	No position stated
Adaptation arrangements at end of period, e.g., contract continuity	No position stated	No position stated

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TRANSITIONAL PERIOD KEY ISSUES

- **Timing:** seeking political agreement at March 2018 European Council meeting, to take effect upon the UK's EU membership ceasing on 29 March 2019
- **Value of transitional agreement:** decreasing each day
- **Developing acquis** during the transitional period: scope for problematic legislation, and without UK influence in its development? How to enforce duty of good faith or sincere co-operation
- **Nature of the agreement:** political, with legal effect in due course
- **"Nothing is agreed until everything is agreed"** – transitional agreement to be delivered as part of the Withdrawal Agreement, to be adopted under Article 50
- What would be the position **if nothing is agreed** and there is no transitional agreement?
- How does all of the above affect **firms' implementation plans**?

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THE EU (WITHDRAWAL) BILL



SPEAKERS' MATERIALS

THE EU (WITHDRAWAL) BILL – OWEN LYSAK

OBJECTIVES OF THE BILL

1 'Domesticate' EU law with effect from 'exit day'

- Repeal European Communities Act 1972 (ECA)
- Convert EU-related law into stand-alone domestic law: 'retained EU law'.

2 Give Government broad powers to amend UK law

- Where retained EU law would not work effectively or to remedy deficiencies
- To prevent/remedy breaches of UK's international obligations arising from UK exit
- To implement the Withdrawal Agreement (up to exit day).

3 Resolve Brexit issues arising out of devolution settlement

- UK Government to exercise most powers 'repatriated' as a result of UK exit.

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KEY CONCERNS

How will we know what the law is post-Brexit?

- Retained EU law at exit day + statutory instruments + interpretative provisions
- Government to publish copies of retained EU direct legislation in force at exit day.

Will the Government get it right?

- Wide-ranging task for Government with limited time or opportunity to consult
- Some inoperables raise major policy decisions or have practical impact on firms
- Firms will need to identify impact/solutions and engage with Government and regulators.

Will the Government have adequate powers to make UK law work post-Brexit?

- Bill gives very broad powers to fix 'inoperables'
- Amendments.

Can UK law adapt to meet changing circumstances post-Brexit?

- Bill may lead to 'statutory sclerosis'.

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SPEAKERS' MATERIALS

THE EU (WITHDRAWAL) BILL – OWEN LYSAK

PRACTICAL STEPS

Brexit planning should include impact of the Bill

Action with respect to retained EU law

- Identify elements likely to be material to firm's business
- Identify likely inoperables and potential business impact of likely outcomes
- Including under a transitional arrangement scenario
- Also likely impact where expected EU law may not be implemented in UK
- In particular, where may affect business strategy or systems.

Advocacy and engagement

- Industry associations
- Government and regulators.

THE VIEW FROM THE CONTINENT



SPEAKERS' MATERIALS

THE VIEW FROM THE CONTINENT – FRÉDÉRIK LACROIX

EU27 VIEW FROM THE CONTINENT

Relocation in EU27: possible structures

Relocation strategies	Some regulatory implications
New or scaled up EU27 subsidiary	
<ul style="list-style-type: none"> • Central hub • EU27 passport 	<ul style="list-style-type: none"> • Autorisation and supervision: ECB / local authorities
New or scaled up EU27 branch of <u>UK</u> entity	
<ul style="list-style-type: none"> • Local licences • No EU27 passport 	<ul style="list-style-type: none"> • Local authorities • Local prudential requirements
New or scaled up EU27 branch of <u>third country</u> entity (e.g. US)	
<ul style="list-style-type: none"> • Local licences • No EU27 passport 	<ul style="list-style-type: none"> • Local rules and authorities • Prudential waiver
Continued cross-border business from UK	
<ul style="list-style-type: none"> • Rely on national regimes 	<ul style="list-style-type: none"> • Local rules and authorities

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EU27 VIEW FROM THE CONTINENT

