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External in-house counsel

BREXIT UPDATES: UK
EXTENTION AND NO
DEAL PREPARATION IN
BELGIUM, GIBRALTAR,
PORTUGAL, RUMENIA
AND SWEDEN

After the withdrawal agreement the Prime Minister of the United Kingdom agreed with the European Union (“EU”) negotiators had been rejected three times by British MPs, and faced with the real possibility of a “no deal Brexit”, i.e. the UK leaving the EU without a deal in place for its orderly withdrawal, on 10 April 2019 the EU council granted the UK a flexible extension until 31 October, already coined a “flexextension”.

The intention is to allow some extra time to the British Parliament so that it can reach an agreement and ratify the withdrawal agreement concluded back in November 2018; if the agreement is ratified before the end of October, the flexextension will end as soon as the agreement is approved. Should the UK Parliament not find a majority to support the agreement, the UK could be forced to seek another extension or risk again a no deal Brexit.

Therefore, a no deal Brexit still remains a likely event, considering that the withdrawal agreement has already repeatedly been rejected by the UK Parliament, and that successful cross-party negotiations is not by any means a foregone conclusion.

As consequence, it still makes sense for the UK, the EU and individual EU members to carry on their no deal Brexit preparations.

The UK certainly will continue its no deal preparations, including efforts to strike post-Brexit trade agreements with third countries; however, to date the agreements secured cover only about 11 per cent of UK trade by value. The UK also could use this time to reconsider its Brexit strategy, which ranges from holding a second referendum to attempting to amend the Political Declaration attached to the withdrawal agreement, which delineates mutual commitments concerning the future UK-EU relationship, to abandoning Brexit altogether and therefore revoking the art. 50 notification of its intention to leaving the EU.

An important part of the flexextension is that the UK will continue to have full EU membership rights and obligations. It will remain part of the internal EU Single Market and external trade will continue to take place pursuant to EU free trade agreements with third countries. EU law will continue to be fully applicable, which also means that the UK must participate in European elections in May 2019. Should it fail to do so without having ratified the withdrawal agreement, the UK would find itself ejected from the EU as of 1 June 2019.

The terms of the “flexextension” also reflect concerns about extending the UK’s status as an leaving EU member. Since the UK remains an EU member with full rights and obligations (including the right to revoke its notice under Article 50), it has committed to act in a constructive and responsible manner throughout the extension period in accordance with its duty of sincere cooperation.

When participating in the EU’s decision making, the UK is to facilitate the achievement of the Union’s objectives, and is expected to act in a manner consistent with a withdrawing member state.

The decision to grant the flexextension, due to a review of the progress made at the European Council meeting in June, emphasises that the UK’s actions during the extension ‘should be compatible with the letter and the spirit’ of the withdrawal agreement, ‘and must not hamper its implementation. Such an extension cannot be used to start negotiations on the future relationship.’ A version of the withdrawal agreement with consequential amendments was also published, and as the covering letter stresses out, the necessary changes to certain dates are very minor. It is very important to note that the date for the end of the transition period on 31 December 2020 has not been changed; therefore, if the withdrawal agreement does take effect, the extension granted will have eaten in the original 21 months agreed as transition.

As a direct consequence, the disruption of a no deal Brexit is avoided for the time being; however, serious regulatory and legal uncertainty still remains, including primarily all the legal framework applicable to the UK- EU relationship past October 2019, and generally the regime applicable to UK international agreement past that date, possibility for abrupt changes to tariff and trade requirements, and negative impacts on investments, supply chains, the labour market and the value of the British pound. While both the EU, individual member states and the UK announced legal concessions to address the most hard-hitting impacts of a no deal Brexit, in the weeks leading up to the original Brexit date at the end of

March, most measures are limited in scope and time and, further, could be subject to change in the coming weeks and months.

