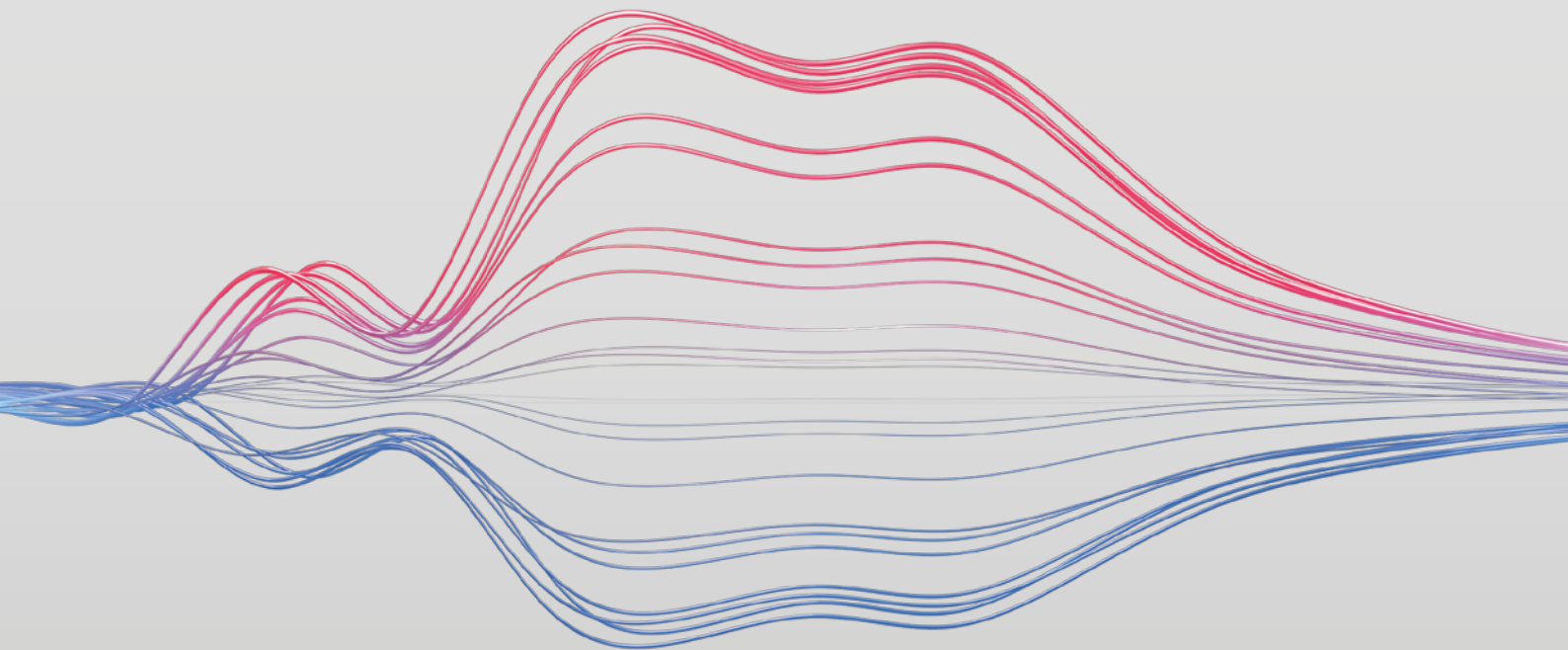


Financial Services Sector – Brexit update: European temporary permissions/reverse solicitation recognition



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This paper summarises the EU position on contingency measures for UK firms providing regulated services in the EU, including temporary permissions and reverse solicitation

The recently concluded Trade Agreement between the EU and the UK, which fails to address trade in financial services in detail, has resulted in regulatory divergence across EU Member States, resulting in uncertainty for UK firms providing regulated financial services (FS) (UK Firms) in the EU before 31 December 2020, when the transition period based on the withdrawal agreement between the EU and the UK came to an end (Relevant Date). One thing that is clear is that such firms can no longer avail of passporting rights and so must look to whether temporary measures have been adopted in EU Member States to allow for orderly termination of activities by UK firms, while ensuring minimum disruption to EU customers. While the UK and the EU are aiming for a Memorandum of Understanding (MoU) in March 2021 on a framework for cooperation between regulators that oversee financial services, this still leaves many in the FS sector in uncertainty.