The EU27 approach to and views on restructuring of UK business into the EU

Authorisation and substance

Views from the authorities

- At EU level: ECB, ESMA, EBA and EIOPA
- Substance requirements
- Timing

Critical matters of concern

- Staffing model
- Booking / hedging models
- Use of London branch
- Delegation and outsourcing
- Sales & trading vs advisory business

Regulatory approaches

Investment firms vs credit institutions

- Bank-like business
- Not subject to SSM
- Draft regulation on investment firms

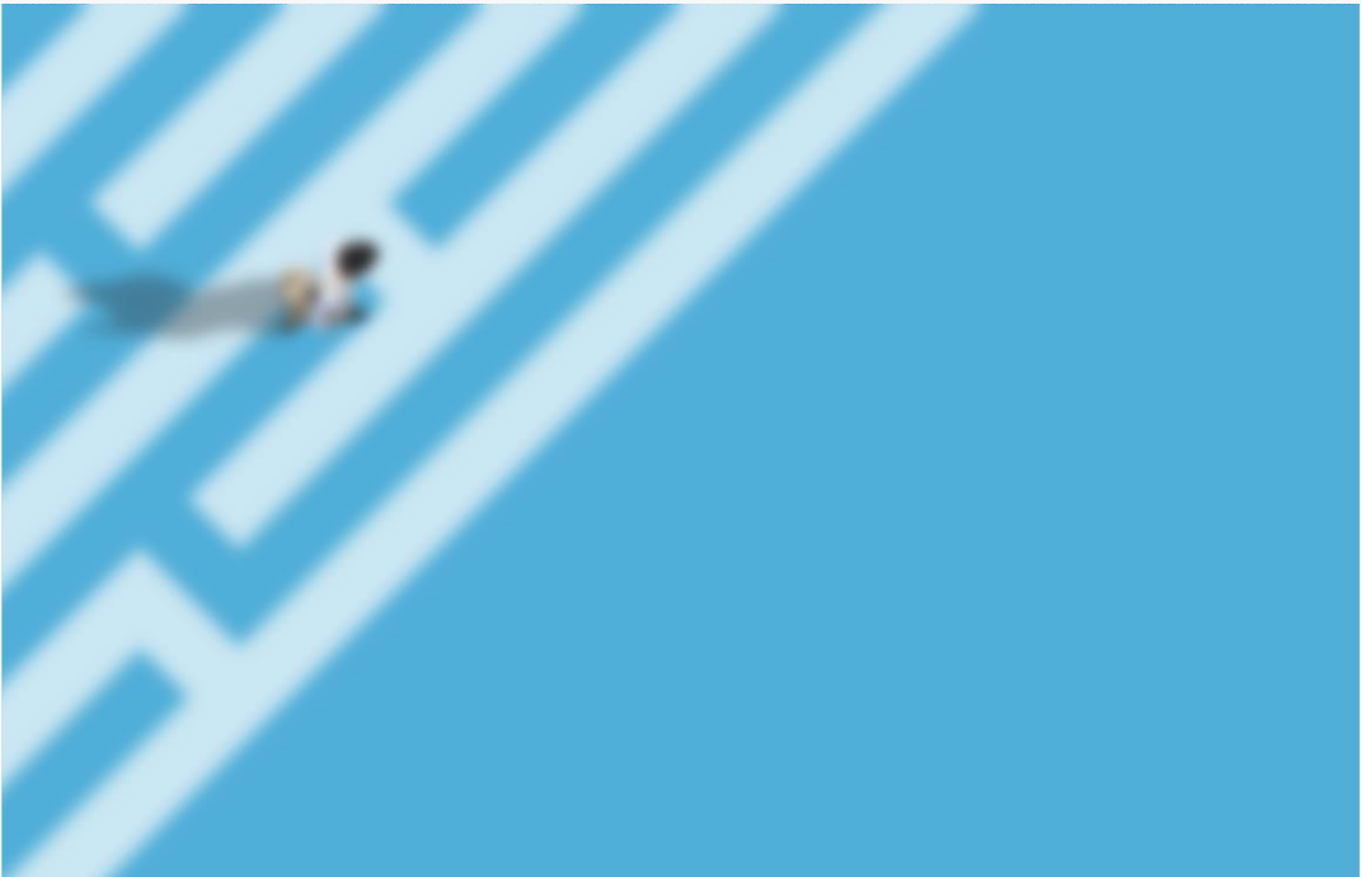
Third country branches

- Not subject to SSM
- Prudential waiver

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PANEL 2





CONTINUITY OF CONTRACT



SPEAKERS' MATERIALS

CONTINUITY OF CONTRACT – MONICA SAH

CONTINUITY OF CONTRACT DEFINING THE ISSUE

1

What is the risk?

- Brexit will end EU passport rights of financial services firms
- UK firms lose passport right to provide services into EU27, likewise for EU27 firms into the UK
- Impacts existing contracts on cross-border basis and through branches
 - Validity
 - Performance
 - Enforcement
 - Amendment.

2

Why leave contracts behind?

- Operational and logistical risks
- Management time, resources and costs
- Transfer or termination may change commercial arrangements: pricing, credit risk and risk mitigation tools
- Tax impact.

3

How to define scope?

- Who is in scope client – fact specific
- Which contracts/transactions?
 - New transactions vs existing transactions
 - Dead register issues
 - Consent not obtained
 - fCapital, tax and operational considerations for firm if transferred
 - Client does not want to move.

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SOLUTIONS

EU comprehensive solution

- Provisions in the Withdrawal Agreement that are directly effective.

National solutions

- Legislative action at EU/EU27 Member State level and UK.

Regulatory solutions

- Temporary regulatory licensing solutions
- Reliance on regulatory forbearance.

Contract by contract life-cycle approach

- Each contract individually assessed to establish which elements are regulated
- Patch work approach
- Would reverse enquiry permit life cycle servicing of existing contract.

