

Introduction

As it stands, the UK will cease to be a member state of the European Union (EU) as of 30 March 2019.

On 24 November 2018, the UK and the EU agreed to enter into a Withdrawal Agreement (the Withdrawal Agreement).

The Withdrawal Agreement provides in Article 127 (6) that during a transition period from 30 March 2019 to 31 December 2020 (the Transition Period), any reference in EU law to a member state of the EU shall include the UK.

Accordingly, the current passporting rules for cross-border services provided by banks, insurance companies and financial services providers from the UK into the EU, as well as the current passporting rules for branches established by UK banks, insurance companies and financial services providers in the territory of the EU to carry out banking business (including commercial lending), insurance business and other financial services in Germany would continue to apply during the Transition Period, provided that the Withdrawal Agreement is finally adopted and entered into by the UK and the EU.

Article 132 of the Withdrawal Agreement further provides that the Joint Committee may, by resolution to be adopted prior to 1 July 2020, extend the Transition Period beyond 31 December 2020 for a period of up to one or two years.

However, the final adoption of the Withdrawal Agreement requires the consent of and ratification by the European Parliament and the Houses of Parliament in the UK. The vote in the House of Commons in the UK scheduled for 11 December 2018 was postponed. The House of Commons has returned on 7 January 2019 and has resumed debate on 9 January 2019. It is expected that the vote in the House of Commons will take place on 15 January 2019. At the time of writing, it is unknown if the House of Commons will vote in favour of the Withdrawal Agreement. If the vote is unsuccessful, it is unclear what will happen next: the House of Commons may vote again, the government may continue to try to renegotiate the Withdrawal Agreement with the EU the UK and the EU, acting unanimously with the consent of all 27 member states, may decide to extend the Article 50 period beyond 30 March 2019, the UK may revoke Article 50 or the UK may leave the EU without a deal.

If the Withdrawal Agreement is not ratified by the UK Houses of Parliament, and the UK leaves the EU as a matter of law on 30 March 2019, the Transition Period will not come into force and UK banks, insurance companies and other financial services providers which are currently passported into the other 27 member states of the EU would need to stop doing banking business and insurance business and need to stop providing financial services in the EU, including Germany, at the end of 29 March 2019.

Doing banking business (including commercial lending), insurance business or providing financial services without the required license in Germany is a criminal offence and, in addition, may trigger damages claims of the customers.

Many banks, insurance companies and financial services providers have prepared themselves for 30 March 2019 by already having set up new EU licensed banking, insurance and financial services subsidiaries in the territory of the EU27.

However, as long as not any and all currently existing business and contracts have been transferred from currently existing branches in the EU or the headquarter in the UK to such newly licensed entities, there is still existing banking, insurance and financial services business that would not be allowed to continue to be done after 29 March 2019.

Express Rejection by EU to Provide for Contingency Measures on EU Level for Currently Existing Passported Banking, Insurance and Financial Services Business by UK Institutions

The approach of the EU Commission in respect of contingency measures for the banking, insurance and financial services sector is explicit and straightforward. The EU Commission takes the point of view that market participants had sufficient time to prepare for Brexit.

In its memo of 19 December 2018 on "Questions and Answers: the consequences of the United Kingdom leaving the European Union without a ratified Withdrawal Agreement (no deal Brexit)", the EU Commission states that contingency measures **will in principle be unilateral (to some extent requiring reciprocity from the UK but without any further negotiations)** and shall be strictly limited to what is necessary to deal with major disruptions and that contingency measures cannot remedy delays that could have been avoided by preparedness measures and timely action by relevant market participants.

Accordingly, the EU Commission has restricted itself to only taking very narrow measures which mitigate financial stability risks in those areas where preparedness actions from market participants alone are insufficient to address these risks by the withdrawal date: A temporary and conditional equivalence decision prolonging the access of EU firms to UK central clearing counterparties and UK central security depositories for 12 and 24 months respectively and amending two Delegated Regulations in order to preserve the regulatory treatment of derivative contracts currently exempted from the clearing obligation and the bilateral margin requirements that EU law imposes, when such contracts are transferred from the UK to the EU27 (for a period of 12 months following the withdrawal date).

The EU Commission concludes that in case of no deal, entities headquartered in the UK providing banking services or insurance services will no longer be allowed to provide services in the EU on the basis of their current authorisations.

It is not expected that the EU Commission will reverse such approach.

An open issue is whether the conclusion that UK operators cannot provide services any longer in the territory of the EU in case of a no-deal Brexit will prevent national legislators in the EU27 from adopting national temporary permission schemes.

The German government has taken the point of view that there is no superior regulation on EU level in respect of the consequences of a member state leaving the EU in the context of the EU framework for financial markets and has accordingly proposed on 12 December 2018 unilateral domestic German legislation. Whether and how such German point of view as of 12 December 2018 will be affected by the Commission Notice of 19 December 2018 will be seen in the coming weeks.

Governmental Draft (*Gesetzentwurf Der Bundesregierung*) of 12 December 2018 of a German Act for a Temporary Permissions Scheme for UK Banks, Insurers and Financial Services Providers Which Currently Do Business in Germany on a Cross-border Passporting Basis

In order to regulate the orderly wind-down of the EU business of UK banks, insurers and financial services providers which currently do business in Germany on an EU/EEA passporting basis in case that the Withdrawal Agreement will finally not be adopted by the UK or the EU, the German government has published on 12 December 2018 a draft (*Regierungsentwurf*) of an act which proposes provisions for a German temporary permissions scheme for insurers, banks and other financial services providers (*Gesetzentwurf der Bundesregierung eines Gesetzes über steuerliche und weitere Begleitregelungen zum Austritt des Vereinigten Königreichs Großbritannien und Nordirland aus der Europäischen Union – German Brexit Temporary Permissions Scheme Act or Act*).

