NORTON ROSE FULBRIGHT

No-deal Brexit: Doing business in the EU

Updated: September 2019

Introduction

The UK Government has implemented a temporary permissions regime (**TPR**) for inbound passporting EEA firms and funds. The TPR will come into effect in the event of a hard Brexit, and will provide a temporary backstop to ensure that such firms and funds can continue their UK business for a limited period of time with minimal disruption.

The TPR is only relevant for firms that passport into the UK. The European Commission has not reciprocated with a similar regime and has instead pushed for UK firms to submit an application for authorisation in the relevant Member State where they wish to conduct business.

However, some Member States have taken take their own steps.

The following is a summary concerning the current position in some of the key EU27 jurisdictions.

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Germany

Key contacts: Norton Rose Fulbright LLP – Martin Krause, Caroline Herkströter and Michael Born

Updated: 18 September 2019

On 29 March 2019, a bill entered into force in Germany which, inter alia, sets out a national transition regime for regulated market participants from the UK in case of a hard Brexit. Given the tax-related provisions also included, the bill is entitled "Tax Act relating to Brexit" (*Brexit-Steuerbegleitgesetz* – **Brexit-StBG**).

The bill seeks to avoid market distortions and risks to financial stability in a hard Brexit scenario. Accordingly, the transitional provisions regarding market access of UK institutions introduced by the bill only apply in the event that the EU and the UK do not enter into a Withdrawal Agreement.

The regulatory transitional rules refer to an unspecified date of withdrawal and, therefore, will cover any further extension of the process under Article 50 of the Treaty on European Union (**TEU**).

Germany – General transition regime (1/4)

The Brexit-StBG introduced transitional rules for the following regulated market participants and trading venues that target the German market from the UK: credit institutions, investment firms, insurance undertakings, payment institutions and electronic money institutions and regulated markets, multilateral trading facilities (**MTFs**) and organised trading facilities (**OTFs**).

The German regulator (**BaFin**) is empowered to allow the UK entities covered by the transitional regime that have operated in Germany under the European passport regime so far to continue providing certain services without a German license, each for a period of up to 21 months following a hard Brexit:

- for UK credit institutions and investment firms that, as applicable, conduct banking business and/or provide investment services in Germany through a branch or on a cross-border basis under the European passport regime on the withdrawal date, BaFin may determine that the passport regime under the German Banking Act (**KWG**) continues to apply, fully or partially;
- for UK insurance undertakings, BaFin may determine that the respective passport regime under the German Insurance Supervision Act (**VAG**) continues to apply to UK insurers and reinsurers operating in Germany under a passport on the withdrawal date; and
- for UK payment institutions and electronic money institutions, BaFin may similarly determine that the respective passport regime under the German Payment Services Supervision Act (**ZAG**) continues to apply, fully or partially.

Germany – General transition regime (2/4)

Such general transition periods will apply to all covered UK entities without the need for any additional application or notification. However, in relation to new business after Brexit, the scope of the general transition regime set out in the bill is limited:

- UK credit institutions, investment firms, payment institutions and electronic money institutions are only authorised to conduct their regulated activities if these activities are “closely connected” to contracts that existed at the time of withdrawal. The bill’s explanatory statement mentions certain examples of the required “close connection” such as (i) hedging transactions, (ii) lifecycle events, (iii) netting transactions, (iv) portfolio compression transactions, (v) prolongations or (vi) the exercise of contractual option or conversion rights; and

- for UK insurance undertakings, the transitional regime only covers the run-off of insurance contracts that were concluded before the time of withdrawal.

Germany – General transition regime (3/4)

Furthermore, BaFin may order that UK markets for financial instruments listed as trading venues in the respective register of ESMA at the time of withdrawal are deemed to be trading venues within the meaning of the German Securities Trading Act (**WpHG**) for a transitional period of up to 21 months. During such period, no application for authorisation as a third country trading venue will be needed, thus allowing German participants to continue their trading activities on these regulated markets, MTFs and OTFs. Such activities in the UK, however, may also be affected by the trading obligations of EU27 investment firms under MiFIR.

The general transition regime introduced by the bill only covers UK entities operating under a European passport. Despite criticism by certain pressure groups, the bill does not refer to services provided by UK branches of EEA institutions back to clients in the EU (so-called "back-branching"). Such structures currently are subject to general debate; the European regulators have announced that they will not accept (at least comprehensive) "back-branching" by EEA institutions after Brexit.

The bill grants BaFin flexibility regarding its orders. The regulator is authorized to issue and announce each of the transitional periods by means of general decree (*Allgemeinverfügung*) addressed to all market participants. BaFin may decide about the length of the transition periods at its discretion and may further limit its transitional orders to certain types of transactions. BaFin also has the general power to impose conditions and shall pay particular attention to deposit and investor protection schemes.

Germany – General transition regime (4/4)

A representative of the German regulator has announced that BaFin will make use of the authorisation under the Brexit-StBG in a hard Brexit scenario. However, the regulator has not published any details or drafts of its general rulings yet. Based on the parliamentary debate relating to the Brexit-StBG, BaFin could first grant transitional periods of 12 months only and could then later assess an extension of these transition periods.

Germany – Individual exemption for proprietary business (1/3)

In addition to the general transition periods, the bill also provides for a specific relief measure for certain trading activities of UK entities. Limited to "proprietary business" (*Eigengeschäft*), UK entities will be deemed to have been granted an exemption from the licensing requirement pursuant to Sec. 2 (5) KWG with effect from the withdrawal date if they file a "complete" application with BaFin within 3 months after Brexit.

The German regulator will require certain corporate and other documents in order for such an application of the UK entities to be considered as "complete". So far, the German regulator has not yet specified its related requirements. A certain indication could be the documentation necessary for an earlier transitional procedure that is referred to for the purposes of the specific Brexit relief measure: BaFin required, in particular, a "statement of no prior or pending convictions" (*Straffreiheitserklärung*) signed by each board member in connection with these earlier transitional procedures. The enclosures further included a detailed description of the business activities, current financial statements, sample contract forms or the appointment of a receiving agent in Germany.

Germany – Individual exemption for proprietary business (2/3)

"Proprietary business" (*Eigengeschäft*) is one of 2 regulated activities transposing into German law the MiFID II investment service "dealing on own account". So far, a license for "proprietary business" is required by anyone who trades financial instruments in one's own name and on one's own account (without providing any service to a third party in doing so) (i) as a member of a regulated market or a MTF, (ii) by means of "direct electronic access" to a trading venue, or (iii) with commodity derivatives, emissions allowances or derivatives of emissions allowances. The additional relief measure will exempt UK entities from such licensing requirement in Germany on application.

It should be noted in this context that the German government has published a draft bill on 5 September 2019 that sets out a general reduction of the scope of the licensing requirement for "proprietary business". The draft bill introduces a new exemption for all enterprises with a seat in a non-EEA country that conduct "proprietary business" as a member or participant of a trading venue. This new exemption on the national level is explicitly subject to the introduction of the equivalence regime under MiFIR on the European level. Provided that the scope of the licensing requirement will be reduced for all third country entities by the new bill, UK entities will only have to rely on the specific relief measure in a hard Brexit scenario for those cases of "proprietary business" that are still licensable (*i.e.*, dealing by means of "direct electronic access" and dealing with certain derivatives and emissions allowances).