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SPEAKERS' MATERIALS

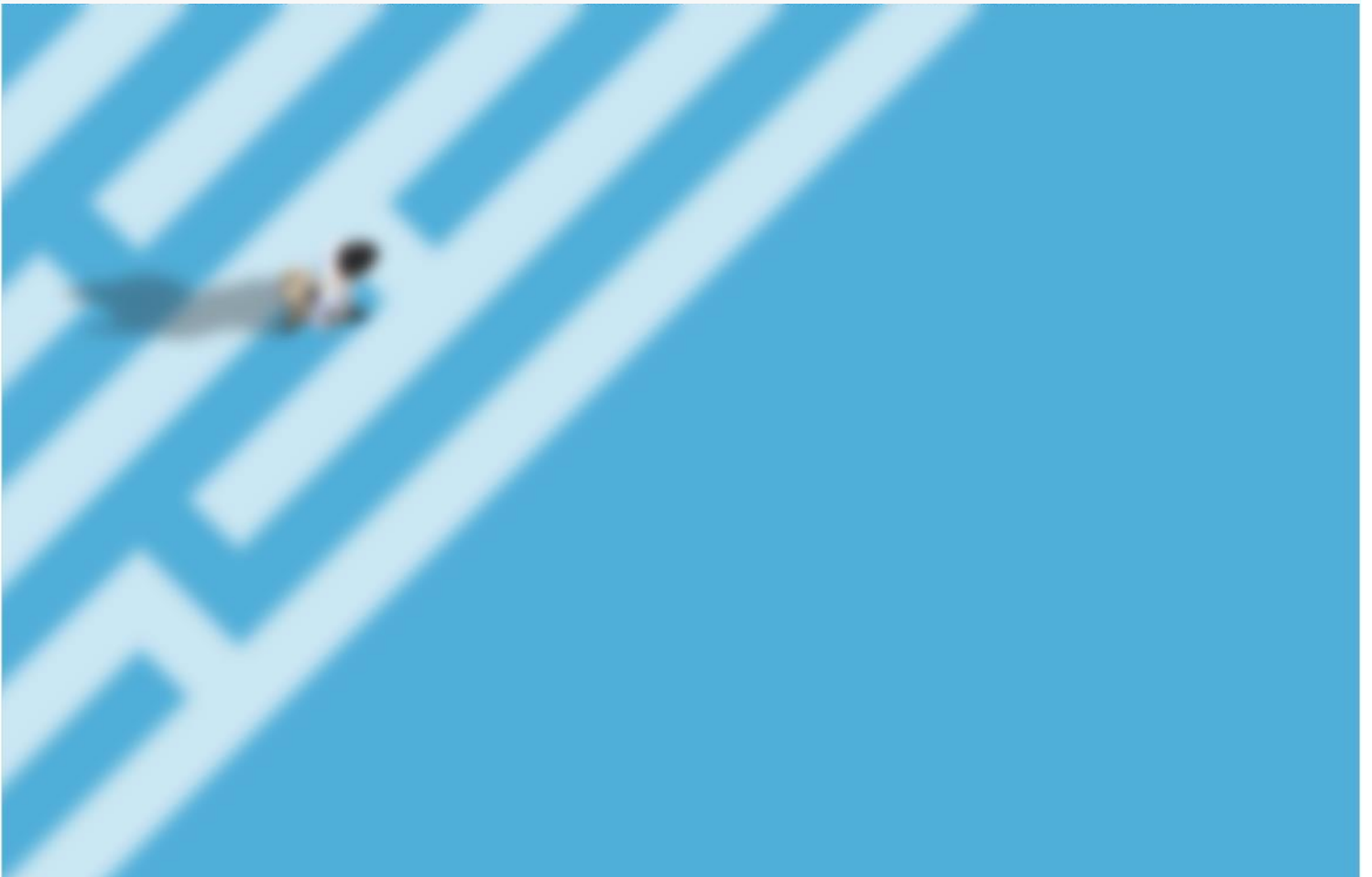
CONTINUITY OF CONTRACT – MONICA SAH

SOME LIFE-CYCLE EVENTS

Derivatives	Lending	Ongoing services
Payment or delivery obligations	Establishing commitment (re term, revolving, acquisition facility, flexible facility)	Investment management agreements
Exercise of option	Funding a participant in a loan (re term, revolving, acquisition facility, flexible facility)	Custody agreements - Corporate actions
Rolling open position	Actions allowing cancellation of the commitment and option to reinstate	
Collateral transfers	Establishing ancillary facility	
Novations	Acting as facility agent	
Unwinds	Guarantee arrangements	
Portfolio compression	Security Trustee	

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REPAPERING YOUR BUSINESS



SPEAKERS' MATERIALS

REPAPERING YOUR BUSINESS – CAROLINE MEINERTZ

