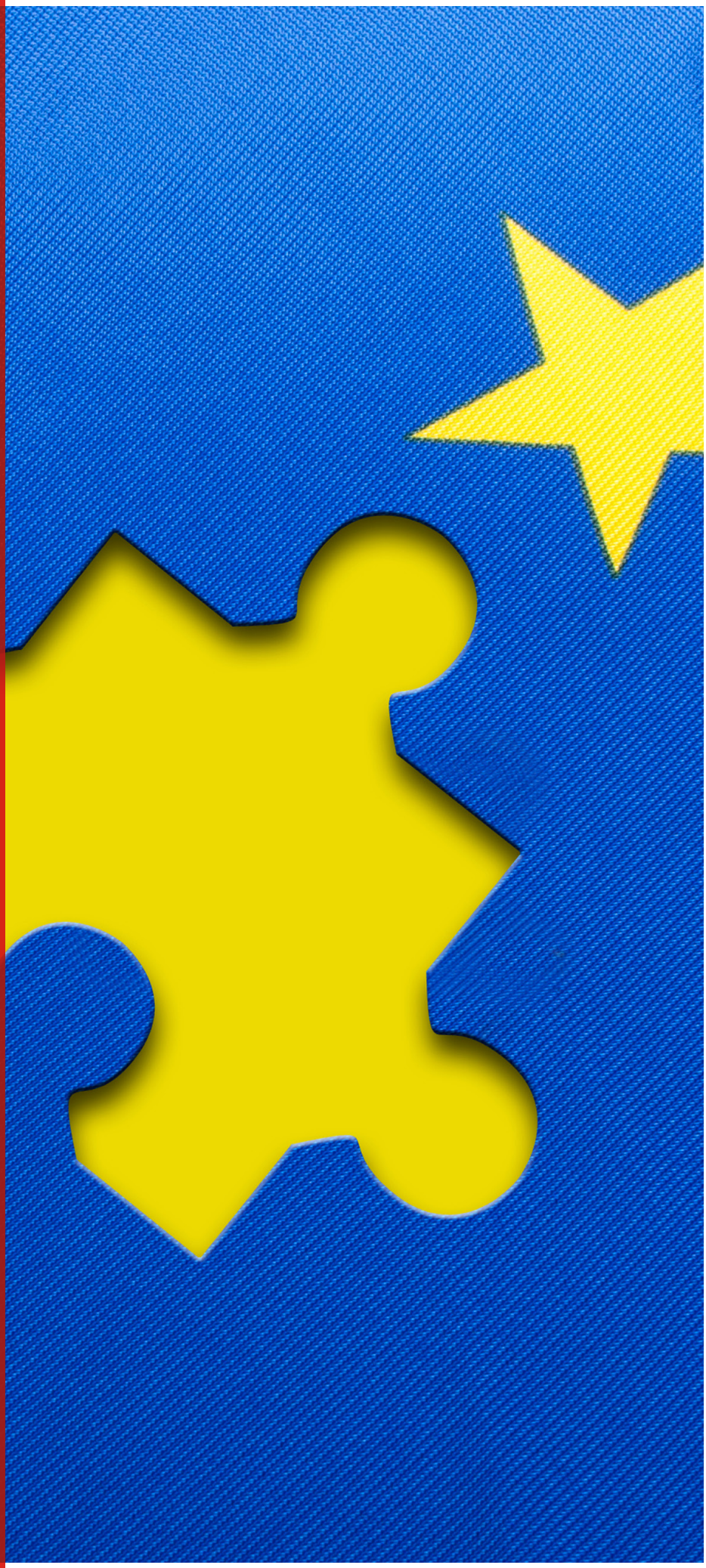
NORTON ROSE FULBRIGHT

Doing business in the EU after the transition period



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Introduction

On 31 January 2020, the United Kingdom (UK) left the European Union (EU) and entered into a transition period (otherwise known as an implementation period). During this period, whilst not an EU Member State, the vast majority of EU law and regulation continues to apply to the UK. During the transition period the UK and EU are negotiating the terms of their future relationship in a free trade agreement the first draft of which was publicly made available by the EU on 18 March 2020. As regards financial services, in the non-legally binding Political Declaration on the future EU/UK relationship the UK and the EU have agreed to endeavour to conclude their respective assessment of equivalence with respect to each other by the end of June 2020. Such frameworks allow the UK and the EU to declare a third country's regulatory and supervisory regime equivalent for relevant purposes including, for example, market access for investment services.

However, the transition period is set to end on 31 December 2020 unless both the EU and the UK agree an extension by 1 July 2020. Any extension can be for no more than two years. However, in the UK the European Union (Withdrawal Agreement) Act 2020 which was passed earlier this year contains a provision which prohibits a Minister of the Crown from agreeing to an extension of the transition period. With this in mind both the UK and a number of EU27 states have been making preparations for the scenario where the UK leaves the transition period this year without a free trade agreement and there are no positive equivalence assessments in place. In some instances these preparations have involved extending those measures that were put in place for a no-deal Brexit last year.