Germany – Individual exemption for proprietary business (3/3)

The specific relief measure will not cover the regulated activity of "proprietary trading" (*Eigenhandel*) defined as "dealing on own account" that is provided as a service for others. "Proprietary trading" includes, in particular, the activities of market makers and systematic internalisers. Also, high-frequency trading is defined to be a case of "proprietary trading" (even if not provided as a service for others) and will therefore be excluded from the scope of the specific relief measure.

Germany – Other implications on market access for UK entities (1/2)

In principle, the general transition regime and the specific relief measure set out in the Brexit-StBG will be introduced in addition to the other options for the market access of non-EEA entities in Germany. However, the bill may have indirect implications for these other options as well.

Pursuant to Sec. 2 (5) KWG, BaFin may grant a non-EEA institution that intends to provide regulated services in Germany on a cross-border basis an individual exemption from the German licensing requirement on application "if the institution does not require additional supervision by BaFin due to the supervision by the competent authority in its home country". The explanatory statement of the Brexit-StBG explicitly mentions that such general powers of BaFin remain unaffected by the transitional bill. The relating examples given in the statement, however, are rather restrictive (transitional exemption until a license has been granted; exemption for purposes of the orderly run-off of business). Also the Brexit-StBG will introduce a specific exemption limited to "proprietary business" (*Eigengeschäft*) which could be seen as a negative indication of the legislator with respect to exemptions beyond this activity. BaFin has not publicly announced so far that it intends to grant UK institutions individual exemptions under general third country rules.

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Germany – Other implications on market access for UK entities (2/2)

Further, BaFin has generally recognised an exception from the national licensing requirements with respect to cross-border services of a non-EEA provider requested at the own exclusive initiative of a German client (so-called reverse solicitation exemption). BaFin has explicitly stated that such exception may also cover maintaining an existing relationship without a German license. However, the explanatory statement of the Brexit-StBG does not refer to the exception of reverse solicitation. The German Federal Government expects UK institutions to either terminate the relevant business relationships, obtain a German license (by establishing a dependent German branch) or transfer the respective business to a licensed provider before the end of the national transition period. Thus, the transitional bill appears to put into question the exception of reverse solicitation in relation to services provided under an existing relationship. In this context, it should also be noted that ESMA has narrowly interpreted the concept of reverse solicitation in its recently updated Q&As on MiFID II.

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Austria

Key contacts: Geppert & Maderbacher Rechtsanwälte - Stefan Geppert

Updated: 23 August 2019

Currently there is no proposal similar to Germany's Brexit-StBG.

A 'BREXIT – Accompanying Law 2019' has been enacted by the Austrian Parliament but it currently does not provide for a temporary permissions regime which makes it possible for UK investment firms to provide services in Austria. The only financial market matter which is currently dealt with by the BREXIT – Accompanying Law 2019 is the fact that UK UCITS shall not be treated immediately as alternative investment funds (**AIFs**) after a no deal Brexit meaning that employee pension funds may not need to sell UK UCITS before 31 October 2019 in order to comply with the investment limits for AIFs. In addition an amendment to the Insurance Supervision Act has been enacted so that the same benefit applies to the cover funds of fund linked life insurance policies.

There are no legal obstacles in Austria that prevent UK firms from replicating their business in subsidiaries (with the exception that back-branching shall be prevented).

Further, Austria is not reviewing its third country access regime, as a result of Brexit, with a view to limiting access.

With the exception of the reverse solicitation exemption and the exemption under Article 46 et seq. MiFIR following an equivalence decision, there are no existing exemptions that allow third country firms to provide services without authorisation.

France

Key contacts: Norton Rose Fulbright LLP - Roberto Cristofolini

Updated: 6 September 2019

On 7 February 2019, Ordinance No. 2019-75 dated 6 February 2019 relating to the preparatory measures for the withdrawal of the UK from the EU with respect to financial services (the **Ordinance**) was published.

The Ordinance provides for a number of measures in relation to financial services which will enter into force as from the date of exit of the UK from the EU, in the event of hard Brexit, i.e. a Brexit with a no-deal.

France – Summary of the Ordinance (1/3)

Interbank settlement systems and delivery and settlement systems:

- a measure is designed to recognise UK interbank settlement systems and delivery and settlement systems (such as CLS, CHAPS, CREST and the UK clearing houses) as interbank settlement systems and delivery and settlement systems benefitting from the provisions of Directive 98/26/EC on settlement finality in payment and securities settlement systems; and
- the rationale of this measure is to avoid French participants to these systems being excluded from the UK systems on the basis of the legal uncertainty which would result from the absence of recognition (by French authorities) of the UK systems as benefitting from the provisions of the Directive 98/26/EC.

Supervision powers of the Autorité de Contrôle Prudentiel et de Résolution (**ACPR**):

- the Ordinance provides that: "This power of sanction is exercised in respect of persons and facts which are within its scope of supervision on the date of the breach or the offense." This provision provides that the ACPR remains the competent for control of the acts or omissions committed by UK regulated firms prior to the withdrawal of the UK from the EU; and
- the Ordinance also provides that the ACPR is competent to control compliance with French law with respect to the performance of agreements entered into pre-Brexit, on the basis of the cross-border passport or branch passport, which parties continue to perform after Brexit.

France – Summary of the Ordinance (2/3)

Designation of the Autorité des Marchés Financiers as a competent authority to supervise activities relating to securitization.

Implements specific rules for the management of collective investment schemes, the assets of which comply with specified investment ratios in European entities:

- the Ordinance provides for a grandfathering clause in relation to investment in UK entities for collective investment schemes; and
- broadly, UK entities will still be eligible for specified investment ratios in European entities after Brexit during a period of time set by the Arrêté of the French Minister of Economy dated 22 March 2019, within a maximum of 3 years.

Ensuring the continuity of the use of master financial services agreements (such as ISDA agreements):

- the French Government took measures to adapt French law in relation to the scope of transactions eligible to netting and the possibility to provide for compound interest in order to allow master financial services agreements to be governed by French law; and
- the Ordinance also provides for a mechanism of transfer of master financial services agreements (such as ISDA agreements) from UK entities to French entities belonging to the same group. This transfer of master financial services agreements can be carried out on the basis of implicit consent of the French counterparty where the French counterparty has not opposed such transfer within 5 days of receipt of the offer of transfer. The transfer must also comply with a number of other requirements. This mechanism of transfer will only be available during 12 months as from the date of entry into force of the Ordinance (i.e. the date of withdrawal of the UK from the EU in absence of a deal).

France – Summary of the Ordinance (3/3)

Finally, a provision of the Ordinance aims, broadly, at protecting French insured having entered into an insurance contract with a UK risk carrier before Brexit, whilst encouraging the latter to transfer to an EU risk carrier its insurance business in respect of risk located in France.