We have put together this paper to assist, in particular, UK clients in considering the extent to which they can continue to operate in EU Member States, either through a temporary permissions regime or through recognised exemptions, such as the recognition of "reverse solicitation". The current status of any relevant temporary permission regimes and "reverse solicitation" are set out in the table below, with further information in the Appendix.

This Guide is not a substitute for legal advice. Nor is it intended to be an exhaustive guide to all rules and regulations relating to contingency measures for UK Firms providing regulated services in the EU, including temporary permissions and reverse solicitation, in the jurisdictions covered, or to cover all aspects of the legal regimes surveyed, such as specific sectoral requirements. Rather, it aims to simplify what are often complex provisions into a more manageable summary and to highlight areas of potential concern to UK Firms. It is current as at the last publication date.

Appendix 1: Current regime

EU MEMBER STATE	TEMPORARY PERMISSION				REVERSE SOLICITATION RECOGNISED	
	INSURANCE	PAYMENTS	BANKING	INVESTMENT SERVICES	FORMALLY	INFORMALLY
Austria	x	x	x	x	Section 24 Austrian Securities Supervision Act	
Belgium	✓	x	x	x	Article 13 § 1 of the Investment Services Act of 25 October 2016 states that the license requirement [for third country investment firms] does not apply where a client located or situated in the EU seeks the provision of an investment service by a third country firm solely on its own initiative.	FSMA's point of view is that reverse solicitation is an exceptional regime and that it cannot be used – as a business model - to continue servicing an existing client base post-Brexit
Denmark	✓	x	x	x	Section 33(3) the Danish Financial Business Act implements the reverse solicitation rule set out in article 42 of the MiFID II	Strict interpretation of reverse solicitation by the DFSA, and per the ESMA Q&A on MiFID II and MiFIR investor protection and intermediaries topics
Finland	x	x	x	x	The concept is generally accepted in Finland and referred to in the AIFM legislation.	The laws or the FIN-FSA guidelines do not clearly provide what in practise qualifies as reverse solicitation.
France	x	x	x	x	x	x
Greece	✓	x	x	x	Article 42 of MiFID II introducing the issue of reverse solicitation has been transposed as is in the Greek legislation by virtue of L. 4514/2018	

EU MEMBER STATE	TEMPORARY PERMISSION				REVERSE SOLICITATION RECOGNISED	
	INSURANCE	PAYMENTS	BANKING	INVESTMENT SERVICES	FORMALLY	INFORMALLY
Ireland	✓	✗	✗	✗	Investment services under MiFID	Yes – Dear CEO letter to UK credit institutions
Italy	✗	✓	✓	✓	✗	✓
Luxembourg	✗	✓	✓	✓	Article 32-1 of the LFS	CSSF Circular 19/716, as amended by CSSF Circular 20/743
The Netherlands	✗	✗	✗	✗		
Norway	✗	✗	✗	✗	Per MiFID II	[TBC]
Portugal	✓	✗	✗	✓		
Romania	✗	✗	✗	✗	Article 125 of the Law No 126/2018 on markets in financial instruments (Law No 126/2018) transposing article 42 of MIFID II	✗
Spain	✓	✓	✓	✓	Royal Decree 217/2008 (in transposition of MiFID II) expressly establishes that third country financial institutions may provide financial services to Spanish clients at the initiative of the latter without needing a Spanish authorisation	

Austria

Unlike in other EU member states, Austria has not adopted a national temporary permissions regime that would enable UK firms to provide cross-border services post 31 December 2020. Consequently, as of the relevant date UK firms will be treated as firms from third countries, that cannot rely on the freedom to provide services, the freedom of establishment and passporting-rights in the EEA. The unauthorised providing of financial services as should be avoided by UK-based firms in any case, as Austrian supervisory law provides for severe administrative penalties (e.g. Section 98 Austrian Banking Act, Section 94 Securities Supervision Act).

Reverse solicitation

According to Section 24 Austrian Securities Supervision Act, MiFID II as well as the national regulations do not apply, where a retail client or professional client established or situated in the EU approached the investment firm on its own unsolicited initiative and has requested specific investment service or activity by a third-country firm. In this case the third country firm is not required to establish a branch in the EU. However, an initiative by such clients shall not entitle the third-country firm to market new categories of investment products or investment services to that client other

than through a licensed branch. The reverse solicitation exemption applies not only to investment firms within the meaning of MiFID II, but also in relation to AIFs, as reverse solicitation is not considered as marketing. There will be no licensable marketing activity in Austria for an AIF, if the initiative to invest only comes from the customer himself and not the AIFM or a marketing entity (reverse solicitation; Section 2 ref 24 AIFMG).