In the UK, the Bank of England (BoE) and the Prudential Regulation Authority (PRA) have issued a joint statement relating to HM Treasury's intention to 'shift' the temporary transitional power (TTP) so it will be available for up to two years after the end of the transition period. The BoE and the PRA intend to use the TTP after the transition period as previously communicated in relation to exit day (the day the UK left the EU). The BoE and the PRA intend to grant general transitional relief on a broad basis, with key exceptions as previously identified, for a period of 15 months after the end of the transition period (i.e. ending on 31 March 2022). Specific uses of the TTP, in particular those relating to some of the new requirements on firms entering the temporary permission regime, are expected to remain as previously published. The Financial Conduct Authority (FCA) has also updated its web page on the TTP. Like the BoE and the PRA, the FCA confirms that after the transition period it intends to apply the TTP on a broad basis and to the same areas previously communicated. The FCA intends to grant transitional relief from the end of the transition period until 31 March 2022. The FCA states that there are specific areas where it will not grant transitional relief. In these areas, it will continue to expect firms and other regulated entities to take reasonable steps to comply with the changes to their regulatory obligations by the end of the transition period. The detail of how and to what the TTP applies will be set out in the annexes to the TTP directions. The FCA will publish updated draft directions and annexes in due course, which will include details on the application of the TTP in relation to new EU legislative requirements that become applicable during the transition.

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

Germany

In order to avoid market distortions and risks to financial stability, Germany had adopted transitional rules for regulated market participants from the UK before the UK withdrew from the EU. However, this national transition regime was limited to a hard Brexit scenario without any transition regime on the European level. Other Brexit legislation in Germany only supplements the European rules under the Withdrawal Agreement. Therefore, with respect to the time following the transition period, the German legislator has not yet modified the rules on market access for participants from the UK. Certain elements of the general third country rules will be particularly relevant for UK market participants.

Germany – I. National transition regime for hard Brexit

The German legislator has taken various legislative measures at the federal level and at the level of the different states in preparation for Brexit. As one of the federal legal acts, the "Tax Act relating to Brexit" (*Brexit-Steuerbegleitgesetz* – **Brexit-StBG**) that entered into force on 29 March 2019 introduced Brexit-related rules in existing statutory acts belonging to different fields of law. The Brexit-StBG included aspects such as: (i) tax provisions intended to prevent disadvantages arising solely as a result of the UK's withdrawal from the EU; (ii) labour law provisions limiting the protection against dismissal for highly paid "material risk takers" in order to make Germany more attractive for relocating UK banks; or (iii) grandfathering provisions for investments in UK assets in connection with, *inter alia*, covered bonds (*Pfandbriefe*).

General transitional periods

Further, the Brexit-StBG introduced: (iv) a national transition regime for regulated UK market participants operating in Germany under a European passport. The Brexit-StBG empowered the German regulator (**BaFin**) to announce general transitional periods of up to 21 months after the withdrawal date for:

- UK credit institutions and investment firms under the German Banking Act (**KWG**);
- UK insurance undertakings and institutions for occupational retirement provision under the German Insurance Supervision Act (**VAG**);
- UK payment institutions and electronic money institutions under the German Payment Services Supervision Act (**ZAG**); and
- UK regulated markets, multilateral trading facilities (**MTFs**) and organised trading facilities (**OTFs**) under the German Securities Trading Act (**WpHG**).

With respect to new business after Brexit, however, the scope of these general transitional periods would have been limited: UK credit institutions, investment firms, payment institutions and electronic money institutions would only have been authorised to conduct regulated activities if these activities were "closely connected" to contracts that existed at the time of withdrawal. UK insurance undertakings would even have been limited to servicing pre-Brexit insurance contracts.

Specific relief measure for trading activities

In addition to the general transition periods, the Brexit-StBG also provided for a specific relief measure for certain trading activities of UK entities. Limited to "proprietary business" (*Eigengeschäft*), UK entities would have been deemed to have been granted an exemption from the licensing requirement pursuant to Sec. 2 (5) KWG with effect from the withdrawal date upon filing a "complete" application with BaFin within three months after Brexit.

Limitation to a no-deal scenario

However, despite certain elements of the Brexit-StBG also being applicable in a deal scenario, all described transitional rules for UK market participants under the Brexit-StBG are limited to a no-deal Brexit scenario. The wording of each of the respective regulatory provisions explicitly requires a situation in which the UK leaves the EU without any Withdrawal Agreement. The transition regime introduced under the Brexit-StBG therefore does not cover the situation at the end of the European transition period.

Germany – II. National transition regime for soft Brexit

Another federal act, the Brexit Transition Act (Brexit-Übergangsgesetz – BrexitÜG) specifically addresses a soft Brexit scenario.

National rule supplementing the Withdrawal Agreement

Sec. 1 of the BrexitÜG provides for a simple transitional rule: If a provision of German federal law refers to an EU member state, the UK is deemed to be such a member state during the transition period set out in the Withdrawal Agreement. Based on such rule, UK market participants will be able to benefit from the German provisions implementing the underlying European passport directives.

Limitation to European transition period

The BrexitÜG was amended with effect from 1 January 2020 in order to cover the concluded version of the Withdrawal Agreement and entered into force in parallel to the transition period. However, despite this update, the BrexitÜG does not provide for any transitional rules for the time after the end of the transition period.

Germany – III. Market access after the end of the transition period

Therefore, based on the current status of the German Brexit legislation, no national transitional measures will apply to UK entities at the end of the transition period. BaFin has only referred to the negotiations regarding a free trade agreement between the UK and the EU and the pending assessments of the equivalence frameworks on the European level so far (please see the introduction of this briefing). Without these European measures being in place, UK entities will be fully subject to the market access rules for non-EEA entities in Germany. In principle, this would mean that the UK entities need to apply for a national license (through a dependent branch). **However, in certain scenarios, no German license will be needed. Three of these exemptions are described below.**

Individual exemption from licensing requirements

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 requirements 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 German regulator has discretion and will take into account: (i) if the company is effectively supervised in its home country in accordance with internationally recognised standards; and (ii) whether the competent home country authorities cooperate satisfactorily with the German regulator.