To date the French Government has not announced a temporary permissions regime for inbound passporting UK financial firms and funds.

Italy

Key contacts: Norton Rose Fulbright LLP - Salvatore Iannitti and Pietro Altomani

Updated: 6 September 2019

On 25 March 2019, the decree containing the Italian transitional regime was published in the Official Gazette and on 26 March 2019 it entered into force. It was later confirmed by the Italian Parliament and converted, with minor amendments, into Law No. 41 of 20 May 2019 (the **Decree**), effective from 25 May 2019.

Under the Decree, in a no-deal Brexit the Italian transitional regime will run from the date of the UK's withdrawal from the EU for eighteen months. UK investment firms, banks and e-money institutions that are carrying out their activities in Italy at the date of withdrawal are allowed to continue carrying out such activities during an 18-month transitional period, provided that (i) they notify the competent authorities of their intention to continue business after the interim period (within 3 days before Brexit), and (ii) within the first six months they make a notification to the competent authority applying for a full license. If the entity does not make the initial notification, it shall enter into a "run off" period and must close its Italian business within six months. If the entity makes the initial notification but then does not apply for a full licence within the first 6 months it shall also enter into a "run off" period and must close its Italian business within a further 6 months (i.e. 12 months after the UK's withdrawal from the EU).

The main provisions of the Decree, which would kick-in in the event of the UK's withdrawal without a deal, are set out in the following slides.

Italy – Main provisions of the Decree (1/4)

Banking activities and deposit collection

UK banks which at the date of the UK's withdrawal from the EU are carrying out activities admitted to mutual recognition (such as banking activities, including granting financing and payment services), can continue to carry on such activities, during the transitional regime (both towards existing clients and new clients), subject to prior notification to the Bank of Italy.

However, UK banks may continue to carry on deposit collection under the freedom to provide services regime, only to the extent necessary to manage client relationships commenced before the date of the UK's withdrawal from the EU, without entering into new contracts or renewing (not even automatically) existing ones, in any case, subject to prior notification to the Bank of Italy.

Branches of UK banks may continue to carry out business in Italy in the interim period (both towards existing clients and new clients), subject to prior notification to the Bank of Italy.

The Bank of Italy has published a communication addressed to UK banks, dated 27 March 2019, implementing the Decree, containing inter alia the templates for notifications and communications to Bank of Italy as contemplated in the Decree, and a recap of the applicable steps for banks.

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Italy – Main provisions of the Decree (2/4)

Investment services

UK banks and investment firms which are carrying on investment services and activities under the freedom to provide services regime for retail clients and professional clients upon request shall terminate such activities and services at the date of the UK's withdrawal from the EU. In order to avoid clients' prejudice, it is possible to carry out transactions that are necessary for the orderly closure of the existing relationship, as soon as possible and in any case within six months from the date of the UK's withdrawal from the EU, in compliance with the withdrawal notice provisions in the relevant client agreement. In any case, a communication to clients and competent supervisory authorities must be served – within 15 days from the UK's withdrawal from the EU – illustrating the initiatives adopted to grant the orderly closure of business.

UK banks and investment firms carrying out investment services and activities under the freedom to provide services regime, may continue to render such services during the transitional regime (both towards existing clients and new clients), exclusively towards eligible counterparties and per se professional clients as defined under Italian law, in any case, subject to prior notification to respectively, the Bank of Italy or Consob.

Italian branches of UK banks and investment firms carrying out investment services under the freedom of establishment, may continue to carry on the provision of such services (to any kind of clients and both towards existing clients and new clients) subject to prior notification to Bank of Italy.

Specific provisions are aimed at allowing banks and investment firms to continue the management of OTC derivatives not subject to clearing by a CCP existing on the date of the UK's withdrawal from the EU (this is allowed even if it involves amendments or new contracts), for the interim period or a more limited run-off period.

Consob has published a press release and a communication, dated 26 March 2019, implementing the Decree in respect of investment firms (and Banks that will cease providing investment services in connection with Brexit), containing inter alia the templates for notifications and communications to Consob contemplated in the Decree.

Italy – Main provisions of the Decree (3/4)

Collective asset management

Under the Decree, UK asset managers and collective investment schemes carrying out business in Italy (both under the freedom of services and through a branch) vis-à-vis retail or professional clients upon request, shall stop their activities at the date of the UK's withdrawal from the EU. As such UK asset managers and collective investment schemes are only allowed to manage orderly closure of pending contracts, as soon as possible, and in any case within 6 months from the date of the UK's withdrawal from the EU (no new contracts or renewals, even automatic, would be allowed). In any case, a communication to clients and competent supervisory authorities must be served – within 15 days from the UK's withdrawal from the EU – illustrating the initiatives adopted to allow the orderly closure of business.

Electronic money

Branches of UK e-money institutions may continue to carry on their activities in the transitional period (both towards existing clients and new clients), subject to notification to the authorities.

UK e-money institutions carrying out business in Italy under the freedom of services regime shall cease their activities at the date of the UK's withdrawal from the EU. As such UK e-money institutions not having a branch in Italy are only allowed to manage the orderly closure of pending contracts, as soon as possible, and in any case within 6 months from the date of the UK's withdrawal from the EU (no new contracts or renewals, even automatic, would be allowed). In any case, a communication to clients and competent supervisory authorities shall be served – within 15 days from the UK's withdrawal from the EU – illustrating the initiatives adopted to grant the orderly closure of business.

Italy – Main provisions of the Decree (4/4)

Payment institutions

UK payments institutions, irrespective of whether acting on a freedom of establishment or freedom of services regime, shall stop their activities at the date of the UK's withdrawal from the EU and will be only allowed to manage orderly closure of pending contracts, as soon as possible, and in any case within 6 months from the date of the UK's withdrawal from the EU (no new contracts or renewals, even automatic, would be allowed). In any case, a communication to clients and competent supervisory authorities shall be served – within 15 days from the UK's withdrawal from the EU – illustrating the initiatives adopted to grant the orderly closure of business.

Access to trading venues

UK members or participants to Italian trading venues (who adhered to them prior to Brexit) may continue to access them in the interim period, if the trading venue has filed an application for extending the activity to the UK prior to the UK's withdrawal from the EU.

UK managers of trading venues may continue to carry out business in Italy in the interim period, continuing to grant access to Italian operators that were already members or participants on Brexit date, provided they apply for authorization (in their quality of, respectively, non-EEA investment firms, non-EEA banks, or non-EEA regulated markets) to the Italian regulator prior to the UK's withdrawal from the EU.

Italy – Other observations

The above mentioned notifications are to be served within 3 business days before the date of UK withdrawal.

UK banks, investment firms and e-money institutions that are allowed to continue operations in Italy in the interim period pursuant to the above rules and intend to continue their activity in Italy after the interim period, shall file an application for authorization as a non-EEA entity (or for authorization of an Italian newco) within 6 months of Brexit. In the absence of such an application for authorization, a run-off period of 6 months applies.