Although many companies have been planning for a no deal Brexit for a long time now, statistics and surveys from multiple sources, however, indicate that a majority of companies that will be affected have yet to assess implications for their business of operating under new trade agreements, including customs procedures and currency changes; implications for data transfers, work forces and legal contracts; and the production, cost, availability and provenance of essential business goods.

In light of all the above, it still makes sense to follow developments in the remaining EU countries with regard to no deal Brexit preparations, with a particular eye to the financial services sector.

BELGIUM

On 28 March 2019, the Belgian parliament approved the law on the withdrawal of the UK from the European Union (the “Belgian Brexit Law”), as part of a number of measures taken by the Belgian government to prepare for a no deal Brexit.

Chapter 1 of Title 6 (Finances) provides measures in relation to the provision of financial services post Brexit. It aims to respond temporarily to the main difficulties posed by Brexit by (i) amending the law of 25 October 2016 on the access to the investment services business and the status and control of portfolio management and investment advisory companies (the Investment Services Law); and

(ii) granting powers to government to take further measures in relation to regulated markets, Multilateral Trading Facilities (“MTFs”) and Organized Trading Facilities (“OTFs”) and in relation to contract continuity.

Cross-border regime for investment services

As already seen in other EU countries, where a no deal scenario brings about the provision each country has set up for “third countries”, i.e. countries outside the EU, the Belgian Investment Services Law already provided a regime whereby third country firms can provide cross border investment services in Belgium under certain conditions. The regime requires that:

- (i) a notification is made to the Belgian Financial Services and Markets Authority (the “FSMA”);
- (ii) the services are only provided to per se professional clients and expatriates; and
- (iii) there is reciprocity in relation to the market access of Belgian firms in the relevant third country.

In a no deal Brexit scenario, the UK will qualify as a third country under these rules and the FSMA clarified that temporary permissions regime for EEA firms providing cross-border services in the UK, as announced by the British government in December 2017 and applied by the FCA, would be sufficient to satisfy the reciprocity condition, as long as this temporary regime is in force.

The Belgian Brexit Law clarifies that this regime is applicable in case of both investment services and investment activities.

In addition, a more substantial amendment is made to the Investment Services Law. This amendment grants powers to the Belgian government, upon prior advice of the FSMA, to impose additional rules on third country firms providing investments services and activities in Belgium on a cross-border basis. These rules should be aimed at protecting the interests of Belgian investors and preserving the proper functioning, integrity and transparency of financial markets in Belgium. The government may, to a certain extent, align the rules for these third country firms to the regime applicable to EEA firms.

In particular, the government may adopt rules on data retention and reporting of transactions in financial instruments, which would take into account the provisions of Market in Financial Instruments Regulation (“MiFIR”) and other EU texts as applicable to EEA firms.

Regulated markets, MTFs and OTFs

A Belgian regime may be adopted for third country regulated markets, MTFs and OTFs. The Belgian Brexit Law grants powers to government, upon prior advice of the FSMA and the National Bank of Belgium (the NBB), to regulate the operation of regulated markets, MTFs and OTFs in Belgium by operators of a third country, such as the UK in case of a no deal Brexit. The Belgian government may set out the criteria under which such activities are considered to be conducted in Belgium, specifically in case provisions are made allowing users, members or participants in Belgium to access and trade on these markets.

These measures should be aimed at aligning the regime applicable to EEA markets with the regime applicable to these third country markets.

Contract continuity

As in other EU countries, one of the main concerns of a no deal Brexit is ensuring the continuity of contracts. In case of a no deal Brexit, financial institutions established in the UK, such as credit institutions, investment firms, (re)insurance undertakings, payment institutions, credit providers, ICBs, fund managers and financial or insurance intermediaries established in the UK will lose their authorisation to provide services in Belgium, unless an exemption, such as the cross border regime for investment services, can be used. There are no EU rules setting out the legal consequences of the loss of the EEA passport on the validity of contracts entered into prior to this loss.

The continuity of these contracts could thus be called into question.

The Belgian Brexit Law empowers government to take measures to safeguard the ongoing performance of contracts entered into prior to Brexit by financial institutions established in the UK.