For a hard Brexit scenario, the explanatory statement of the Brexit-StBG also referred to the general powers of BaFin to grant an exemption in individual cases and mentioned two examples where BaFin could make use of such powers: ((i) an exemption granted until a German license has been obtained and (ii) an exemption granted the purposes of the orderly run-off of business). BaFin could grant corresponding individual exemptions to UK entities after the end of the transition period; however, BaFin has not publicly announced any plans in this regard so far.

Reverse solicitation exemption

Further, BaFin has generally recognised an exemption 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 exemption may also cover maintaining an existing relationship without a German license.

It should be noted, however, that the European Securities and Markets Authority (**ESMA**) has narrowly interpreted the concept of reverse solicitation in its Q&As on MiFID II and MiFIR investor protection topics (in particular, with respect to one-off services).

New exemption for proprietary business

With effect from 28 March 2020, the German legislator also introduced a new exemption allowing for certain trading activities of third country entities without a German license. This new exemption will also apply to UK entities after the end of the transition period. Pursuant to Sec. 32 (1a) Sentence 3 No. 4 KWG, the exemption covers all enterprises with a seat in a non-EEA country that conduct "proprietary business" (*Eigengeschäft*) as a member or participant of a trading venue.

"Proprietary business" (*Eigengeschäft*) is one of the two regulated activities transposing into German law the MiFID II investment service of "dealing on own account". Non-EEA entities will continue to trigger the German licensing requirement for "proprietary business" (Eigengeschäft) if trading financial instruments in their own name and on their own account: (i) by means of "direct electronic access" to a trading venue; or (ii) with commodity derivatives, emissions allowances or derivatives of emissions allowances.

It should further be noted that the new exemption does not cover "proprietary trading" (*Eigenhandel*) defined as "dealing on own account" that is provided as a service for others. "Proprietary trading" (*Eigenhandel*) includes, in particular, the activities of market makers and systematic internalisers. Also, even if not provided as a service for others, high-frequency trading is deemed to be a case of "proprietary trading" (*Eigenhandel*) and is therefore excluded from the scope of the new exemption.

Austria

A 'BREXIT – Accompanying Law 2019' did not enter into force as it was enacted under the condition that the UK leaves the EU without the conclusion of an agreement under Article 50 para 2 of the Treaty of the European Union.

Currently, no other measures have been proposed.

Market access after the transition period

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

In 2019, the French Government adopted preparatory measures to apply in the case of a hard Brexit. However, a hard Brexit is unlikely to happen as a transition period was established by the Withdrawal Agreement during which the UK and the EU are negotiating the terms of their future relationship.

At the end of the transition period, unless otherwise agreed by the EU and the UK (and unless further transitional measures are adopted), UK firms carrying out regulated activities in France will be subject to the French regime in relation to third country firms.

French regime for hard Brexit

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 authority 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 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 24 months as from the date of entry into force of the Law n° 2019-486 of 22 May 2019 *relative à la croissance et la transformation des entreprises.*

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.

The Ordinance will not enter into force if the UK and the EU succeed in negotiating the terms of their future relationship to come into effect at the end of the transition period provided for in the Withdrawal Agreement.

French regime for the end of the transition period

In the case where the UK is considered to be a third-country after the transition period, the principal consequence for UK firms is that a full license will be required to provide regulated services to both professional and non-professional clients in France, unless the UK firms rely on a permitted exemption.

The required license will depend on the type of regulated services to be provided in France (e.g. license as a credit institution, a credit institution providing investment services, an investment firm or a payment institution, etc.).

For each type of license, UK firms need to be established in France (through a branch or a subsidiary) and submit an application file with the French authorities.

Concerning permitted exemptions, French law provides for the following principal exemptions in relation to the provisions of investment services by a third country firm:

- reverse solicitation which is to be interpreted in a very narrow way;
- the "French inter-dealer exemption" providing that a third country firm which (i) enters on own account into transactions on financial instruments or greenhouse gas emission allowance, and (ii) does not provide any investment service in France other than the service of own account dealing may, without establishing a branch in France:
  - enter into OTC transactions with French credit institutions, French investment firms or French public entities;
  - become a member of French regulated markets, MTFs or OTFs.

Italy

The EU and the UK have jointly agreed on a transition period during which EU law continues to apply until 31 December 2020, unless further extended in case of (i) agreement by both parties and (ii) decision made by 1 July 2020.

As a consequence, the Law-Decree No. 22 of 25 March 2019, which had been introduced to provide for a transitional regime applicable in the event of a no-deal Brexit (containing provisions concerning the temporary continuation of certain regulated financial activities and the run-off of others), will not apply and Consob Communications No. 4 of 14 of March 2019, No. 8 of 29 March 2019 and No. 10 of 1 August 2019, as well as No. 5 of 17 October 2019, must be considered outdated. Notifications sent by UK investment firms to Consob pursuant to these Communications are also not valid anymore.