This transitional regime appears more restrictive compared to what was originally expected (as expressed by the Italian Ministry of Finance on 24 January 2019).

Further additional rules govern the modalities for applying to continue to carry out business in Italy after the interim period (subject to different requirements depending on the relevant kind of entities and/or activities). The Decree also contains provisions on the insurance sector and on activities of Italian firms into the UK market (in particular, a notification to the competent Italian regulator, within 3 business days before Brexit is required).

At present, there are no initiatives aimed at reviewing the third country market access regime. In addition, the law converting the Decree confirmed that its application to UK firms shall be made according to existing legislation.

Under Italian law, there are no specific exemptions that allow third country firms to provide services without authorisation unless the services are provided following a genuine exclusive initiative of the client.

Netherlands

Key contacts: Norton Rose Fulbright LLP - Floortje Nagelkerke and Nikolai de Koning

Updated: 27 September 2019

In the Netherlands, a transitional regime has been published for investment firms (*beleggingsondernemingen*) with their seat in the UK in case of a no-deal Brexit. For other financial institutions such as banks, regulated markets and insurers, no transitional regimes have been proposed (nor are they expected to be proposed). This means that in case of a no-deal Brexit, these financial institutions will be treated as third-country firms under the Act on the Financial Supervision (*Wet op het financieel toezicht*, **AFS**) and in principle require authorization in order to continue to provide regulated services within the Netherlands.

More generally, legislation is in preparation regarding the so-called ‘Dutch Brexit Act’, making it possible to quickly take necessary legislative action by means of a general administrative order or Ministerial decree instead of by changing the law.

Netherlands – Transitional regime for investment firms

On 12 February 2019, the amendments to the Exemption Regulation AFS (*Vrijstellingsregeling Wft*, the **Exemption Regulation**) in relation to the (temporary) exemptions for investment firms based in the UK were published in Dutch Government Gazette (*Staatsblad*), stipulating that Article 10 of the Exemption Regulation will apply to investment firms with their seat in the UK if the UK and the EU have not entered into an agreement on the exit of the UK from the EU. The Exemption Regulation is available in Dutch only. The consequence of this exemption is that investment firms with their seat in the UK are exempted from the license obligation for providing investment services and/or the investment activity dealing on own account in the Netherlands, insofar provided to professional investors or eligible counterparties. A condition is that the investment firm will need to be supervised in the UK and it will need to notify the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, the **AFM**). The investment firm will largely be exempted from the prudential and ongoing code of conduct requirements as set out in the AFS.

The exemption will apply to investment firms from the UK acting on a cross-border basis or via a branch office in the Netherlands, as of the moment they have received their license and they have completed the notification. The fees for the notification with the AFM are EUR 4,400.

The date of entry into force of this exemption can be set by means of a ministerial decree (where necessary retroactively). This means that any registration of UK investment firms is currently still conditional to such ministerial decree in case of a no-deal Brexit. The exemption will in any event be for a maximum of two years. If there is a deal on Brexit and a transitional regime for investment firms, registration under this exemption will not take place.

Despite the aforementioned conditionality, UK investment firms are nevertheless urged to register themselves with the AFM as soon as possible. The notification form that needs to be used for this purpose is available on the AFM's website.

Netherlands – Dutch Brexit Act

In addition, on 16 November 2018, the Dutch Minister of Justice and Security (Minister van Justitie en Veiligheid) submitted a legislative proposal to the Dutch Parliament proposing changes to a number of laws and regulations in the Netherlands in preparation for Brexit (the **Dutch Brexit Act**). On 12 April 2019, the Dutch Brexit Act was published in the Dutch Government Gazette (*Staatsblad*), stipulating that the date of entry into force us yet to be set by a Governmental decree. The Dutch Brexit Act is available in Dutch only.

The explanatory notes to the Dutch Brexit Act provide that the proposal is a product of an inventory that was carried out to see whether Dutch laws needed to be amended as a result of Brexit. This inventory was based on the fact that the withdrawal of the UK will lead to the loss of its EU membership, irrespective of whether consensus will be reached on a Withdrawal Agreement or the UK leaves the EU without an agreement in place (**hard Brexit**). For most cases, it turned out that the existing legislative frameworks offer sufficient freedom to be able to act quickly and adequately in each of the currently foreseen scenarios. Therefore, the Dutch Brexit Act only contains technical amendments to Dutch legislation that are strictly necessary and need to enter into effect as of the date of Brexit.

In view of the complexity and the amount of legislation possibly affected by Brexit, the Dutch legislator believes it to be important that quick legislative action can be taken in cases of urgent, unforeseen issues resulting from Brexit. This is only insofar as is necessary for the proper implementation of a Brexit-related binding EU legal act or to avoid unacceptable consequences. Therefore, the Dutch Brexit Act contains a generic provision making it possible to quickly take necessary legislative action by means of a general administrative order or ministerial decree instead of by changing the law. These emergency legislative actions will in principle have a transitional nature, meaning that they will generally apply only temporarily and/or will be substituted by a more structural / formal legislative action.

It is important to note that neither the Dutch Brexit Act nor the explanatory notes thereto include (or mention) changes or measures aimed specifically at the financial sector. However, the aforementioned generic provision can also be used as a basis for legislative actions that may need to be taken in the financial sector.

Netherlands – Existing exemptions for third country firms (1/3)

Investment firms dealing on own account

Third-country firms that exclusively deal on own account in the Netherlands via an authorised person, are exempted from the obligation to obtain a licence as an investment firm. We understand that this exemption should be understood to mean that a third-country investment firm that deals on own account is allowed to be a member, participant or client of any Dutch trading venue without the need to be licensed or use another party which is licensed in the Netherlands. No notification to the AFM is required in order to be able to rely on this exemption.

Please note that there is another exemption in place for investment firms based in Australia, Switzerland or the United of States of America (**US**) that provide investment services to eligible counterparties or professional clients, or deal on own account on a cross-border basis or via a branch office in the Netherlands. In case of a no-deal Brexit, this exemption will temporarily also apply to investment firms based in the UK. For more information on the conditions for this exemption, please refer to the section "Transitional regime for investment firms".

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Netherlands – Existing exemptions for third country firms (2/3)

Clearing institutions (*clearinginstellingen*)

A number of clearing institutions, banks and investment firms that are under supervision for providing clearing services in their home state, including firms from the UK, that act on a cross-border basis or via a branch office in the Netherlands, are exempted from the obligation to obtain a licence as a clearing institution, if they have submitted a notification to the Dutch Central Bank (*De Nederlandsche Bank*, **DNB**). For investment firms, additional requirements apply, as they will have to:

- hold a licence for dealing on own account in their home state; and
- be authorized and supervised under this licence for providing clearing services

AIFMs

Third-country firms are exempted from the obligation to obtain a licence as an AIFM for the offering of units in an AIF to investors in the Netherlands, or for the managing of AIFs that are based in the Netherlands, if the following conditions are met:

- the units of the relevant AIF are offered in the Netherlands exclusively to qualified investors (*gekwalificeerde beleggers*). Qualified investors are mostly regulated firms such as investment funds, or firms with a certain size that fulfil two of the following conditions: balance total of EUR 20 million, net turnover of minimal EUR 40 millon, own capital of EUR 2 million;
- a notification form is submitted to the AFM; and
- an attestation from the regulatory authority, confirming its ability to effectively comply with the cooperation agreement as referred to above, is also submitted to the AFM. In practice, instead of an attestation, a hyperlink to the registration with the regulatory authority suffices.

