
NEWS

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PREPARING FOR A HARD BREXIT

On 29 March 2017, the UK government submitted its notification of withdrawal, triggering a maximum time period of 2 years for the negotiation of an agreement setting out the arrangements for the UK's withdrawal, taking account of the framework for the UK's future relationship with the European Union. There is now a hard deadline for the Brexit preparation. This note provides an overview of current trends and issues in this context.

The die is cast. The UK government has submitted its notification of withdrawal pursuant to Article 50 (2) of the Treaty on European Union to the European Council.

On 29 March 2019, the UK will likely leave the European Union. The departure could be accelerated if the withdrawal agreement to be concluded with the UK stipulates an earlier date – which, however, appears extremely unlikely. It seems equally unlikely that the departure date will be postponed as this would require a unanimous decision of the European Council, acting in agreement with the UK.

As it is still very uncertain whether transitional arrangements can be concluded prior to the exit date, all Brexit planning must assume that as of 29 March 2019 the UK will become a third country for purposes of access to the Single Market. As a consequence, UK financial institutions will lose their EU passports under which they established branches or provided services on a cross-border basis in the remaining 27 EU Member States („EU 27“). Likewise, financial institutions in the EU 27 will lose their respective passports for doing business in the UK.

In our newsletter of 24 June 2016, we provided an overview of the third country regimes in the biggest economies of the EU (licensing requirements, booking models, available exemptions, sanctions and enforcements) which is still up-to-date. If you would like to revisit this overview, you can find it here: [BREXIT – Third Country Rules](#)

With this newsletter, we will give you an update of the current trends and issues in connection with Brexit preparation of credit institutions (and, by implication, MiFID investment firms).

What to do with an EU branch?

UK institutions operating a branch in an EU Member State only have two choices: (i) to find a regulated entity for hosting these operations, be it a locally registered institution in such host Member State or in another Member State which can establish an EU branch in the host Member State or (ii) to change their business model by either withdrawing their physical presence altogether or by providing only unregulated services in that branch.

How to operate on a cross-border basis?

Some jurisdictions provide for a cross-border license for third country institutions, others for a license exemption. With respect to MiFID services to be provided to per-se professional clients and eligible counterparties, these regimes will become obsolete once the MiFIR third country access rules will come into play, i.e. after the European Commission has adopted an equivalence decision confirming that the regulatory regime in the UK is equivalent with EU standards. The MiFIR rules, however, do not apply in relation to private clients, even if they opted for treatment as professional clients, and furthermore not to banking services. MiFID services for these clients, as well as banking services in general, can potentially be provided under the aforementioned third country license or exemption regimes.

How can business be continued with limited disruption of the present infrastructures?

This is indeed the key question asked by many UK financial institutions. The regulators in some key jurisdictions seem to be going out of their way in displaying a service-mindedness which has been sorely missed before the Brexit referendum. However, it is fair to say that some appear to be more eager and forthcoming than others. The matrix

below shows how local regulators have positioned themselves in the competition for Brexit refugees and what topics are currently being discussed with the local regulators.

What are the consequences for EU financial institutions and corporates wishing to do business in the UK?

The current working assumption in the UK is that EU credit institutions will be permitted to retain UK branches following Brexit, albeit that there remains considerable uncertainty as to whether this will be the final policy determination. The expectation is that such branches will require local authorisation from the UK PRA, although it is at least possible that a transitional period will be provided for a temporary period immediately following Brexit, during which existing EU passported credit institution' branches will be given interim authorisation in the UK.

In practice, given the level of uncertainty around the final policy decision on this important point, banks' Brexit planning arrangements lean towards the realistic worst case assumption that a local authorisation in the UK will be required ahead of the date on which the Brexit becomes effective. There is also, at the same time, a general recognition that the policy approach towards the continued existence of UK branches of EU credit institutions generally is still to be confirmed by the UK authorities (thereby heightening the level of uncertainty). Naturally, the confirmation on this point is viewed as a critical element of the Brexit planning framework on which banks seek clarity in the UK, but where there is recognition that there may be reluctance to provide policy confirmation in the UK absent a degree of reciprocity.







As a result, EU credit institutions operating branches in the UK are left with a complex decision as to whether to progress the (potentially costly) option of subsidiarisation in the UK as a "Brexit proof" measure, and absorb the capital and liquidity costs that this may imply, or to wait for clarity on the policy approach towards UK branches of EU credit institutions (the timing and outcome of which is uncertain).