At the end of the transition period, unless otherwise agreed by the EU and the UK (and unless further transitional measures are adopted), UK entities operating in the EU and in Italy, will be subject to the legislation relating to third country's entities.

UK banks, electronic money institutions, payment institutions, asset management companies

On April 29, 2020 the Bank of Italy published a Communication providing guidance on the Italian third-country licensing regime for those UK firms carrying out business in Italy for which the Bank of Italy is the competent authority. In addition, the Bank of Italy urges all UK firms operating in Italy to duly inform their clients about the actions they have taken in relation to Brexit and its consequences for existing contractual relationships.

More specifically, the Bank of Italy clarified that:

UK banks and e-money institutions operating in Italy through a branch ('branching e-money institutions'), that intend to continue to operate in Italy at the end of the transition period shall, in accordance with, and within the limits provided for by Italian law, acquire a licence as a third-country firm according to Italian law, before the end of the transition period.

With specific reference to the provision of investment services by UK banks on a cross-border basis, any activity vis-à-vis clients other than eligible counterparties and per se professional clients has to cease. UK banks can only provide investment services to other clients (e.g. retails) through a branch. The same regime applies to investment firms, which in Italy are subject to supervision by Consob (see below).

UK e-money institutions currently operating either under the freedom of services or through a network of agents ('non-branching e-money institutions'), payment institutions, and asset management companies cannot be licensed to operate as third-country firms, and are required by law to cease operations by the end of the transitional period. For this purpose, they may either:

1. transfer the activity to a firm authorized to operate in Italy (either an Italian or an EU firm 'passported' into Italy); or
2. close their activity, in an orderly fashion.

As such, the following categories of entities have a duty to cease operations by the end of the transition period:

- UK banks and branching e-money institutions (i) not having obtained a license from Italian authorities before the end of the transition period or (ii) that do not intend to continue operating in Italy as third-country firms after the transition period;
- UK banks providing investment services on a cross border basis to clients other than eligible counterparties and per se professional clients, and
- UK payment institutions, UK asset management companies.

Firms that intend to continue operating in Italy either need to:

1. obtain a licence as a third-country firm, where this is allowed (i.e. UK banks, except for the offer of investment

services on a cross-border basis to clients other than eligible counterparties and per se professional clients, and UK branching e-money institutions); or

2. transfer their Italian activities to an Italian duly licensed entity (existing or newly established) or to an EU-licensed entity 'passported' into Italy.

To avoid any discontinuity of services to customers and to ensure an orderly closure of activity, where required, the Bank of Italy recommends that:

All UK firms that intend to continue operating in Italy either as a third-country firm or by transferring their activity to a newly established Italian intermediary, file an application in due time, taking into consideration the statutory duration of licensing procedures (i.e. 120 calendar days) and the regulation on administrative procedures (which allows extension of the statutory duration by up to six months if further information is necessary). As such, if the application is not filed shortly after this Communication, the intermediaries should be prepared to guarantee the closure of all activities by the end of the transition period.

All firms that intend to transfer their activity to an EU entity 'passported' into Italy complete the procedures for passport notification and transfer of activity by the end of the transition period.

All firms that intend, or are required, to cease their activity end their relationships with customers in an orderly fashion by the end of the transition period, and transmit their closure plans to the Bank of Italy as soon as possible, using the templates attached to the Bank of Italy Communication. The intention to cease operations must also be communicated to the relevant UK supervisory authorities.

Finally, the Bank of Italy recommends all UK firms currently operating in Italy to inform customers, pursuant to the Bank of Italy's communication of 19 February 2019, of their Brexit-related initiatives and the related impacts on existing contracts. Firms that have not already informed their customers are invited to do so in due time during the transition period.

Trading venues

Consob announced in its Warning Notice No. 4/20 that UK trading venues that wish to operate in Italy will need to obtain, as appropriate, a measure of authorisation (as MTF or OTF) or recognition (for trading venues "equivalent" to regulated markets) in order to extend their activity in Italy, pursuant to, respectively, Articles 28 and 70(1)[3] of the Italian Consolidated Law on Finance.

Those measures are adopted by Consob in the presence of an "equivalence" assessment of the UK regulatory and supervisory framework, as well as of a cooperation agreement between Consob and the Financial Conduct Authority (FCA) of the UK.

In this context, UK market operators wishing to operate in Italy after the end of the transition period are invited to make a timely application to Consob for authorisation or recognition, in accordance with the above-mentioned applicable regime.

In this regard, it is worth mentioning that, in March 2019, Consob introduced a number of measures to ensure that, post-Brexit, UK trading venues could operate in Italy (as well as Italian trading venues in the UK). These measures were subject to a 'no-deal' scenario which, as stated above, did not materialise.

Moreover, in March and April 2019, Consob received further requests from some UK trading venue operators in order to continue operating in Italy after Brexit, and these too were based on a no-deal scenario.

In light of the above, all UK trading venues that have already applied for authorisation or recognition in order to continue operating in Italy on a cross-border basis are hereby invited to:

- confirm their interest to obtain clearance or authorisation, pursuant to respectively, Articles 70(2) or 26(6) of the Italian Consolidated Law on Finance;
- report any changes and/or amendment to the information already provided under their original filing, by sending the relevant documentation.

Investment services

Consob in its Warning Notice No. 3/20 of 26 March 2020 communicated that in relation to investment services, in light of MiFID II/MiFIR, how UK investment firms access the EU market will depend on the type of clients served (retail/elective professional or per se professional/eligible counterparties).