Netherlands – Existing exemptions for third country firms (3/3)

Please note that there is also an alternative exemption in place for third-country AIFMs that offer units in AIFs to investors in the Netherlands, or that manage AIFs that are based in the Netherlands, which units are offered to all types of investors (instead of exclusively qualified investors). This exemption is only available for firms based in Guernsey, Hong Kong, Jersey and the US. We have no indication that this exemption will also apply to AIFMs from the UK following Brexit, but they can use the abovementioned exemption. Therefore no further details on this exemption will be provided.

Please note that (a limited number of) regulatory conduct of business requirements will apply to the third-country firm if it relies on any of the exemptions mentioned in the previous slides.

We are not aware of the Dutch authorities reviewing its third country market access regime as a result of Brexit.

Luxembourg

Key contact: Norton Rose Fulbright LLP – Manfred Dietrich

Updated: 30 September 2019

The laws of April 8, 2019 regarding measures to be taken in relation to the financial sector in the event of a withdrawal of the UK from the EU (the **Brexit Laws**) have been published.

The Brexit Laws apply to firms established in the UK that prior to Brexit were authorised entities under the Capital Requirements Directive IV (**CRD IV**), the revised Markets in Financial Instruments Directive (**MiFID II**), the revised Payments Services Directive (**PSD2**), the revised Electronic Money Directive (**EMD2**), the Alternative Investment Fund Managers Directive (**AIFM Directive**) or the UCITS Directive, as well as to UCITS and Part II undertakings for collective investment (**UCIs**) established under the UCI Law of 2010.

The Brexit Laws also cover the situation of investment fund managers established in the UK managing UCIs established in Luxembourg at the date of Brexit and the specific situation of potential exclusively Brexit-related breaches of investment policies by UCITS and Part II UCIs. The Brexit Laws further clarify the situation of UCITS established in the UK marketed to retail and/or professional investors in Luxembourg at the time of Brexit.

Luxembourg – wait and see approach

- In the event that, and from the date, the UK leaves the EU without concluding a withdrawal agreement (**hard Brexit**), UK firms will be considered as "third-country firms" and will lose the benefit of passporting rights under the relevant EU Directives. The purpose of the Brexit Laws is to anticipate the consequences of such loss of passporting rights, to ensure the continuity of existing contracts, the orderly functioning and the stability of the financial markets as well as to ensure the protection of UCI investors in the event of a hard Brexit.
- As such, the Brexit Laws provide that UK firms may, subject to certain conditions, be permitted to continue their activities in Luxembourg during a transitional period. The Commission de Surveillance du Secteur Financier (**CSSF**) intends to grant such possibility for a limited period of time (i.e. a limited period set by the CSSF to 12 months after the date of a hard Brexit) (the **Transitional Regime**). Such safe harbour provisions under the Brexit Laws apply only to contracts that entered into force before the date of Brexit and to contracts concluded post Brexit with close links to contracts that entered into force before the date of Brexit. In all other cases, especially in order to conclude new contracts or start new activities, UK firms will be required, as applicable, to set up an establishment in Luxembourg or to submit an application to provide investment services in Luxembourg on a cross-border basis under Article 32-1, paragraph (1) of the law of April 5, 1993 on the financial sector.

Luxembourg – wait and see approach

- UK firms that have been planning to continue to service existing contracts in Luxembourg under the Transitional Regime are required to have notified this to the CSSF by 15 September 2019 via its dedicated notification eDesk portal. According to CSSF press release 19/41 entities that have not submitted a notification through the eDesk portal by 15 September 2019 will not be entitled to benefit from the Transitional Regime and will have to cease all business as of the date of a no-deal Brexit

Sweden

Key contacts: Gernandt & Danielsson - Niclas Rockborn or Rikard Sundstedt

Updated: 10 September 2019

The Swedish Securities Markets Act (2007:528) has been amended, authorising the Swedish Government to issue temporary regulations, or to delegate the authority to issue such regulations to the Swedish Financial Supervisory Authority (the **SFSA**) making it possible for UK MiFID II investment firms to provide services into Sweden. The authority granted to the Swedish Government to issue such temporary regulations (or to delegated the authority to do so) expires at the end of 2021.

The Swedish Government has utilised the legislation to issue temporary regulations, which allow UK MiFID II investment firms to provide investment services and activities until the end of 2020 based on their home member state authorization (either on a cross-border basis or through a branch office) in Sweden, provided such notification is effective and in place as per 29 March 2019. The right to continue to provide investment services and activities is limited to professional clients in Sweden with which the UK MiFID II investment firm had a contractual relationship as of 29 March 2019.

Further, the SFSA has been given a right to issue regulations, which would give UK MiFID II investment firms the possibility to continue to provide investment services and activities in Sweden without a license in other situations than above. Such regulations have, however, not yet been published.

UK MiFID II investment firms that wish to rely on the Swedish temporary regime, i.e. to continue to provide investment services or activities in Sweden are not obliged to actively take any steps to rely on such exemption, i.e., no application/registration will be needed (except for a previous valid passport notification as of 29 March 2019 as set out above).

Sweden – latest Article 50 extension

With respect to the postponement of Brexit, the Swedish Government does not intend to amend the transitional regime's reference to 29 March 2019. Thus, any UK MiFID II investment firm which has completed its passport notification procedure subsequent to such date will not be able to rely on the transitional regime post-Brexit.

However, as the authority for the Swedish Government, or the SFSA, to issue delegated regulations is valid until the end of 2021, it is possible that extended or amended regulations will be issued to manage a postponement of Brexit. There is no publicly available information regarding any intentions to issue such extensions or amendments at this time.

Aside from the transitional regime described above, the general principle of reverse solicitation applies to foreign service providers providing services to Swedish clients soley at the genuine request of such client. This principle will be possible to rely on by any UK investment firm that does not qualify under the transitional regime (e.g. due to a lack of a valid passport as of 29 March 2019).

Finland

Key contacts: Roschier - Jussi Pelkonen or Jaakko Laitinen

Updated: 6 September 2019

At the end of 2018 the Finnish government concluded that it is necessary to add provisions to the Investment Services Act (747/2012) (**ISA**) that would enable third-country investment firms to offer services into and conduct investment activities in Finland without establishing a branch. This would involve applying for authorization from the Finnish Financial Supervisory Authority (**FIN-FSA**).

The amendment was approved by the Finnish Parliament and entered into force on 20 March 2019. There are currently no plans to amend the regulation concerning banks and investment firms operating from third countries. In the preparatory works for the amendment discussed above, it was stated that the reverse solicitation regime specified under Chapter 5 Section 4 of the ISA has a quite narrow scope, and thus cannot in all cases be relied on for service provision in Finland.