The mere execution or the occurrence of 'life cycle events' (eg the renewal of the contract or the modification of an essential obligation of the contract) could imply the provision of a (new) service or activity triggering authorisation in Belgium. This would be problematic, even detrimental, for the customers or counterparties concerned, in particular for contracts that involve the provision of financial services on a continuous basis.

To avoid any uncertainty, the government, upon prior advice of the FSMA and the NBB, may take the necessary measures to secure contract continuity, and such measures are referred to in a non-exhaustive way. The Belgian government could, among other things, grant the required authorisation to the third country firms or grant equivalence with EEA firms within certain limits (in time, or otherwise).

Government may also define which lifecycle events should be considered as the provision of a new service for whom a new authorization would be required.

At this stage, there is no clarity on what measures the government will adopt in this respect.

FSMA provides clarity on the provision of investment services and performance of investment activities by UK companies

On 21 February 2019 the FSMA issued a communication

(i) describing the system that applies in Belgium to UK investment firms post Brexit and (ii) examining the issue of the impact of Brexit on the continuity of contracts in force, entered into in Belgium by UK investment firms;

(i) Existing regimes for third country firms

The FSMA refers to the existing regimes for third country firms to provide investment services in Belgium:

- by establishing of a branch in Belgium; and
- by providing cross-border services in Belgium (regime as amended by the Belgian Brexit Law).

In this regard, the FSMA requests the UK firms that are active in Belgium, to inform the FSMA, as of now, if they intend to pursue their activities in Belgium and, if so, under which regime.

(ii) Contract continuity

The FSMA refers to the issue of contract continuity post Brexit and the solution provided in the Belgian Brexit Law.

The FSMA clarifies that, in relation to derivative contracts, UK firms should be able to continue to hold and honour existing derivative contracts after Brexit without having to obtain a Belgian authorisation, on the condition that there is no life cycle event that ensues in a new contract or at least a substantial amendment to the contract.

The FSMA further sets out that it is however still too early to make any statements on measures that may be adopted by the government on the subject. Considering that the illegal provision of investment services and the illegal performance of investment activity is punishable by criminal sanctions in Belgium, and subject to measures to be taken by government on the subject, the FSMA requests the firms concerned to provide proof of caution in their analyses.

GIBRALTAR

The peculiarity of Gibraltar is that it is a British Overseas Territory and it is in the EU as part of the UK's membership. As such, Gibraltar applies EU law under provisions in its own European Communities Act 1972. Following the result of the EU referendum, Gibraltar will therefore be leaving the EU in parallel with the UK. The government of Gibraltar will undertake its own contingency preparations for its withdrawal from the EU, including adopting a similar and reciprocal approach to the UK in its own EU Exit legislation.

In March 2018, at the Joint Ministerial Council with the government of Gibraltar, the UK government announced that Gibraltar's authorised financial services firms will continue to be able to access the UK as now until 2020 in a no-deal scenario. UK firms will also continue to be able to exercise their passport rights as now in Gibraltar.

The UK government aims to work closely with the government of Gibraltar to design a long-term framework for EU market access beyond 2020, based on the same principles it envisages for the UK, which are high standards of regulation, enforcement of this regulation, and underpinning of it by modern arrangements for information-sharing, transparency and regulatory co-operation.

As a consequence, the aim for Gibraltar as well as for the whole UK is to reflect their new positions outside the EU, preserving current market access and regulatory treatment as much as possible, and smoothing the transition to such new position.

The Financial Services (Gibraltar) (Amendment), part of the (EU Exit) Regulations 2019 (SI 2019/589) has been laid before the British Parliament and is published alongside its explanatory memorandum.