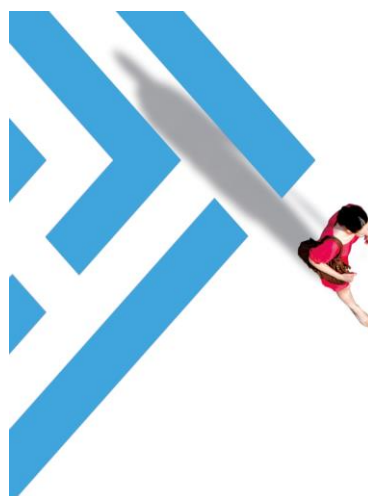
REPAPERING CONTEXT

Brexit is likely to require moving some books of business

- Basic driver: licensing
- Moving business will require documentation exercise vis-à-vis new and existing clients
- Scale and complexity of that exercise will depend on the method used to move business
- Statutory transfer tools versus bilateral novations.

Other factors affecting complexity

- Relationship documentation/master agreements or existing transactions?
- Methodology: replicate and amend or new docs?
- Approach to governing law.



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TRANSFER METHODS



STATUTORY TOOLS/ PROCESSES

- Business transfers pursuant to Part VII of the Financial Services and Markets Act 2000
 - Only available when transferring some deposit business
 - “Virtual Repapering”
 - Ancillary relief, contract cloning and splitting
 - Transfer, not novation
- Cross-border mergers.