The authorization to provide services cross-border into Finland would essentially act as an extension of UK investment service providers' (including banks providing these services under a MiFID II passport regime) right to offer services and conduct investment activities in Finland under their currently valid EU passports, in case applied for before the date of Brexit.

Finland – Prerequisites for the third country application

According to the Chapter 5 Section 7 of the ISA, the FIN-FSA will grant the authorization, if:

- the European Commission has not adopted an equivalence decision concerning the service provider's home country, or if such a decision would not be in force. (If such a decision were in force, the investment firm could be entered into a register maintained by ESMA, allowing the investment firm to provide services also to Finnish investors);
- the regulatory environment in the third country and the supervision of the service provider by the third-country regulator is essentially equivalent to the regulation and supervision under the MiFID II and ISA. In practice, the service provider's home country regulator should have concluded a memorandum of understanding concerning cooperation arrangements with the FIN-FSA;
- the service provider is authorized in its home country to provide investment services;
- the service provider has an action plan specifying the services and possible ancillary services to be offered and activities to be conducted, its organizational structure and description of possible outsourcings of critical and important functions; and
- the service provider has sufficient capital.

Finland – Interim arrangements for UK investment firms and timeline

Interim arrangements

The new regulation also specifies interim arrangements for UK firms, enabling them to temporarily continue their activities in Finland after Brexit. This option would be reserved for UK investment firms or credit institutions providing investment services based on a valid EU passport (and within the limits of the current valid passport), provided that they apply for cross-border authorization by no later than the date Brexit enters into force. These service providers could then continue to provide the services specified in their passporting notification until the FIN-FSA has processed their authorization. After that, the applicant could operate in Finland with the new cross-border authorization, if granted. Any new services, however, would have to be authorized separately, as described above. During the processing period discussed below, the service provider would be subject to the regulations of its home country.

Timeline

According to Chapter 3 Section 2 of the ISA, the FIN-FSA must process an authorization application within six months of receiving the application. If the application is incomplete, the six months is calculated from the date on which the applicant has provided all necessary documents and information. The maximum time to process an application is one year from the date the application was filed.

To benefit from the new provision, a UK firm must apply to the FIN-FSA for a permanent third country licence before Brexit becomes effective. UK firms that do not apply to the FIN-FSA before Brexit for a third country licence will not be able to benefit from the interim arrangements. A UK firm may apply for a third country licence post-Brexit, but in such case it has to suspend its offering of services until the licence is granted. Applications for third country licences can now be submitted to the FIN-FSA, however for UK firms the processing period for the application would not begin until Brexit occurs.

Finland – Application

The FIN-FSA has not provided a template for the application, and the application is thus free-form. The cross-border authorization application should include the following information on the UK firm and its cross-border activities in Finland:

- all relevant details of the firm (legal name and any other trading name to be used, legal form, registered office and address, members of the management body, relevant shareholders (10% or more), contact details);
- a certified copy of the articles of association;
- a certified copy of the licence/authorization the third-country firm holds in its home state;
- an extract from the commercial register (or similar) where the third country firm is registered, which indicates the board of directors (management body) and the CEO of the firm as well as their deputies;
- a programme of operations setting out the investment services and/or activities, ancillary services and financial instruments to be provided on a cross-border basis in Finland;
- the name of the home state regulator responsible for the firm's supervision in the third country concerned and in case of more than one, the division of duties between those;
- a permission from the home state regulator for the third-country firm to carry out cross-border activity in Finland, where such permission is necessary under home state law; and
- an extract of the decision made by the relevant body of the third country firm: (i) to continue service provision in Finland in line with the EU passport in place before UK exit day from the EU to eligible counterparties and professional clients within the meaning of Section I of Annex II to Directive 2014/65/EU; and (ii) to apply for an authorization in Finland with a reference to the Act on Investment Services Section 5, paragraph 7 (2) and (4).

Once the application is made, FIN-FSA will publish the name of the applicant on it web-pages, as the delivered application allows the applicant to continue to provide services into Finland.

Finland – Fees

The processing fee of EUR 1,600 is charged after the authorization decision has been made by the FIN-FSA. The authorization has an annual supervisory fee of 3,210 euros per year.

NRF

Belgium

Key contacts: Lydian - Tom Geudens or Pieterjan Van Assche

Updated: 23 August 2019

The Belgium Financial Services and Markets Authority (**FSMA**) has issued a communication of 21 February 2019 concerning the provision of investment services and performance of investment activities in Belgium by firms governed by the law of the UK after a hard Brexit. The communication describes the system that applies in Belgium to investment firms governed by the law of the UK or Gibraltar after entry into force of a hard Brexit. It also examines the issue of the impact of a hard Brexit on the continuity of contracts in force, entered into in Belgium by investment firms governed by the law of the UK or Gibraltar. The communication looks at this issue from the angle of administrative law, i.e. the impact of the loss of a European passport on the ability to continue the performance of such contracts for investment firms governed by the law of the UK that will no longer be authorised to carry on their activity in Belgium.

Belgium – FSMA communication

The communication provides that third-country investment firms that intend to offer or supply investment services and/or perform investment activities in Belgium, by establishing branches, must first be authorised by a Belgian supervisory authority, which, depending on the case, will be the National Bank of Belgium or the FSMA. Third country investment firms governed by the law of a third country that intend to offer or supply investment services and/or perform investment activities in Belgium, without establishing a branch, are authorised to do so, but they must adhere to certain conditions (discussed further in section 2.2 of the communication). These include:

- the services or activities must actually be provided or performed in the home State;
- the third country investment firm may only approach the following types of investors: eligible counterparties, per se professional clients and persons established in Belgium with the nationality of the home State of the company concerned or of a State in which the third country investment firm has established a branch.

The FSMA asks investment firms governed by the law of the UK that are active in Belgium to inform the FSMA if they intend to pursue their activity in Belgium and, if so, under which form (establishment of a branch or provision of services without establishing a branch).

If they have not already done so, firms that wish to establish or maintain a branch in Belgium are asked to submit an authorisation dossier to the National Bank of Belgium or the FSMA, depending on the type of investment services or activity for which they are authorised in the UK.

The FSMA also asks firms that wish to commence or carry on the supply of investment services in Belgium under the freedom to provide services, without establishing a branch, and that fulfil the conditions mentioned above, to notify the FSMA specifying the envisaged activity in Belgium and the categories of investors to which they intend to supply their investment services. The notification must be in a prescribed form, a link to which is set out in the communication. The email address to which the completed form must be sent is also set out in the communication.

Belgium – Update

On 10 April 2019 the law of 3 April 2019 on the withdrawal of the UK from the European Union was published in the Belgian State Gazette; it has entered into force. The law is essentially aimed at conferring powers upon the government to implement transitional relief measures.

