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Brexit planning:
EU27 Financial Services Contingency Plans

EU27 Contingency Plans for Financial Services under a "No-Deal" Brexit

4 April 2019

Background

- By default, the UK will leave the EU at 11pm (UK time) 12 April 2019 unless a withdrawal agreement is concluded, or the UK and EU agree a further extension of the Article 50 Treaty on European Union process.
- It is currently far from clear whether any withdrawal agreement will be approved by the UK parliament and/or whether a further extension of the Article 50 process will be negotiated.
- As a result (and due to the previously anticipated 29 March exit date), both the UK and EU27 have taken significant steps to plan for a "no-deal" Brexit.

Why are contingency plans necessary?

- If no withdrawal agreement is approved or no further extension of the Article 50 process is agreed, from 12 April 2019, UK financial services firms will lose the right to provide their services in the EU27 through the use of EU financial services passports.
- This would result in a "cliff edge", where UK financial services firms and counterparties would, in many circumstances, be unable to interact with EU financial services firms and counterparties due to licensing and other compliance concerns.
- Concerns have been voiced about the financial stability risks of such a scenario and the legal consequences for firms with existing UK-EU27 interactions. For instance, in the absence of contingency measures, existing derivatives contracts between UK and EU counterparties could trigger licensing issues due to "lifecycle events", even though no new EU business is being solicited/entered into.

> "A "no-deal" scenario on 12 April is now a likely scenario. The EU has been preparing for this since December 2017 and is now fully prepared for a "no-deal" scenario at midnight on 12 April. **European Commission Press Release,** 29 March 2019

What are the current EU27 contingency plans?

- The UK has already published extensive contingency plans for financial services, including a temporary permissions regime and a financial services contracts regime. We have previously published a note on the Statutory Instrument that established the UK temporary permissions regime, a note on the financial services contracts regime.
- However, EU27 contingency plans may be more difficult for financial services firms to ascertain, as they rely on action being taken both at the EU level and across the individual EU member states.
- We have summarised the key recent financial services contingency measures announced by the EU itself, and certain key EU27 states, to provide an overview of the current state of play. In addition to the contingency measures mentioned below, we are aware of contingency measures in a number of other jurisdictions.

European Union

- In December 2018, the European Commission published contingency measures to cover the event of a “no-deal” Brexit which mainly focussed on market infrastructure, and contractual continuity for existing derivatives. These measures included:
    - A temporary equivalence decision that enables ESMA to recognise UK Central Counterparties for 12 months, enabling them to continue providing services in the EU temporarily.
    - A temporary equivalence decision to allow UK Central Securities Depositories to continue to provide notary and central maintenance services to EU operators for 24 months.
    - A delegated act amending EMIR requirements on margin for uncleared derivatives relating to the novation of contracts with UK counterparties and risk managed according to pre-EMIR procedures. The act allows relevant counterparties to replace their UK counterparty with an EU27 counterparty with respect to pre-existing transactions not subject to the EMIR margin requirements, without losing the benefit of the existing relief from margin requirements.
    - A delegated act amending clearing obligations under EMIR to allow parties to transactions with UK counterparties, that are currently exempt from the clearing obligation, to replace their UK counterparty with an EU one via novation and without losing the benefit of the exemption.
- These measures (as originally drafted) were expressed to take effect on 29 March 2019 (the original exit date) and would not automatically cover a “no-deal” Brexit which occurred after an Article 50 extension. Hence, following the extension of the Article 50 process to 12 April, on 25 March the European Commission confirmed that they would adjust these measures to address such a scenario. On 28 March this was echoed by the European Securities and Markets Authority (ESMA) who confirmed that they would also update their own related measures (e.g. recognition of 3 UK Central Counterparties and a UK Central Securities Depositories) accordingly.
- The European Commission has also published measures intended to exempt the Bank of England and UK Debt Management Office from certain regulatory requirements (e.g. under MiFIR and EMIR) in the event of Brexit.
- Outside of these legislative measures, the European Supervisory Authorities (ESAs) have undertaken various steps to mitigate the impact of a “no-deal” Brexit. Most significantly, the ESAs have coordinated memoranda of understanding between themselves and/or EU27 regulators and the UK regulators covering areas such as insurance, financial market infrastructure, and asset management delegation. ESMA has also issued guidance and statements on its approach to issues such as the MiFIR share trading obligation, MiFIR data, the credit rating agencies regime and EMIR reporting in the event of a “no deal” Brexit.

