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External in-house counsel

BREXIT UPDATE: ITALY, LUXEMBOURG AND IRELAND NO DEAL MEASURES

February 2019

As a result of the continuing uncertainty over the UK departure from the EU, different European countries have been preparing for a so called no deal Brexit, i.e. the scenario where the UK leaves the EU on 29 March (or later) without a withdrawal agreement and a transition period in place.

The aim of this wave of national legislation in EU states is therefore to limit the risks connected with such a situation, ensure financial stability, the integrity and the operational continuity of markets, and protect intermediaries and markets participants alike, through the introduction of an appropriate transitional period during which such entities can continue to operate, similarly to the transitional period planned in the event of an agreement between the United Kingdom and the EU.

ITALY

On 24 January 2019 the Italian Ministry of Economy and Finance published an official press release[1] stating that, in close cooperation with the Italian supervisory authorities, and after a consultation with the trade associations – it has drafted legislation dealing with the provision of regulated activities in the event of a no-deal Brexit by Italian-based entities in UK and UK-based companies in Italy, such as UK credit institutions, payment institutions, investment firms, UCITS management companies, AIFMs, insurance and re-insurance companies and pension funds ("**UK Service Providers**"). Unlike other EU countries which have already approved or are in the parliamentary process of approving emergency legislation, it is likely that in Italy the measures will be adopted in the form of a decree-law, the quickest way legislation can be approved in case of urgency, should it be necessary to do so.

UK Service Providers will be able to continue operating lawfully for a transitional period under the pre-Brexit EU licenses in order to prevent any business disruption and safeguard investors' and depositors' protection.

The decree-law will also identify the obligations and procedural steps that the UK Service Providers have to comply with – based on applicable sector legislation on European and national levels– in order to continue to operate beyond the defined transitional period, with the aim of ensuring stable and certain parameters to allow each intermediary to adapt to the new institutional and operational framework.

Similar provisions will be included in the part of the decree-law concerning trading venues and UK Service Providers access to those venues, with provisions for the transitional period applicable to both the British companies managing trading platforms operating in Italy and Italian companies managing trading platforms operating in the UK.

Another provision will also allow Italian pension funds to keep their investments in UCITS and AIFs domiciled in the UK, which – in the lack of a provision allowing them – would no longer be permitted after a (no-deal) Brexit, due to the restrictions set forth under the applicable Italian regulation.

Finally, the draft legislation also provides for the requirements to be fulfilled by the above firms in order to also continue operating after the transitional period. It could therefore be the case that the Italian Ministry is envisaging to introduce a sort of "preferential route" for those intermediaries that are already carrying out business in Italy and that after Brexit would otherwise be subject to the rules currently set out for any other non-EU country firms operating in Italy.

[1] To check the complete press release please click here: Italian Minister press release.

LUXEMBOURG

A jurisdiction particularly exposed to the risk of a no deal Brexit is Luxembourg, in light of the size of its financial sector and its close ties with the UK financial services industry.

A draft bill proposed by the Luxembourg government[2] entrusts the Luxembourg supervisory authority of the financial sector, the *Commission de Surveillance du Secteur Financier* (“**CSSF**”), and the Luxembourg supervisory authority for the insurance sector, the *Commissariat aux Assurances* (“**CAA**”), with certain limited powers to safeguard financial stability should the UK withdraw from the EU without an agreement.

For a period of 21 months after a no-deal Brexit, the CSSF and the CAA, each within its field of competence, would be able to allow UK Service Providers to continue servicing their Luxembourg-based clients. However, such measures are limited to the case where the UK service provider had a relationship established before the no deal date, i.e. where it (i) has properly passported its services into Luxembourg before the exit date; and (ii) has entered into an agreement with the relevant Luxembourg client prior to the exit date, or after the exit date but only for so long as such agreement is connected closely to agreements entered into before the exit date.

Should the draft bill be approved, a UK-authorised AIFM or a UCITS management company could be allowed to continue to manage a Luxembourg UCITS or AIF for a maximum period of 21 months after the exit date. If the entity marketing the relevant Luxembourg UCITS or AIF was notified in Luxembourg prior to the exit date, such entity could also be allowed to continue to market the relevant UCITS or AIF in Luxembourg.

While the draft bill notes that the CSSF and the CAA may continue to apply the relevant provisions relating to the passport, it unfortunately does not provide guidance as to the process to be followed by a UK Service Provider to benefit from this grandfathering.

The Luxembourg Budget and Finance Commission will discuss the draft bill in one of its next sessions. The State Council will also review the draft bill and might request further clarification regarding the roles of the CSSF and the CAA, as these roles are arguably vague in the current text. Time pressure to enact the draft bill is high, with the 29 March 2019 less than 50 days away.

IRELAND

The Central Bank of Ireland (the “**Central Bank**”) has recently clarified a number of key points to the Irish funds industry which will be relevant to market participants impacted by Brexit, including the below relating to delegation by Irish fund management companies to UK firms of the investment management of Irish funds post Brexit.

Regulation 21(1)(d) of Ireland’s EU (Alternative Investment Fund Managers) Regulations, 2013, as amended (“**AIFMD Regulation**”) requires that an Irish authorised AIFM or internally managed AIF cannot delegate portfolio management or risk management to a third country firm unless there is a co-operation arrangement between the Central Bank and the supervisory authority of the undertaking.

Similarly, Regulation 23(1)(d) of Ireland’s European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 2011, as amended (“**UCITS Regulation**”), requires that an Irish UCITS management company or self-managed UCITS cannot delegate investment management to a third country firm, much like the above, unless there is a co-operation arrangement between the Central Bank and the supervisory authorities of the third country concerned.

[2] For the complete text of the bill, please check: Luxembourg draft bill

The ESMA Multilateral Memorandum of Understanding ("**MoU**") with the FCA was announced by ESMA on 1 February 2019 and satisfies both of the requirements noted above in relation to delegation under the AIFMD Regulation and the UCITS Regulation. To view the FCA's statement on this MoU, please click here and to view our previous article on this matter please click here.

A number of other Brexit related matters remain under consideration by the Central Bank including the eligibility of UK OTC counterparties for Irish UCITS as well as the rules to be applied in relation to investments by Irish UCITS and AIFs in UK funds. We will provide further updates on these in due course.

THE NETHERLANDS

Further to our previous newsletter on Brexit and the third country exemption regime in the Netherlands (please click here), it has been confirmed by the Dutch regulator that as of 12 February 2019, investment firms from the UK can apply for the exemption via the link here on their website.

CONCLUSION

This wave of national legislation will allow UK AIFMs and UK management companies to continue providing certain services in these EU countries for a period of up to 21 months in case of a no deal exit. This would provide UK asset managers with additional time to rearrange their activities and adapt to the new regulatory landscape as it unfolds in the coming months.

NEXT STEPS

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

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