Accordingly, the reverse solicitation exemption does not apply to products outside the scope of MiFID II and the AIMFD.



Belgium

Temporary permissions

To address the urgent issues of a no-deal Brexit scenario, the Belgian legislator enacted the Brexit Act of 3 April 2019 (Belgian Brexit Act). The Belgian Brexit Act allows the Government and regulator (FSMA) to establish a temporary permissions regime for credit institutions, investment firms, insurance or re-insurance undertakings, payment institutions, e-money institutions, a range of funds and insurers operating from or otherwise domiciled in the UK. These transitional measures related to the continuity of existing contracts could in particular consist of granting the required authorisations to companies governed by the law of a State that is not Member of the EU, or granting an equivalent to the existing mutual recognition regime in accordance with EU law.

The Belgian Brexit Act has been recently amended, which allows the Belgian government to provide for a transitional period for such entities that lose their European passport as a result of Brexit and have not yet obtained a license to exercise their activities and/or provide their services in Belgium as from 1 January 2021. This transitional period will last for a maximum period of 12 months. Unfortunately, despite having access to these powers, the Belgian government has taken little legislative action so far to develop a temporary permissions regime.

The government has issued a Royal Decree in respect of insurance undertakings and intermediaries only, which allows insurance undertakings, who have to stop their activities in Belgium and cannot conclude new insurance contracts anymore as from 1 January 2021, to continue their existing insurance contracts concluded prior Brexit under certain conditions. With regard to insurance and re-insurance intermediaries, the Royal Decree also provides for a temporary permissions regime by

allowing insurance and re-insurance intermediaries to continue their activity of insurance or reinsurance distribution in Belgium relating to existing insurance contracts for a maximum period of 18 months under similar conditions as insurance undertakings. They have to inform the FSMA no later than two months after the withdrawal of the United Kingdom from the European Union of such intention.

The FSMA has also issued a communication with regards to UK asset managers and UK funds after Brexit. However, this communication only lists the consequences of Brexit (mainly loss of authorisation or the qualification as third-country AIF/UCITS manager or third-country AIF/UCITS) without offering a temporary permissions regime for UK asset managers and UK funds.

The FSMA has issued a similar communication with regard to investment services. This communication equally does not provide a temporary permissions regime, but only elaborates on the consequences of Brexit, namely that UK investment firms will qualify as third-country investment firms. They will need to obtain an authorisation to carry on activities in Belgium either through the establishment of a branch on the Belgian territory or otherwise. However the FSMA states that UK investment firms that are not authorised to pursue their activity in Belgium post-Brexit should be able to perform their existing contracts in Belgium on the condition that (i) the (existing) clients are not actively solicited and (ii) the transaction does not constitute performing a new investment service or product (for which the investment firm is subject to the obligation to obtain authorisation). Future developments should be monitored in this regard.

Reverse solicitation

Reverse solicitation is in principle allowed if (i) the investment service is provided at the exclusive initiative of the client; (ii) only the service requested by the client is provided and (iii) the investment firm does not solicit, advertise or promote any new investment services or product to the client.

With regard to investment services: article 13 § 1 of the Investment Services Act of 25 October 2016 states that the license requirement [for third country investment firms] does not apply where a client located or situated in the EU seeks the provision of an investment service by a third country firm solely on its own initiative.

The FSMA's view is that reverse solicitation is an exceptional regime and that it cannot be used – as a business model – to continue servicing an existing client base post-Brexit. Reverse solicitation is only meant

to offer legal certainty to firms that do not intend to offer investment services in Belgium and that respond to clients' unsolicited calls, without having previously contacted any such clients directly.

More generally, the Belgian regulators consider that a website providing potential Belgian customers with information, does not imply direct solicitation and that financial services are offered in Belgium. However, a website will be considered a financial service offered in Belgium when it is used as an alternative way of communication with Belgian customers (e.g. use of Dutch language on a foreign website or contact addresses situated in Belgium), and when this website replaces actual contact with and financial services offered to Belgian customers (such as telephone calls, letters, etc.) (e.g. a transactional website accessible for Belgian customers).



Denmark

Temporary permissions

As of 1 January 2021, some UK insurance undertakings retain portfolios covering risks in Denmark. To ensure that Danish insurance holders are not suddenly left without coverage, the Danish Financial Supervisory Authority (DFSA) has issued an executive order granting a temporary permission to continue servicing existing insurance contracts until the end of 2021.