Belgium

- The Belgian Government has prepared a draft law which grants powers to the Government to take measures to ensure “continuity of agreements” that were entered into pre-Brexit. Measures adopted under the draft law can include granting required approvals and equivalence based on mutual recognition. However, it is not yet clear what measures the Belgian Government will adopt in this respect.
- The draft law has been submitted to Parliament but has not yet been adopted.
- It is worth noting that separately from specific “no deal” contingency measures,

Belgium has an existing cross-border registration regime for third country firms that allows continued provision of MiFID investment services to per se professional clients, eligible counterparties and expatriates. UK firms can take advantage of this regime by notifying the Belgian regulator.

France

- The French "no deal" legislation (Ordinance no. 2019-75 on preparatory measures relating to the UK withdrawal from the European Union in relation to financial services (the Ordinance)) was published on 7 February 2019. Unhelpfully, the Ordinance neither includes any general transitional relief for UK firms doing business into France, nor provisions on contract continuity (except in respect of insurance business). The Ordinance rather contains a limited number of targeted measures:
    - implementing changes to ensure that the provisions of French law on payment finality within EEA systems will apply to French members of UK payment and settlement systems;
    - provision for the continuity of existing insurance contracts;
    - creating a process for the transfer of existing "framework agreements" with respect to financial instruments with French counterparties to an EEA affiliate – although this is subject to specific conditions that mean it is unlikely to be used frequently in practice; and
    - providing temporary grandfathering relief for investments in UK companies, UK UCITS and companies listed on UK markets by designated French private equity funds and investments through French tax-efficient equity investment plans.

Germany

- Germany has put in place legislation to, among other things, deal with contractual continuity in the event of a "no deal" Brexit. The centrepiece of the law proposes that the German regulator (BaFin) can allow passport extensions in the areas of banking, investment, insurance and payment services for up to 21 months for services "in close connection with contracts that already existed pre-Brexit" as permitted by BaFin. The use of this power by BaFin is discretionary and subject to key conditions, including that the relief is necessary to "avoid adverse effects on the systemic stability of financial markets".
- The law requires one or multiple BaFin implementing acts which are not expected until a very late stage (e.g. the date of Brexit itself). These implementing acts are necessary to, for example, determine the exact scope of application and duration of the transitional period.
- Whilst the passport extension can last for up to 21 months, it is currently expected that BaFin may initially use its powers for only 12 months and then assess whether further extensions are necessary.
- The law also addresses issues other than contractual continuity, including licensing relief for UK trading venues that offer direct market access to German market participants (also subject to a BaFin implementing act) and beneficial conditions for applications of UK firms for exemptions (*Freistellungsverfügungen*) from the licensing requirement for certain types of proprietary business (*Eigengeschäft*), i.e. trades that are not client-connected.

Italy

- Italy has put in place a law decree (*decreto legge*) which establishes a transitional period during which, *inter alia*, banks and investment firms may continue to carry out business under the current rules through their local branches, and, with certain restrictions, on a cross border basis.

- Other financial companies, such as e-money institutions operating on a cross border basis, asset managers, insurance undertakings and payment institutions will no longer be able to operate in Italy and will have to discontinue their business by the withdrawal date, subject to a run-off period.
- The transitional period will last for up to 18 months post-Brexit but is subject to conditions. To fully rely on the transitional period, firms will need to (i) make a prior notification to the competent Italian authorities, to be made no later than 3 business days before the withdrawal date, in the manner to be prescribed by these authorities; and (ii) obtain a third country local authorisation within 6 months of withdrawal date.
- The Bank of Italy and CONSOB have made the relevant forms and instructions regarding the notification available on their websites (see the Bank of Italy and CONSOB websites, respectively).

Luxembourg

- Luxembourg already has a broad existing cross-border exemption that will allow UK entities to carry on investment activities/services for Luxembourg per se professional clients and eligible counterparties provided that the UK firm has no physical presence in Luxembourg. There is also an "equivalence-light" exemption that may apply where there is an occasional/temporary physical presence of the UK firm in Luxembourg in view of providing investment services, provided that certain conditions are met. We understand from recent ESMA statements that the required memoranda of understanding for this exemption are ready for signing. However, the CSSF has not published an equivalence statement with regard to the UK.
- In addition, on 26 March 2019 a contingency plan for financial activities in the event of "no deal" Brexit was adopted by the Luxembourg Parliament. The scope of the contemplated continuity regime is very broad and encompasses:
    - banking and investments activities/services;
    - UCITS Management companies activities;
    - AIFM activities;
    - payment activities/services;
    - insurance activities/services; and
    - resolution, restructuring and bankruptcy for credit institutions and investment firms.
- In a nutshell, the law grants Luxembourg regulators the power to allow continuity for existing agreements and new agreements to the extent they are appropriately linked to existing contracts. This continuity regime would cover the provision of services to both retail and professional Luxembourg clients and would be in force for a maximum of 21 months as from the withdrawal date.