BRANCH-TO- BRANCH

- Intra-entity relocation of business
- More limited due diligence likely to be required as no transfer of assets and liabilities
- Limited number of counterparty consents likely to be needed in some product areas, e.g. change of branch status / office.



BILATERAL

- Novations
- Most onerous repapering requirements in terms of due diligence and customer intrusion
- Potential trigger for regulatory requirements.

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SPEAKERS' MATERIALS

REPAPERING YOUR BUSINESS – CAROLINE MEINERTZ

OTHER FACTORS AFFECTING COMPLEXITY

Relationship documentation only or existing transactions?

- “Pre-papering” versus “Re-papering”
- Some existing transactions may be permitted to continue from a licensing perspective (e.g. fully-drawn loans)
- Commercial considerations.

Replicate and amend or new docs?

- Quality of existing data
- Customer journey
- Repapering an opportunity?

Approach to governing law?

- Maintain English law for Terms of Business and Product agreements?
- Legal considerations
 - Validity of choice of law for existing and new transactions
 - Mandatory provisions of local law
- Other considerations
 - Market acceptability
 - Basis risk if back-to-back hedging?



FINANCIAL MARKET INFRASTRUCTURE



SPEAKERS' MATERIALS

FINANCIAL MARKETS AND INFRASTRUCTURE – JEREMY WALTER

FINANCIAL MARKET INFRASTRUCTURE (1)

Recognition and equivalence

FMI perspective

- Ability of UK FMIs to provide services in EU27 (and vice versa?)
 - Existing regimes for third country CCPs, trading venues, CSDs and trade repositories
 - No equivalence regime for third country data reporting service providers under MiFID2

Participant perspective

- Satisfying trading and clearing obligations and reporting requirements

Impact on cross-border business between UK and other third countries?

- UK FMIs may lose benefit of existing EU-third country equivalence determinations

Non-discriminatory access to FMIs

Trading venues

- Transparent and non-discriminatory access, based on objective criteria
- Plus, for RMs
 - Access limited to investment firms, credit institutions and other persons meeting specified criteria
 - Provision of DEA restricted to investment firms and credit institutions

CCPs

- Non-discriminatory, transparent and objective admission criteria
- Criteria restricting access permitted for risk-based reasons (only)

CSDs

- Publicly disclosed criteria for 'fair and open' access
- Criteria restricting access permitted for risk-based reasons (only)

Loss of additional rights for investment firms?

- No additional regulatory or administrative requirements for investment firms accessing RMs in other member states
- Access to CCP, clearing and settlement systems in any member state based on same criteria as local members

FINANCIAL MARKET INFRASTRUCTURE (2)

Trading venue access to CCPs

Accepting contracts for clearing

- CCPs not to discriminate based on trading venue when accepting contracts for clearing
- Applies to:
 - Contracts subject to clearing obligation (EMIR)
 - Other financial instruments (MiFIR)
- Specific third country equivalence regime under MiFIR
- Various CCPs granted transitional relief for ETDs under MiFIR

Other issues

- Insolvency protections, including settlement finality
- Recognition of resolution under BRRD and proposed CCP R&R regulation
- Choice of venue

CCP access to trading venues

Access to trading venue feeds

- Trading venues to provide CCPs with non-discriminatory access to trade feeds
- Applies to:
 - Contracts subject to clearing obligation (EMIR) for authorised CCPs only
 - Other financial instruments (MiFIR) for authorised and recognised CCPs
- Specific third country equivalence regime under MiFIR
- Various trading venues granted transitional relief for ETDs under MiFIR

Other FMI access requirements

Access to benchmark information

- Persons with proprietary rights to benchmarks to provide
 - price, data feeds and licences to CCPs and trading venues
 - on a reasonable and non-discriminatory basis
- Specific equivalence regime for third country trading venues and CCPs requesting access