There is no specific time line for the adoption of the Act. It is currently believed that such an Act would be adopted between January and March 2019.

What Does the German Brexit Temporary Permissions Scheme Act Provide for Insurance Companies?

The German Brexit Temporary Permissions Scheme Act provides, *inter alia*, that a new Section 66a shall be inserted into the German Insurance Supervisory Act (*Versicherungsaufsichtsgesetz – VAG*).

The proposed new Section 66a VAG would provide that in case that the UK leaves the EU without a Withdrawal Agreement, the German Federal Financial Services Supervisory Authority (BaFin) is authorised to declare – for the purpose of protecting the interests of insured and recipients of insurance services – that UK insurance undertakings which currently provide insurance or insurance services on a cross-border passported basis either through a branch or through mere services without a branch shall be deemed to be allowed to do so on the basis of the currently existing rules under Sections 61 to 66 and 169 VAG for a period of up to 21 months after the UK ceased to be a member state of the EU.

Such Section 66a VAG further provides that the scope of such deemed licence to carry out insurance business does not allow the relevant UK insurers to enter into new insurance business and that the purpose of such deemed license is only to wind-down those insurance contracts which have been entered into prior to the UK ceasing to be a member state of the EU. The reasoning added to the draft Act states that the exercise of unilateral rights of insured contemplated in insurance contracts which have been entered into prior to the UK ceasing to be a member state of the EU to unilaterally opt for a prolongation of the insurance contract shall not be deemed to constitute new business.

The current draft of Section 66a VAG provides that BaFin is entitled to make such a declaration through a so-called "*Allgemeinverfügung*", i.e. a general declaration not addressed to certain insurance undertakings but addressed to insurance undertakings in a generic and abstract way.

Some open issues remain:

- I. The current draft of Section 66a VAG does not state that BaFin needs to make such declaration for any and all UK insurance undertakings, which are currently active in Germany and any and all insurance types currently operated by such insurance undertakings.

The new Section 66a VAG provides BaFin with the discretion to make such a declaration only for certain types of UK insurance undertakings and certain types of insurance business.

- II. The draft Act provides that it comes into force on 29 March 2019 and accordingly the powers of BaFin to make a decree under the new Section 66a VAG would only come into force on 29 March 2019. It is an open issue whether BaFin will start to draft and publish relevant drafts of the relevant decrees it could issue on 29 March 2019 prior to 29 March 2019.

It should further be noted that the concept of regulated insurance business in Germany is quite wide. The governmental considerations and reasoning for the proposed Act state the following:

"The operation of insurance business does not only encompass the acquisition of insurance contracts, the administration thereof and the claims handling, but also the mere handling and run off of terminated and finished insurance contracts and the handling of open claims, and including the collection of premiums."

What Does the German Brexit Temporary Permissions Scheme Act Provide for Banks and Other Financial Services Providers?

The German Brexit Temporary Permissions Scheme Act provides, *inter alia*, that a new subparagraph 12 shall be added to Section 53b of the German Banking Act (KWG).

The proposed new Section 53b (12) KWG provides that in case that the UK leaves the EU without a Withdrawal Agreement, BaFin is authorised to declare – for the purpose of avoiding disadvantages for the operability and stability of the financial market – that UK banks and financial services providers which currently provide services on a cross-border pass-ported basis either through a branch or through mere services without a branch shall be deemed to be allowed to do so on the basis of the currently existing rules under Section 53b (1) to (9) for a period of up to 21 months after the UK ceased to be a member state of the EU.

It should be noted that the purpose of Section 53b (12) KWG for banking (including commercial lending) and financial services business is, in contrast to the proposed Section 66a VAG for the insurance sector, not the protection of the interests of the individual customers but rather the financial market as a whole, which means that any measures taken by BaFin may be restricted to the most important market participants from the UK but do not need to encompass also other market participants from the UK.

Such Section 53b (12) KWG further provides that the scope of such deemed licence to carry out business does only allow the relevant UK banks and financial services providers to do business which is in a close context (*enger Zusammenhang*) with contracts which exist at the time of the UK ceasing to be a member state of the EU.

The current draft of Section 53b (12) KWG provides that BaFin is entitled to make such a declaration through a so-called "*Allgemeinverfügung*", i.e. a general declaration not addressed to certain banks and financial services providers but addressed to undertakings in a generic and abstract way.

Some open issues remain:

- I. The current draft of Section 53b (12) KWG does not state that BaFin needs to make such declaration for any and all UK undertakings, which are currently active in Germany and any and all types of business currently operated by such undertakings. Rather it expressly states that BaFin may restrict the scope of its declarations to certain types of business.
- II. The draft Act provides that it comes into force on 29 March 2019 and accordingly the powers of BaFin to make a decree under the new Section 53b (12) KWG would only come into force on 29 March 2019. It is an open issue whether BaFin will start to draft and publish relevant drafts of the relevant decrees it could issue on 29 March 2019 prior to 29 March 2019.

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