By virtue of MiFIR (Articles 46 and 47), third country firms may operate under the freedom to provide services only to eligible counterparties or per se professional clients, provided that:

1. the European Commission (EC) has adopted an equivalence decision on the requirements in force in the third country;
2. the intermediary is authorised in the country of origin, and
3. appropriate cooperation agreements have been established with the authority of the home country.

In the absence of an equivalence decision by the EC (or if this decision is no longer in force), each Member State is entitled to allow the non-EU firm to operate in its territory, even without the establishment of branches.

The Italian Consolidated Law on Finance (Article 28, paragraph 6) has afforded to third-country firms other than banks the possibility of operating through the freedom to provide services, subject to authorisation by Consob, after consulting the Bank of Italy, when the conditions set out therein are met and exclusively with per se professional clients and eligible counterparties. The quoted Italian legislative act, exercising the option provided for in Article 39 of MiFID II, has prescribed the establishment of a branch for the provision of services to retail and elective professional clients, subject to authorisation by Consob, after consulting the Bank of Italy (Article 28, paragraph 3, Consolidated Law on Finance).

- Should the EC issue the equivalence decision before the end of the transition period: UK firms operating under the freedom to provide services to professional clients, per se and/or eligible counterparties will be subject to the operating (and supervisory) regime provided by MiFIR (i.e. ESMA registration when certain conditions are met allowing the firm to operate in the EU27). However, UK investment firms (other than banks, authorised by the Bank of Italy) will have to request a specific authorisation from Consob if servicing with retail and elective professional clients.
- Should the EC fail to issue the equivalence decision: UK firms, including those operating under the freedom to provide services, will be required to comply with national regulations. UK investment firms (other than banks) will have to apply to Consob for a specific authorisation to operate in Italy.

In the absence of the required authorisations/registrations, UK firms will not be able to continue to provide investment services and activities in Italy at the end of the transition period.

In this context, UK investment firms are invited to promptly notify Consob of their interest in continuing to operate in Italy or their intention to cease operations once the transition period is over.

With specific reference to OTC derivative contracts may be in place with Italian counterparties, it is recalled that - should UK firms not be licensed to operate as third country firms by the end of the transition period (and should the OTC derivative contracts with Italian counterparties not be transferred to an EU-27 entity) – the possible qualification of some of their servicing activities as abusive provision of investment services could have an impact on the contracts themselves and, in particular, on their possible early termination.

Insurance sector

As anticipated, in the insurance sector, the current regime of mutual recognition of authorisations and the supervisory system (the so-called passport regime) is extended until the end of the transition period.

In light of the UK's withdrawal from the EU, IVASS has already asked insurance companies with registered offices in the UK to:

- adopt special contingency plans to ensure continuity of service and performance of contracts concluded in Italy; and
- promptly inform Italian clients of the measures taken and their impact on existing contracts.

IVASS has followed, in collaboration with EIOPA (European Insurance and Occupational Pensions Authority) and other national authorities, the adoption and correct execution of the action plans and the accuracy of information to policyholders on the possible consequences of Brexit.

On 3 October 2018, IVASS addressed a letter to UK companies operating in Italy, drawing their attention to the need to proceed promptly to:

- send adequate individual information on the impacts of Brexit to its Italian policyholders and beneficiaries, along the lines of the EIOPA Opinion;
- publish similar information on its website; and
- transmit appropriate instructions to its distribution networks on the information to be provided to current and potential policyholders.

At the end of the transition period, unless otherwise agreed, UK entities operating in the EU and in Italy, will be subject to the legislation relating to third country entities.

In detail, without prejudice to the outcome of the negotiation of such agreements, insurance undertakings and insurance intermediaries with registered offices in the UK will, at the end of the transition period, lose the application of:

- the freedom of establishment, i.e. the ability to establish a permanent establishment in Italy without authorisation from the Italian State; and
- the freedom to provide services, i.e. the ability to conduct insurance business in Italy without having a permanent establishment.

Insurance contracts already concluded would remain valid.

Netherlands

In the Netherlands, before the Withdrawal Agreement was signed a transitional regime was published for investment firms (*beleggingsondernemingen*) with their seat in the UK in case of a no-deal Brexit. For other financial institutions no transitional regimes were proposed. Meaning that in the event of a no-deal Brexit, they would have been treated as third-country firms under the Act on the Financial Supervision (*Wet op het financieel toezicht*, AFS). However, when the UK and EU entered into the Withdrawal Agreement the transitional regime for investment firms was not put into effect. It remains to be seen whether the same proposal will be made should the EU and UK not conclude a free trade agreement.

More generally, the so-called Dutch Brexit Act has entered into force. This Act makes 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

Whilst it is not known whether the same measures will be made by the end of this year if the transition period ends and there is no free trade agreement concluded between the UK and the EU, we briefly describe the transitional regime for UK investment firms that was envisaged for a no-deal Brexit last year. The amendments to the Exemption Regulation AFS (Vrijstellingsregeling Wft, the Exemption Regulation) provided that investment firms with their seat in the UK were exempted from the license obligation for providing investment services and/or the investment activity of dealing on own account in the Netherlands, insofar provided to professional investors or eligible counterparties. A condition was that the investment firm would 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 would largely be exempted from the prudential and ongoing code of conduct requirements as set out in the AFS.

The exemption would 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 had received their license and they had completed the notification.