Netherlands

- On 4 February 2019, the Dutch Minister of Finance published a temporary exemption for UK investment firms that only deal on own account in the Netherlands or provide services to eligible counterparties or per se professional clients in the Netherlands. By way of Ministerial Regulation an existing exemption which is currently available only for investment firms in the United States, Switzerland or Australia will temporarily also become available to UK investment firms.
- In order to rely on the exemption, adequate supervision must be exercised over the investment services or own account trading that such investment firms intend to provide or perform in the Netherlands by the relevant regulator in the home country

of the investment firm. Such supervision may be evidenced by way of: (a) an attestation issued by the relevant supervisor; or (b) a reference to the website of the relevant supervisor on which information about the regulated status of the investment firm can be obtained (e.g. the FCA register).

> Investment firms that apply the exemption, are also exempt from the prudential supervision rules in the Netherlands, and from the majority of conduct of business rules.

> Investment firms that apply the exemption will be able to both continue to service their existing clients and service new clients. However, the Minister has indicated that the exemption is intended to give UK investment firms the opportunity to take adequate measures to prevent or mitigate adverse consequences of a no-deal Brexit. As such, UK firms should be careful in attracting new clients under the exemption in light of its temporary nature.

> The exemption will last a maximum of two years, and in order to apply the exemption, an application must be filed electronically through the Dutch regulator's digital portal.

Poland

> Poland has put in place a law to provide limited relief for UK established entities conducting financial services (including banking, payments, brokerage and insurance) in the case of a "no deal" Brexit scenario.

> The relief will last 24 months for banking services, and 12 months for payment, insurance and investment services. The relief varies and generally only allows firms to continue providing certain services according to contracts that were concluded prior to exit day (i.e. new agreements cannot be entered into). For example, the relief for banking services has been limited to credit agreements while investment firms may continue to perform agreements which were concluded pre-Brexit but cannot conclude new agreements or extend or prolong existing ones. They may also continue to be members or participants of Polish trading venues (or access these venues via direct electronic access).

Portugal

> On 27 March 2019, the Portuguese Parliament approved the implementation of the pack of contingency measures proposed by the Government in order to minimise the impact of Brexit in Portugal, but those measures left the financial services sector for the Portuguese regulators to coordinate.

> Neither the Portuguese securities regulator nor the banking regulator (the CMVM and the Bank of Portugal, respectively) have so far issued rules or guidelines. We do not anticipate that the regulators shall issue contingency measures, but rather they should just implement, if and as necessary, the European Commission measures.

Spain

> Spain has put in place Royal Decree-Law 5/2019 of 1 March 2019 (the RDL), the aim of which is avoiding the disruption caused by a hard Brexit. The RDL guarantees the continuity of agreements entered into before the UK's withdrawal from the EU. Firms must nonetheless adapt to the rules for third countries, as follows.

> It will not be necessary to apply for authorisation to carry on activities arising from those agreements to the extent those activities are not subject to authorisation in Spain.

> However, authorisation will be required to (i) enter into new agreements; (ii) renew pre-existing agreements; (iii) change the parties' essential obligations under pre-existing agreements; or (iv) provide new services in Spain.

- This authorisation will also be necessary to carry on activities subject to authorisation which arise from pre-existing agreements. However, in this case, firms will have a period of nine months from a hard Brexit to (i) apply for the relevant authorisation or (ii) terminate or transfer these agreements to another firm if the relevant entity decides to put an end to its activities in Spain, being able to carry on these activities during that period.

Sweden

- Sweden has put in place a law that permits UK firms to provide investment services (all MiFID investment services but not payment services/deposit taking) on a temporary basis in Sweden without needing a licence from the Swedish regulators. The law covers services provided to existing professional and eligible counterparty clients. The exemption will apply until the end of 2020.
- The available details indicate that the aim is to eliminate the risk of interruption to derivative contracts entered into by Swedish businesses with a UK counterparty prior to Brexit, and that the proposal is contingent on the UK leaving the EU without a UK-EU transitional deal in place (i.e. a “no deal” Brexit).

Further resources

For more information on Brexit, please visit our:

> Brexit Knowledge Portal

> Linklaters Brexit homepage

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