Generally speaking, the EU Exit law repeals the Community Act 1972 on the day the UK leaves the EU and converts into UK domestic law the existing body of directly applicable EU law. In addition, it also gives Ministers powers to make Statutory Instruments ("SIs") to prevent, remedy or mitigate any failure of EU law to operate effectively, or any other deficiency in retained EU law, with the aim of ensuring that a fully functioning statutory book is in place from day one after the UK leaves the EU. These contingency preparations for financial services legislation are known as 'onshoring'.

HM Treasury is using these powers to ensure that the UK continues to have a functioning financial services regulatory regime in any scenario. This includes ensuring that the current regulatory position with regard to Gibraltar is temporarily preserved notwithstanding amendments made to financial services legislation under the withdrawal agreement.

The SIs make amendments to the Financial Services and Markets Act 2000 (Gibraltar) Order 2001, the Financial Services and Markets Act 2000 and the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018. The SIs will allow financial services firms authorised in Gibraltar to continue to provide services and establish branches in the UK. The government of Gibraltar will be adopting a similar and reciprocal approach.

This includes, among other, UK-Gibraltar financial services arrangements with regard to:

- maintaining existing provisions for home state responsibility in cross-border insolvency proceedings;

- maintaining existing treatments for policy holder and depositor protections; and
- maintaining a payments regime governing euro transactions between the UK and Gibraltar;
- deleting provisions relating to financial services firms in the EEA, other than Gibraltar, being able to continue their access to and between the UK and Gibraltar markets from exit day;
- providing that financial service firms incorporated and headquartered in Gibraltar will not be able to join the TPR or the FSCR. This reflects the UK government's commitment to preserve UK access for Gibraltar firms as now; and
- including a provision to continue the existing market access framework between the UK and Gibraltar until at least the end of 2020. The mechanism can be extended by one year at a time.

Part 2 of, and Schedules 1 and 2 to, the Regulations make a number of Gibraltar-related modifications and amendments to UK financial services legislation in the context of Brexit. Part 3 of the Regulations saves the effect of certain financial services legislation in relation to Gibraltar-based firms and activities. Regulations 2, 3, 4, 5, 11 and Schedules 1 and 2 to the Regulations come into force on exit day. The other provisions in the Regulations come into force immediately before exit day.

The FCA has also published a statement on the treatment of Gibraltar in the FCA Handbook post-Brexit, clarifying its intention to issue rules and guidance to ensure that authorised financial services firms in Gibraltar retain access to UK markets after exit day. It has also published draft rules and guidance which it intends to finalise shortly before the UK leaves the EU, whenever that date will be.

PORTUGAL

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

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

ROMANIA

On 20 March 2019, the Romanian Financial Supervisory Authority (the "FSA") formally clarified its position on the fate of UK entities acting in the non-banking financial services market in Romania in the event of a 'no-deal' Brexit.

The FSA confirmed that in such a circumstance, UK entities operating in the nonbanking financial markets will qualify as a third country entity and will no longer be authorised to carry out activities in Romania on the basis of freedom of services or the right of establishment (through branches).

As already seen in other EU countries, such entities will be able to operate on Romanian territory only subject to prior authorisation in accordance with the procedure provided by law for third country entities.

The FSA further recommended that UK entities operating in the Romanian non-banking financial market, which will be affected by the UK's new status, should already start implementing measures, including administrative ones, to ensure continuity of services and consumer rights protection.

In this context, the FSA urged such entities to ensure the timely provision of clear information to clients whose contracts may be affected, mentioning at least: the impact of the UK's withdrawal from the EU on the respective contract; the actions which such entity will take to minimize a potential negative impact; the risks and contractual rights of the consumers; and contact details for additional information.

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 license from the Swedish regulators. The law covers services provided to existing professional and eligible counterparty clients, and 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 a no deal Brexit.

NEXT STEPS

In addition to contingency planning, businesses continue to be well advised to follow the UK's progress in implementing new legislation to replace EU law and to take advantage of the opportunity to address potential issues by contributing to public consultations and engaging with regulators.

For more information, and any guidance or advice on the impact of Brexit on your business, Cleveland & Co, your External in-house counsel, are here to help.

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