Netherlands – Dutch Brexit Act

In addition, on 12 April 2019, the Dutch Brexit Act was published in the Dutch Government Gazette (*Staatsblad*). The Act changed a number of laws and regulations in the Netherlands in light of Brexit. The Act entered into force as of the date of Brexit, being 31 January 2020. The Dutch Brexit Act is available in Dutch only.

The explanatory notes to the Dutch Brexit Act provide that the Act 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 would lead to the loss of its EU membership, irrespective of whether or not the UK could agree a Withdrawal Agreement with the EU. For most cases, it turned out that the existing legislative frameworks offered sufficient freedom to be able to act quickly and adequately in both the deal and no-deal scenarios. Therefore, the Dutch Brexit Act only contained technical amendments to Dutch legislation that were strictly necessary to enter into effect upon the UK leaving the EU.

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".

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 million, 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 a cooperation agreement, 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)

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 the end of the transition period where no free trade agreement is concluded between the UK and the EU, but they can use the abovementioned exemption. Therefore no further details on this exemption is provided.

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

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

DNB MoU with PRA and FCA

Furthermore, in May 2019, the Dutch Central Bank (De Nederlandsche Bank, DNB) and the Netherlands Authority for the Financial Markets (Autoriteit Financiële Markten, AFM) entered into a Memorandum of Understanding (MoU) with the UK Prudential Regulation Authority and the UK Financial Conduct Authority. This MoU provides a basis for the four authorities to continue their cooperation after Brexit. The MoU will enter into force once the transition period ends.

Luxembourg

The CSSF issued on 31 January 2019 a press release (CSSF Press Release 20/03, hereinafter referred to as the Press Release) which followed the formal adoption of the Withdrawal Agreement by the Council of the EU on 30 of January 2020, and the fact that the UK left the EU on 31 January 2020 at midnight (the Exit Date).

Previous CSSF communications

The scenario of a hard Brexit, under the assumption of which previous CSSF communications (and other laws, regulations or communications and decisions from other Luxembourg authorities) have been issued are no longer relevant. The CSSF's individual decisions granting the 12-month transition regime to UK entities and all notifications made in that context have lapsed.

The CSSF has also stressed the fact that entities impacted by Brexit should continue to take all necessary steps to prepare and anticipate the end of the transition period.

Law no. 238 of 11 April 2019

Besides, law n° 238 of 11 April 2019 on the measures to be taken in relation to the financial sector in the event of the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union, provides for specific transitional measures applicable to Undertakings for Collective Investments in Transferable Securities (UCITS), undertakings for collective investment regulated by Part II of the UCI Law (Part II-Funds) and Specialized Investment Funds (SIFs). This law applies in any scenario of withdrawal of the UK from EU (whether or not a no-deal Brexit).

This law grants a 12-month remedy period to rectify any breach of the investment policy or investment restrictions in a UCITS, Part-II Funds or SIF resulting from Brexit. This requirement only covers positions taken prior to the Exit Date.

It further sets out specific provisions for UK UCITS currently authorized by the FCA to market in Luxembourg with an authorized management company in accordance with the UCITS Directive at the time of the Exit Date. In that respect, this law provides that they may continue marketing theirs shares to retail investors in Luxembourg for a maximum period of 12 months from the Exit Date.

Sweden

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 delegate 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 – effects of the transition period

The commencement of the transition period as of 1 February 2020 has not prompted any changes to the Swedish transitional regime for UK MiFID II investment firms nor has there been any indication of an intention to make any such changes. Consequently, the Swedish transitional regime is expected to automatically be repealed at the end of 2021. However, as the Swedish transitional regime affords UK MiFID II investment firms the right to continue to provide services only until the end of 2020 and as the UK remains to be treated as an EEA state for the purposes of being able to rely on the EU passport during 2020, the Swedish transitional regime has no practical effect unless it is further extended.

As there is currently no indication that the Swedish transitional regime will be extended or replaced by any other transitional measures, it may be expected that the UK will generally be treated as a third country following the end of the transition period unless the UK and the EU agree on any other solution. If the UK becomes a third country and no equivalence decision is adopted by the European Commission under Art. 46 of MiFIR (which would enable UK MiFID II investment firms to apply for registration with ESMA to provide services to eligible counterparties and professional clients), UK MiFID II investment firms will be subject to requirements to apply for authorisation with the SFSA to continue to carry out regulated activities in Sweden. It may be noted that the principle of reverse solicitation applies to foreign service providers providing services to Swedish clients solely at the genuine request of such client. Any services provided on a reverse solicitation basis are not considered to be provided in Sweden and accordingly do not trigger regulatory authorisation requirements under Swedish law.

Finland

At the end of 2018 the Finnish government concluded that it was 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 EU passports, applied for before the end of the transition period.

Prerequisites for the third country application

According to the Chapter 5 Section 7 of the ISA, the FIN-FSA will grant 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 EU 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 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.

Interim arrangements for UK investment firms

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 from the date when the withdrawal takes place. Applicants are informed within six months of the submission of a complete application, whether or not authorization has been granted. The maximum

time to process an application is one year from the date the UK's final withdrawal takes place.