Denmark - Introduction

Key contacts: Kromann Reumert - Andreas Hallas and Susanne Schjølin Larsen

Updated: 2 July 2019

Under Danish legislation third country firms may obtain a cross-border licence for non-retail business. Retail business requires the establishment of a branch. The Danish Financial Supervisory Authority (**DFSA**) will permit applications from UK investment firms before the UK leaves the EU even though such firms are not (yet) third country firms. The timing for the application procedure (from submission of the application to receiving the approval from the DFSA) is approximately 3 to 4 months. There are no upfront costs involved with the application process, and investment firms will not be subject to annual fees under Danish law. The DFSA will grant a conditional licence to such firms but the license does not enter into force until and unless the UK leaves the EU. The ESMA multilateral MoU between EEA regulators and the FCA announced on 1 February 2019 satisfies Danish UCITS and AIFM regulatory requirements for an MoU.

Denmark – Press release

The DFSA has issued a press release, clarifying that cross-border licences granted to credit institutions and investment firms licenced in the UK are expected to be temporary licences granted for a period of 12 months from Brexit due to political uncertainty, but despite the 12-month period, the temporary and conditional licences will consequently lapse on 30 September 2019. Such temporary licenses have been issued, and if a withdrawal from the EU in the form of a hard Brexit has not occurred on 30 September 2019, the DFSA may prolong all temporary and conditional licences already issued collectively. The DFSA has not yet provided any further guidance on the process for such prolongation. The temporary licences already issued by the DFSA are publicly available in Danish on the following link: https://www.finanstilsynet.dk/~/media/Tilsyn/Virksomheder-under-tilsyn/Brexit/Dok11-pdf.pdf?la=da. Accordingly, firms holding such a temporary licence will have to apply for a new licence within 12 months from the licence date in order to be able to continue offering the services covered by the licence on a cross-border basis into Denmark (unless other solutions are available at such time). The license will only be granted with effect as of the Brexit date.

The DFSA has indicated that they would be able to look at applications from UK firms with existing passporting rights rather quickly and will try to process such applications in advance of Brexit in order to avoid a licence gap, but currently we have no clear indication on the timing to be expected due to the inflow of Brexit-related applications.

Denmark – Existing exemptions for third country firms (1/2)

Generally, an investment service is not considered carried out in Denmark and therefore not subject to licensing requirements if the characteristic performance of the investment service that is subject to the contractual relationship is provided outside Denmark. The characteristic performance test is based on the principle set out by the European Commission's Interpretative Communication of 20 June 1997 regarding the freedom to provide services and the interest of the general good in the Second Banking Directive. We note that this Communication only applies with respect to banking services, but its principles have been applied more generally by the DFSA.

Specifically, where a third country securities dealer is providing portfolio management services directly to a Danish client, given that the Danish client is an AIFM, the DFSA has approved that the third country securities dealer's portfolio management services are considered as being delivered outside Denmark, and therefore do not trigger a requirement to obtain a licence, where an AIFM delegates (part of) the portfolio management for a Danish AIF to a third country securities dealer provided that the following conditions are met:

- the securities purchased under the portfolio management mandate are netted, cleared and safe-kept outside Denmark;
- the securities dealer has obtained the required authorisations to carry out investment services in its home country;
- the securities dealer is under supervision from the relevant financial authorities in its home country; and
- the securities dealer's home country is an IOSCO-member state.

NRF

Denmark – Existing exemptions for third country firms (2/2)

Concerning general exemptions from the licensing regime under Danish law, there may be situations where it can be said that a third country as securities dealer and its Danish counterparty are equal principals and therefore neither party is providing an investment service to the other when trading in derivatives. This is not, however, a clear distinction, and this would depend on the UK counterparty in scope, whether the Danish principal would be deemed unequal for this purpose and therefore a "customer".

Furthermore, a licence to carry out investment services in Denmark is not required if the reverse solicitation principle applies, i.e. where the services and activities are carried out exclusively at the client's own initiative. Reliance on the reverse solicitation principle is contingent upon no direct or indirect marketing activities towards clients in Denmark having been performed prior to the inquiry from a client in Denmark. The activities under the reverse solicitation principle will be limited to performing services included in the initial request of the Danish client and services ancillary thereto, as any marketing/offering of additional financial products/services may trigger licensing requirements.

We are not aware of whether the Danish parliament or the DFSA are reviewing the Danish third country licensing regime with a view to limiting or widening the regime as a result of Brexit in the long term (in the short term, the DFSA is currently issuing temporary and conditional licenses as described above).

Iceland

Key contacts: Logos Legal Services - Guðbjörg Helga Hjartardóttir

Updated: 25 August 2019

The Icelandic regulator has not introduced any temporary relief for UK firms.

NRF

Cyprus

Key contacts: Elias Neocleous & Co LLC - Dimitris Papoutsis

Updated: 28 August 2019

Cyprus has not taken or announced any temporary relief measures with regard to Brexit and the ability of UK-authorised firms to carry out financial services in Cyprus post-Brexit, other than those set out in the MoUs that were signed for the instance of a no-deal Brexit between (a) ESMA and EU-member states securities regulators, including the Cyprus Securities and Exchange Commission (**CySEC**) as regards Cyprus and (b) the UK FCA (please refer to the ESMA press release dated 1 February 2019 with reference ESMA71-99-1096).

The Central Bank of Cyprus, as competent Cyprus regulator for credit institutions has unofficially confirmed that they do not intend to take or announce such temporary relief measures as regards Brexit and it will comply with any EU-wide measures to be adopted by competent EU authorities such as the ECB or EBA.

The Cyprus Securities and Exchange Commission, as competent Cyprus regulator for MiFID II, UCITS, AIFMD and other regulated firms, has also unofficially confirmed that they also do not intend to take or announce such temporary relief measures as regards Brexit and it will comply with any EU-wide measures to be adopted by competent EU authorities such as the EU Commission or ESMA.

Slovakia

Key contacts: Beatow Partners - Oliver Weber

Updated: 6 September 2019

Slovakia has adopted Act No. 83/2019 Coll. (the so-called **Lex Brexit**), which provides for certain transitional measures that would apply in the case of hard Brexit. These measures concern several areas, such as tax advisors, attorneys, private vets, social security insurance, health care insurance, employment services, drug and medical devices, residence of foreigners, etc.

However, none of the measures introduced by the Lex Brexit deal with the position of UK financial services firms and no transitional relief measures have been proposed to be adopted in this respect.

Estonia

Key contacts: Sorainen - Krista Severev

Updated: 3 September 2019

The Ministry of Foreign Affairs have confirmed that there are currently no plans for temporary relief measures or regimes in the area of services in Estonia to prepare for a no-deal Brexit. There are also no prospective or actual legislative changes impacting UK firms within the Estonian jurisdiction that would be relevant to Brexit. The main aim in the case of a no-deal Brexit is to treat UK firms as third country entities to begin with but the Ministry stated they are hopeful for a separate agreement with the UK in this matter.