CSD links

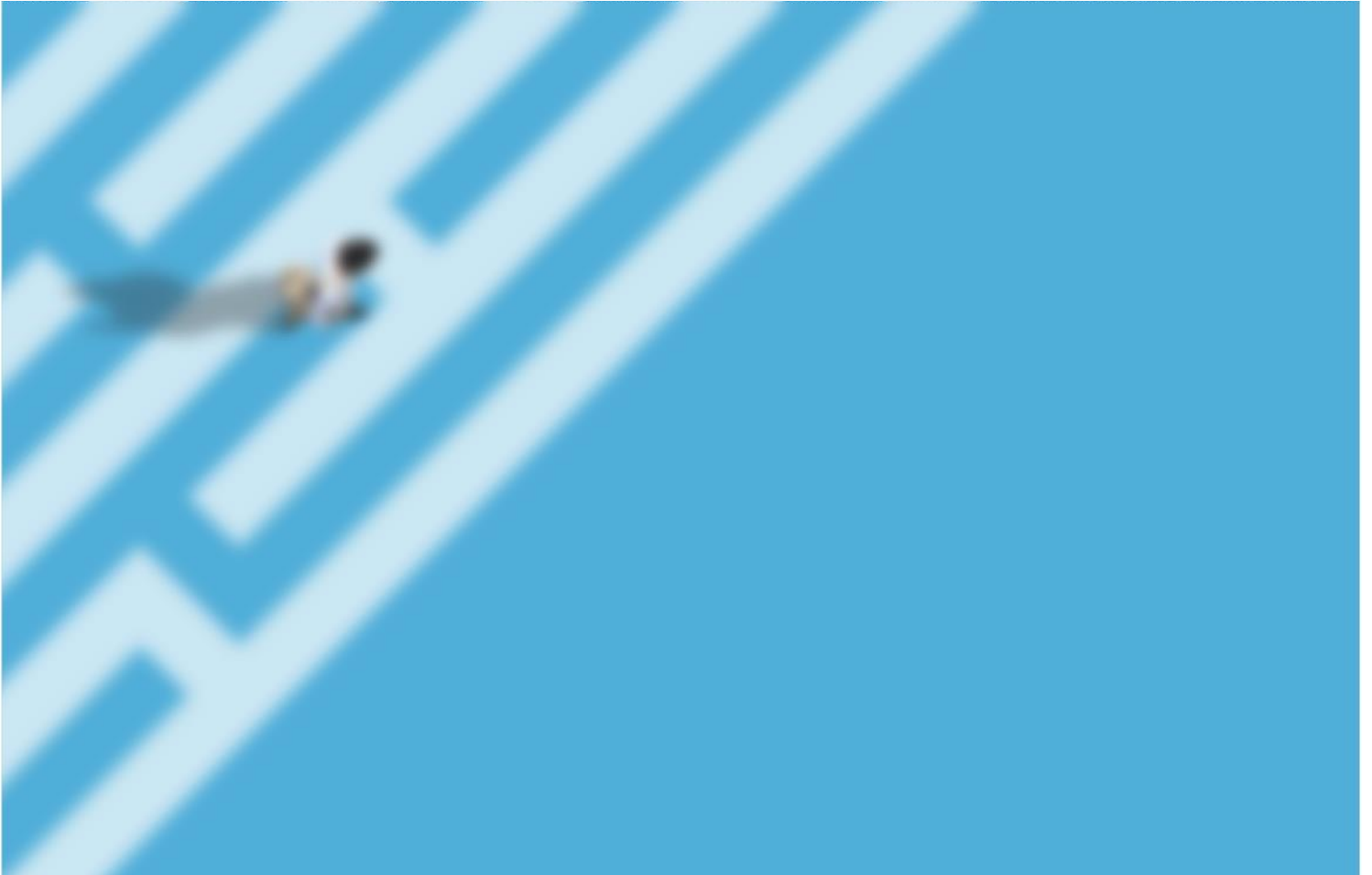
- Additional requirements for CSDs requesting links with third country CSD, including legal assessment of:
 - Entitlement of requesting CSD to securities
 - Impact of insolvency proceedings on segregation, settlement finality etc.



CONCLUDING REMARKS – CHRIS BATES



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