As a consequence of the transition period under the UK's Withdrawal Agreement, during which EU law will continue to apply to the UK between 1 February and 31 December 2020 as if it were a Member State, new applications for the cross-border license can be filed until the end of 2020 and the duration of the application processing period is calculated from 31 December 2020 for all the applications already filed as well as for all new applications. In order to benefit from the new interim arrangements, a UK firm must apply to the FIN-FSA for a permanent third country licence before the end of 2020. A UK firm may apply for a third country licence also post-Brexit, but in such case it has to suspend its offering of services until the licence is granted.

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
    1. 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
    2. 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 its web-pages, as the delivered application allows the applicant to continue to provide services into Finland. By the end of January 2020, almost 80 UK investment firms had applied for the new authorization according to the list of applicants published by FIN-FSA.

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

Belgium

The Belgium Financial Services and Markets Authority (FSMA) issued a communication of 21 February 2019 concerning the provision of investment services and the performance of investment activities in Belgium by firms governed by the law of the UK after a hard Brexit. The communication was due to enter into force in the event of a no deal Brexit. Given that the UK and EU entered into a Withdrawal Agreement the communication did not come into effect. At present we do not know if the communication would be used in a situation where the transition period ends and the UK and EU do not enter into a free trade agreement.

The following provides a reminder of the key points concerning the communication.

The communication described 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 examined 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 looked 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 provided 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, where authorised to do so, must adhere to certain conditions (discussed further in section 2.2 of the communication). These included:

- the services or activities must actually be provided or performed in the home State; and
- 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 asked investment firms governed by the law of the UK that were active in Belgium to inform it if they intended 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 had not already done so, firms that wished to establish or maintain a branch in Belgium were 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 were authorised in the UK.

The FSMA also asked firms that wished to commence or carry on the supply of investment services in Belgium under the freedom to provide services, without establishing a branch, and that fulfilled the aforementioned conditions, to notify the FSMA specifying the envisaged activity in Belgium and the categories of investors to which they intended to supply their investment services. The notification had to be in a prescribed form, a link to which was set out in the communication. The email address to which the completed form had to be sent was also set out in the communication.

On 10 April 2019 the law of 3 April 2019 on the withdrawal of the UK from the EU was published in the Belgian State Gazette. The law, which essentially conferred powers on the government to implement transitional relief measures, was conditional on a no-deal Brexit. It is not yet clear whether it will be amended to deal with the situation where the transition period ends and the UK and EU don not enter into a free trade agreement.

Denmark

Under Danish legislation third country firms may obtain a cross-border licence for non-retail business. Retail business requires the establishment of a branch.

Cross-border licence for non-retail business

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**) announced in a press release on 3 June 2020 that for the time being it will no longer process applications from UK investment firms. Further, it is stated in the press release that temporary licenses conditional upon a no deal Brexit processed by the DFSA during the course of 2019, which ensured the possibility to keep offering investment services to eligible counterparties and professional clients in Denmark, are no longer relevant because of the agreement entered into between the UK and the EU. As such, firms will need to apply for a new license, which the DFSA has stated that it will provide guidance on prior to 1 August 2020.

Denmark – Existing exemptions for third country firms (characteristic performance test)

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.

In a very specific published decision as of 12 January 2005 (i.e. before the implementation of MiFID and MiFID II into Danish law), the Danish FSA held that a non-EEA licensed bank's mediation of securities lending between a Danish bank and the non-EEA licensed bank's customers (which was an investment service at that point in time under Danish law) could not be deemed carried out in Denmark. This decision was based on the fact that the securities were not transferred to Denmark, but were netted, cleared and safe-kept outside Denmark. Accordingly, the activities of the non-EEA licensed bank did not trigger any licensing requirement in Denmark. The practice set out in the decision has since been confirmed informally by the Danish FSA.

Denmark – Existing exemptions for third country firms (equal principals and reverse solicitation)

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.

Iceland

The Icelandic regulator has not introduced any temporary relief for UK firms. According to Act No. 121/2019, UK-authorised firms may continue to carry out financial services in Iceland pursuant to the applicable EU law (MiFID passporting) until 1 January 2021. Until then, the government of Iceland and the UK intend to negotiate the countries' future relationship in this regard.

Cyprus

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 (save for insurance services and insurance distribution, as per the analysis below) 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 FCA.

The Central Bank of Cyprus, as competent Cyprus regulator for credit institutions has unofficially confirmed that they do not intend to take or announce 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 do not intend to take or announce 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.

As regards insurance and reinsurance services and insurance distribution, on 6 March 2020 a new amendment was made to the Cyprus Insurance and Reinsurance Law. The new Section 422A of the Cyprus Insurance and Reinsurance Law, made by virtue of transitional provisions, provides that in the instance of a no-deal Brexit, the Superintendent of Insurance, which is the competent Cyprus regulator for insurance/reinsurance undertakings and insurance intermediaries, may allow:

- UK insurance and reinsurance undertakings to continue operating in Cyprus, on a freedom of services or freedom of establishment basis, for a transitional period of 2 years from the departure of UK from the EU and more specifically to
  - Continue having in force and effect, existing insurance policies without making any amendments to these in a manner which increase the obligations arising from them;
  - Settle claims; and
  - Continue collecting the premium owed to them and perform their assumed obligations, in their normal course of business.
- However, entering into of new insurance policies by such UK insurance undertakings would trigger the licensing requirements in Cyprus.
- UK insurance intermediaries to continue operating in Cyprus, on a FOS or FOE basis, for a transitional period of 2 years from the departure of UK from the EU, as regards the provision of assistance in the administration and performance of existing insurance policies.
- However, such UK insurance intermediaries may carry out insurance/re-insurance distribution activities in full only after licensing in Cyprus in accordance with Section 361 of the Cyprus Insurance and Reinsurance Law.