In terms of existing exemptions for third country firms, two immediately come to mind. The first relates to the equivalence regime under Articles 46 to 49 of MiFIR. The second concerns the reverse solicitation exemption. However, there is not much local detailed guidance in Estonia regarding the operation of reverse solicitation and in our view the interpretation is strict rather than wide.

The Ministry of Foreign Affairs has confirmed that no plans are in place to review the third country access regime as a result of Brexit.

Republic of Ireland

Key contacts: Dillon Eustace - Donnacha O'Connor

Updated: 15 August 2019

Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019

The Irish government has enacted the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act, 2019. This is an omnibus piece of legislation crossing the remit of nine different government departments. The legislation, which is intended to reduce the possibility of a serious disturbance in the Irish economy and in the sound functioning of a number of markets in the event of a hard Brexit, will only take effect in the event of a hard Brexit.

In the financial services sphere, in complementing the European Commission's decision in December 2018 to grant temporary equivalence under EU law to CSD and CCP based in the UK, this legislation facilitates a temporary designation for certain UK systems which is intended to allow Irish participants continued access to designated UK payment and settlement systems (including CREST which is the settlement system for Irish equities listed on Euronext, Ireland's stock exchange) in the event of a hard Brexit. UK systems will have 3 months after a hard Brexit within which to apply for recognition, which is expected to last for 9 months.

The omnibus legislation also provides that insurance undertakings which meet certain conditions will be deemed to be authorised for three years following the withdrawal of the UK for the purposes of running their existing portfolio as well as also establishing a temporary domestic run-off regime for certain insurance intermediaries for the same period, providing certainty to Irish policy holders holding insurance contracts underwritten by UK insurers.

Republic of Ireland – Brexit FAQs

Central Bank of Ireland Brexit FAQs relating to financial services firms

In revised Brexit FAQs – Financial Services Firms published on 10 June 2019, the Central Bank confirmed that the use of UK secondees by Irish firms will be considered by the Central Bank on a case by case basis. In considering any such proposed outsourcing arrangements, it will take into account the time being dedicated to the operations of the Irish firm and the availability of sufficient local management resources to oversee seconded employees. The Central Bank will also have regard to the extent to which the interests of the secondees are aligned with the Irish firm or whether they are in reality aligned with another economic or legal entity.

Spain

Key contacts: Garrigues - Luis de la Pena

Updated: 27 August 2019

The Spanish Government has enacted Royal Decree Law 5/2019 (the **RDL**), which provides a set of temporary measures to deal with a no-deal Brexit.

The RDL encompasses an array of fields such as residence and labour permits for UK expatriates, retirement contributions, healthcare, transport services, etc.

Spain – Financial services and the RDL

From a financial services regulatory standpoint, aiming to preserve continuity in the provision of financial services, the main temporary measures introduced by the RDL are as follows:

- continuity of financial agreements: financial agreements entered into prior to Brexit by a UK entity providing services in Spain shall remain in force;
- authorization: from Brexit onwards UK entities shall be regarded as third country entities. Thus, notwithstanding the continuity of existing financial agreements, UK entities providing services in Spain must apply for the relevant authorization if they: (i) renew or amend their existing agreements; (ii) enter into new agreements; (iii) engage in the provision of new services; (iv) where the activities derived from the management of the agreements require authorization;
- temporary extension of authorization: UK firms currently passporting services into Spain will be allowed temporary relief from authorisation during a period of 9 months following the withdrawal of the United Kingdom from the European Union. No notification is required to benefit from this relief. It is expected that entities enjoying this grace period shall apply for a new authorization (either as a local subsidiary or as a third country entity providing services on a cross-border basis) or, alternatively, they shall orderly terminate or assign the agreements in place to any suitable third party;
- supervision: Spanish regulatory bodies shall retain their faculties to request information, inspect and impose sanctions on UK entities operating in Spain. Non-cooperative entities shall be prevented from the grace period referred to above;
- implementation: Spanish regulatory bodies are vested with remarkable leeway to adopt the measures that they deem necessary to ensure investor protection; and
- entering into force: the RDL shall be applicable when the UK formally leaves the EU. It shall not be applicable if the UK withdraws its Brexit application in agreement with the EU.

Spain – Financial services and the RDL

The CNMV has published a list of questions and answers specifying certain aspects related to the measures implemented by the RDL. In relation to the “Temporary extension of passporting” it states that:

i. To ensure that Brexit does not interfere with the management of contracts entered into with clients prior to the effective withdrawal of the United Kingdom from the European Union (where an authorisation is required) it is accepted that the effects that the authorisation granted by the United Kingdom had at the time, continue to be partially valid while the application for a new authorisation is being processed, for a maximum of nine months after the withdrawal of the United Kingdom from the European Union.

ii. The same temporary regime is applicable in the event of not applying for a new authorisation, but only to the extent that the management is aimed at encouraging the orderly relocation or termination of contracts.

iii. In any event, the partial temporary extension of the effects of prior authorisations will only allow the management of contracts signed prior to the United Kingdom’s departure date but:

   a) will not cover new activities;

   b) nor will it provide coverage for renewing contracts or introducing amendments that involve the provision of new services in Spain or that affect essential obligations or for entering into new contracts.

Application forms for UK entities seeking to become established in Spain:

- ‘pre-authorisation’ form to be emailed to welcome@cnmv.es; and
- general information.
- CNMV’s Brexit guidelines.

NRF

Poland

Key contacts: Norton Rose Fulbright LLP - Agnieszka Braciszewska and Anna Carrier

Updated: 9 September 2019

On 5 March 2019, the Polish government proposed a legislative act that would introduce temporary measures applicable to select financial institutions established or located the UK in an event of no-deal Brexit. The legislative act was formally adopted by the lower house of the Parliament on 15 March 2019, followed by adoption by an upper house (with no amendments) on 21 March 2019 and the President's signature on 28 March 2019. It was published in the Official Journal on 02 April 2019. It will enter into force on the day of no-deal Brexit.

The law regulates the status of the UK credit institutions, investment firms, insurance and re-insurance undertakings, payment institutions and investment funds doing business in Poland following the no-deal Brexit. In respect of credit institutions, the law sets out measures ensuring continuation of credit agreements without obtaining regulatory approvals from the Polish Financial Supervisory Authority (Komisja Nadzoru Finansowego or KNF) for a maximum period of 24 months, but without possibility of entering into new credit agreements during this time. It also introduces 24-month contract continuity for other agreements to which a UK-located bank is a party.

In respect of investment firms located or established in the UK and providing investment services or undertaking investment activities in Poland, the law introduces a 12-month transitional period. During this transitional period, UK firms will not be permitted to enter into new agreements or extend the duration of the existing ones. The 12-month transitional period applies to UK investment firms that are members or participants of a regulated market in Poland or have DEA to such venue. Following the expiry of the transitional period, the UK firms that seek to continue provide investment services or engage in investment activities in Poland will need to obtain permission from the KNF. The law foresees no notification requirement for UK firms that would seek to avail of the transitional provisions. However, such notification obligation applies to certain Polish financial institutions that would seek to continue doing business in the UK following the no-deal Brexit.

Law around the world

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