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

BACKGROUND

On 10 April 2019 the European Union ("**EU**") Council (the "**Council**") granted the United Kingdom ("**UK**") a flexible extension until 31 October, commonly referred to as the "**Flextension**".

The intention is to allow some extra time for the British Parliament so that it can reach an agreement and ratify the Withdrawal Agreement concluded back in November 2018. If the Withdrawal Agreement is ratified before the end of October, the Flextension will end as soon as the Withdrawal 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 the possibility of 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 a consequence, it still makes sense for the UK, the EU and individual EU members to carry on with their no deal Brexit preparations.

UNITED KINGDOM NO DEAL PREPARATIONS

The UK most certainly will continue its no deal preparations, including efforts to implement post-Brexit trade agreements with third countries however, to date the agreements secured cover only about 11% of UK trade by value. The UK is also using 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.

An important part of the Flextension 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 why the UK participated in the EU elections last month.

The terms of the Flextension also reflect concerns about extending the UK's status as a withdrawing EU Member State. As the UK remains an EU Member State with full rights and obligations until it leaves the EU (including the right to revoke its notice under Article 50), it must commit to act in a constructive and responsible manner throughout the extension period in accordance with its duty of sincere co-operation. Moreover, when participating in the EU's decision making, the UK is to facilitate the achievement of the EU's objectives, and is expected to act in a manner consistent with a withdrawing Member State.

An important point to note in regards to timings with the grant of the Flextension is that the date for the end of the transition period on 31 December 2020 has not been changed.

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 the implications to the legal framework applicable to the UK- EU relationship past October 2019. The regime applicable to UK international agreements past that date, may be faced with the possibility of abrupt changes to tariff and trade requirements, 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 2019, most measures are limited in scope and time and could be subject to change in the coming weeks and months.

Although many firms have been planning for a no deal Brexit, statistics and surveys from multiple sources indicate that the majority of firms that will be affected have yet to assess the implications for their business such as changes to legal contracts, operating under new trade agreements, work force passport and visa requirements, changes to customs procedures and foreign exchange fluctuations.

In light of all the above, it still makes sense to follow developments of the no deal Brexit preparations that are being undertaken by the remaining EU countries. The below commentary looks at Belgium, Gibraltar, Portugal, Romania & Sweden with a focus on 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.

In particular, 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:

(a) amending the Investment Services Law 2016 ("**Investment Services Law**") on the access to the investment services business and the status and control of portfolio management and investment advisory companies; and
(b) 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, in preparation for a no deal Brexit scenario each country has set up provisions for "third countries", i.e. countries outside the EU. The Investment Services Law however, already provides a regime whereby third country firms can provide cross border investment services in Belgium under certain conditions. The current regime requires that:

(a) a notification is made to the Belgian Financial Services and Markets Authority (the "**FSMA**");
(b) the services are only provided to per se professional clients and expatriates; and
(c) 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 the 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 regards to both investment services and investment activities.

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

In particular, the government is looking to 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. Criteria will be set out 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 will be aimed at aligning the regime applicable to EEA markets with the regime applicable to 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 the 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 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 the 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' (e.g. 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 could be problematic, (and potentially 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 to EEA firms within certain limits (in time, or otherwise).

In the Belgian Brexit Law, the FSMA clarifies that 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 any 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.

Additionally, the Belgian government is looking into defining which lifecycle events should be considered as the provision of a new service for whom a new authorisation would be required. At this stage, there is no clarity on what measures the government will adopt in this respect.

NEXT STEPS FOR BELGIUM

The FSMA refers to the existing regimes for third country firms to provide investment services in Belgium by establishing a branch and providing cross-border services within the jurisdiction (as amended by the Belgian Brexit Law).

As such, FSMA requests UK firms that are active in Belgium, to inform the FSMA, if they intend to pursue their activities in Belgium and, if so, under which regime.

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 ("**Communities Act**"). 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 Law (defined below).

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 until 2020 in a no-deal Brexit scenario. UK firms will also continue to be able to exercise their passport rights 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, information-sharing, transparency and regulatory co-operation.

As a consequence, the aim for Gibraltar, as well as for the 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 the new position.

The Financial Services (Gibraltar) (Amendment), part of the (EU Exit) Regulations 2019 (SI 2019/589) ("**EU Exit Law**") has been laid before the British Parliament and is published alongside its explanatory memorandum. Generally speaking, the EU Exit law will repel the Community Act on the day the UK leaves the EU. 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 onshoring 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 changes, UK-Gibraltar financial services arrangements with regard to:

(a) maintaining existing provisions for home state responsibility in cross-border insolvency proceedings;
(b) maintaining existing treatments for policy holder and depositor protections;
(c) maintaining a payments regime governing Euro transactions between the UK and Gibraltar;
(d) 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;
(e) 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 Gibraltarian firms; and
(f) including a provision to continue the existing market access framework between the UK and Gibraltar until at least the end of 2020 (which can be extended by one year at a time).

NEXT STEPS FOR GIBRATAR

Overall the provisions made by both the UK and Gibraltar government should allow for as smooth a transition as possible in a no deal Brexit scenario, with both countries adopting a reciprocal approach to allow financial services firms to continue to provide services and have access to each other's market.

Part 2 of, and Schedules 1 and 2 to, the Exit Law make a number of Gibraltar-related modifications and amendments to UK financial services legislation in the context of Brexit. Part 3 of the Exit Law 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 Exit Law will come into force on exit day. The other provisions in the Exit Law will however, 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.

GENERAL UPDATES ON NO DEAL MEASURES

PORTUGAL

On 27 March 2019, the Portuguese Parliament approved the implementation of a package 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 Portuguese Securities Market Commission and the Bank of Portugal, respectively) have thus far issued rules or guidelines. It is not anticipated that the two regulators shall issue contingency measures, but rather will 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 circumstances, UK entities operating in the non-banking 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 in Romanian territory only subject to prior authorisation in accordance with the procedure provided by law for third country entities.

The FSA further recommends 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:

(a) the impact of the UK's withdrawal from the EU on the respective contract;
(b) the actions which such entity will take to minimize a potential negative impact;
(c) the risks and contractual rights of the consumers; and
(d) contact details for additional information.

SWEDEN

Sweden has put in place a law that permits UK firms to provide investment services on a temporary basis in Sweden without needing a licence from the Swedish regulators (this would include all MiFID investment services but not payment services/deposit taking services). 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 a no deal Brexit.

NEXT STEPS

In addition to contingency planning, firms are 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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