Slovakia

Slovakia has adopted Act No. 83/2019 Coll. (the so-called Lex Brexit), which provides for certain transitional measures that would have applied in the case of hard Brexit. Those measures concerned 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 dealt with the position of UK financial services firms and no transitional relief measures were proposed to be adopted in this respect.

Estonia

The Ministry of Foreign Affairs has confirmed that there are currently no temporary relief measures or regimes in the area of services in Estonia to prepare for the situation where the transition period ends and the UK and EU do not conclude a free trade agreement. There are also no prospective or actual legislative changes impacting UK firms within the Estonian jurisdiction that would be relevant. The main aim in such circumstances 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.

Existing exemptions

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 Finance has confirmed that they are considering putting in place a special regime for UK entities and while the discussions have not resulted in any information to share, the Ministry is currently open to proposals in this regard.

Republic of Ireland

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

The primary piece of Irish government legislation addressing Brexit remains the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act, 2019 (the Withdrawal Act). This is an omnibus piece of legislation crossing the remit of nine different government departments and 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. It will only take effect in the event of a hard Brexit.

The Withdrawal Act 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.

Part 15 of the Withdrawal Act was commenced with effect from 11pm on 31 January 2020. Part 15 of the Act provides that all references to "member states" which included a reference to the United Kingdom as a result of it being a member of the European Union in existing enactments or any enactments which come into operation after 31 January 2020 will be interpreted as continuing to include reference to the United Kingdom where this is necessary to give effect to the terms of the withdrawal agreement between the European Union and the United Kingdom.

With the exception of Part 15, and Parts 1 and 14 of the Withdrawal Act, which commenced with effect from 26 June 2019 and 15th July 2019 respectively, the remaining parts of the Act have not been commenced.

New Brexit legislation may be enacted

It is anticipated that a new Brexit related omnibus Bill will shortly be prepared by the Irish Government to prepare for either a limited trade deal, or a no-deal scenario, by the end of this calendar year.

Republic of Ireland – Brexit FAQs

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, the Central Bank states that 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. In practice, while the Central Bank has not generally been open to accept proposals to second staff to Irish firms from unconnected UK firms, it is generally open to intra-group secondment arrangements.

Continued engagement by the Central Bank of Ireland relating to Brexit

The Central Bank has confirmed in its publication "Brexit Task Force – January 2020 update" that its supervisory focus on Brexit will continue throughout 2020. The Central Bank continues to engage with firms to understand potential business impacts arising from Brexit and the possible implications for a no trade deal scenario. Key areas of focus include emerging Brexit risks and how firms are mitigating against these risks; impact on clients, liquidity management and technology resilience.

Spain

The Spanish Government enacted Royal Decree Law 5/2019 (the RDL) on March 2019, which provided a set of temporary measures to deal with a no-deal Brexit, covering an array of fields such as residence and labour permits for UK expatriates, retirement contributions, healthcare, transport services and financial services.

However, as the Withdrawal Agreement has been agreed by both parties (UK-EU), the RDL no longer applies. No regulatory text has been enacted referring to the current Brexit situation, but the transitional period agreed by the EU - UK has been maintained.

Transition period

During the transition period, UK entities[1] entering into financial contracts and/or providing financial services in Spain through a branch or on a cross-border basis under the freedom to provide services without a permanent establishment would benefit from their existing authorisation regime. After the transition period, on 1st January 2021, entities that have not regularised their situation in Spain (closure in Spain of their provision of financial services or file an application as a non-EU third country with the Spanish Regulatory Authority), will no longer be able to operate in Spain.

Effect on new transactions

After the transition period, UK entities must obtain authorisation in order to enter into new transactions.

Effect on existing transactions

After the transition period, UK entities may need to obtain authorisation whenever an existing transaction is novated.

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.

1 UK entities: Should be understood as credit institutions, investment firms, insurance companies, payment entities and electronic money institutions, including their respective branches and subsidiaries

Poland

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. There have been no further legislative initiatives dealing with the status of UK firms doing business in Poland following the end of the transition period where the UK - EU do not enter into a free trade agreement.

Legislative act for a no-deal Brexit

The legislative act was formally adopted by the lower house of the Parliament on 15 March 2019, followed by adoption by the 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 2 April 2019. It was to enter into force on the day of no-deal Brexit. Among others, the law regulated the status of UK credit institutions, investment firms, insurance and re-insurance undertakings, payment institutions and investment funds doing business in Poland following a no-deal Brexit. It also introduced specific transitional periods for such firms. However, since the UK departure from the EU on 31 January 2020 took place in accordance with the provisions of the EU-UK Withdrawal Agreement, the law did not enter into force. Whether the law would be re-enacted should the transition period end and the UK and EU do not conclude a free trade agreement remains to be seen.

In addition, on 19 July 2019 a legislative act was formally adopted (and published in the Official Journal on 12 August 2019), specifying that for the duration of the EU-UK transition period as provided by Article 126 of the EU-UK Withdrawal Agreement (i.e. until 31 December 2020), the UK is to be deemed to be an EU Member State for the purposes of Polish law and subject to certain exclusions as set out by Article 127 of the same. There have been no further legislative initiatives addressing the status of UK firms doing business in Poland following the expiry of the EU-UK transition period.

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