	France 	Germany 	Italy 	Netherlands 	Spain 	Portugal 
1. Special service for institutions wishing to relocate to EU						
Dedicated contact point	Banks, insurance companies and Fintech companies: brexit-acpr@acpr.banque-france.fr (banking and insurance authority, “ACPR”) Investment management firms and FinTech companies: queries 2WeekTicket@amf-france.org (French market authority, “AMF”)	Banks, investment firms (MiFID) and investment management firms: access@bafin.de https://www.bafin.de/EN/Aufsicht/Uebergreifend/Brexit/brexit_artikel_en.html (Federal Financial Services Supervisory Authority, “BaFin”)	No	No	MiFID firms: welcome@cnmv.es (National Securities Market Commission) Banks: vicesecretaria.divisionARE@bde.es (Bank of Spain)* Insurance companies: subregulacion@mineco.es (Ministry of Economy)*	No
English-speaking dedicated contacts and English documents regime	Yes. English document will be accepted only if already submitted to UK supervisory authorities.	Yes	No special provision implemented to date.	No special provision implemented to date.	For MiFID firms, the CNMV will accept that all relevant documentation is presented in English.	No special provision implemented to date.
2. Back to back transaction between EU institution and a group company in the UK						
Supervisors’ approach**	No public views expressed to date.	BaFin is generally open to back-to-back structures, but it considers back-to-back models unsustainable over longer periods of time.	No public views expressed to date.	No public views expressed to date.	No public views expressed to date.	No public views expressed to date.

* More general questions may be sent to Welcome@tesoro.mineco.es (Ministry of Economy).

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** Although back-to-back transactions are not prohibited under the CRR/CRD IV regime, the European Central Bank recently indicated that it will not accept that banks will permanently book all exposures back-to-back with another UK entity.

	France 	Germany 	Italy 	Netherlands 	Spain 	Portugal 
3. Outsourcing of functions from an EU institution to a UK institution						
Prior authorisation/ notification	<i>Ex ante</i> notification duties may, in case of a hard Brexit, apply to the outsourcing of portfolio management services in certain limited cases ¹	No	Yes, <i>ex ante</i> notification duties may apply.	No but certain conditions may apply.	Yes, for credit institutions <i>ex ante</i> notification duties apply for the outsourcing of key functions.	Yes, <i>ex post</i> notification duties apply.
Authorisation/ notification timeline	In case such a prior notification is required, 2 months prior to the execution of the outsourcing agreement.	N/A	60 days before the execution of the outsourcing agreement.	N/A	One month before the execution of the outsourcing agreement.	5 days after the conclusion of the outsourcing agreement.
Are there specific substance requirements?	Yes, the outsourcing institution must keep the ability to control key functions. The services provider must also ensure the continuity of the service, and the security of the data it receives from the French institution.	Yes, the outsourcing institution must have a local risk management and a local control infrastructure. There are minimum standards for the outsourcing and the outsourcing agreement (MaRisk).	Yes, the outsourcing institution must have a corporate governance structure appropriate for its size, operational complexity and type of business.	Yes, the outsourcing institution must have a local risk management and a local control infrastructure. There are minimum standards for the outsourcing and the outsourcing agreement.	Yes, key functions outsourcing agreement must ensure, inter alia, that: (i) the institution remains fully liable for the outsourced functions; (ii) the client relationship and the supervision of the institution remain the same; and (iii) the institution continues to comply with the applicable law and regulations.	Yes, key functions outsourcing agreement must not: (i) affect the quality of the institution's internal control and; (ii) hinder the supervisory authorities' powers.
4. Licensing process						
Average time to process the license application by the regulator	6-12 months	6-12 months	6-12 months	6-12 months	For banking licence, 6-12 months. For MiFID licence, 3- 6 months.	For banking licence, 6-12 months. For MiFID licence, 30 days.
Possibility to accelerate the licencing process	Yes, notably, for management firms and FinTech companies the AMF	Yes, in in case of already existing branch, the licensing process could be	No	No	Yes, for already existing MiFID firms supervised by the FCA, the CNMV has set	No

¹ Hard Brexit implying that the UK does not remain a party to the EEA agreement, and that there is no appropriate cooperation agreement between the UK and FR regulators.

	France 	Germany 	Italy 	Netherlands 	Spain 	Portugal 
for UK entities	has set up a pre- authorisation procedure which allows firms to begin the process of opening offices within 2 weeks.	shortened if BaFin is familiar with the main features of the business model of the new subsidiary.			up a specific process which entails: (i) a pre- authorisation within 2 weeks; and (ii) a formal authorisation within 2 months.	

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