The executive order applies to UK and Gibraltar based insurance undertakings notified to pursue insurance business in Denmark before Relevant Date, and it will grant them a temporary permission to continue servicing insurance contract entered into before the end of 2020, provided that the undertaking meets the requirements stated in the executive order, including reporting to the DFSA.

Insurance undertakings can continue to service contracts in run-off, but are not allowed to extend existing contracts or enter new ones. Undertakings covered by the executive order will also be subject to certain conditions and compliance obligations, however as of 1 January 2021 the insurance contracts will not be covered by the Danish Guarantee Fund for Non-life Insurers.

The DFSA has declared that it will continuously assess whether an extension of the executive order is required.

There have not been issued similar executive orders for other financial services or product. Going forward, UK based credit institutions and investment firms will need to have a separate permit from the DFSA in order to continue its cross-border investment services in Denmark until 31 December 2021. However, the deadline for applying for such permit expired on Relevant Date.

Reverse solicitation

Under Section 33(3) of the Danish Financial Business Act, a third-country firm may provide investment services to customers based in Denmark without triggering the requirement to establish a branch office if such services are provided exclusively at the client's own initiative. Section 33(3) is the Danish implementation of the reverse solicitation rule set out in article 42 of the MiFID II and must therefore be interpreted and applied accordingly by the DFSA.

In its Q&A on MiFID II and MiFIR investor protection and intermediaries topics, ESMA has set out a number of requirements that must be met in order for an investment firm to rely on the reverse solicitation rule. These requirements are rather strict, and – in our experience – applied even more strictly by the DFSA. On 13 January 2021, ESMA has issued a statement reiterating its stance on the reverse solicitation regime under MiFID II, in which ESMA has also addressed recent attempts by third-country firms to circumvent the MiFID II requirements via the reverse solicitation rule, i.e. by including general clauses in their Terms of Business or through the use of online pop-up “I agree” boxes whereby clients state that any transaction is executed on the exclusive initiative of the client.

In summary, while the Danish Financial Business Act does in principle allow for reverse solicitation, it is our assessment that in practice it will be very difficult for third-country firms to prove to the Danish regulators that an investment service has indeed been provided at the client's exclusive initiative.



Finland

Temporary permissions

There is no formal temporary permissions regime for UK financial services entities, however the local regulator, the FIN-FSA, provides some guidance for UK investment service providers and alternative fund managers for transition following the Relevant Date. The main rule is that the UK service providers will become third-country service providers immediately after the Relevant Date, i.e. 01.01.2021, and new notifications/license applications must be submitted.

The FIN-FSA instructions provide that if the UK investment services firm has applied for an authorisation in Finland prior to Relevant Date, it can continue to provide investment services and activities together with ancillary services to professional clients within the meaning of Section I of Annex II to Directive 2014/65/EU and eligible counterparties in accordance with the terms of its EU passport in Finland until the FIN-FSA has processed the firm's authorisation application.

For AIF managers, the FIN-FSA state that the only way to continue marketing in Finland is to send a new notification according to Article 36 or 42 of the AIFMD. If a new notification had been made by the end of November 2020, FIN-FSA guaranteed that they will issue approval letters for marketing during the first week of January 2021. Any AIFMs that did not apply for a new notification until the end of 2020 will be automatically de-registered and removed from the FIN-FSA's register and are not allowed to continue marketing in Finland ([link](#) and [link](#)).

Reverse solicitation

Other than a reference to the ESMA Statement on MiFID II rules on 'reverse solicitation' in the context of the recent end of the UK transition period, the FIN-FSA has not published any guidelines on reverse solicitation. The concept is generally accepted in Finland and referred to e.g. in the AIFM legislation. However local laws or the FIN-FSA guidelines do not clearly provide what qualifies as reverse solicitation.



France

There is no temporary permission regime in the financial sector for UK Firms. Only run-off is possible. The UK is deemed a third-party country since 01 January 2021.

Reverse solicitation

There is no official position or guidance from authorities on reverse solicitation. French law implements MiFID II regime in a narrow manner. Strict interpretation is expected (criminal sanctions will apply in case of breach of licensing rules).

The French regulator, the AMF, has issued a statement confirming that reverse solicitation is an exemption to marketing pursuant to the transposed AIFMD. This exemption would apply to the subscription by EU investors to non-EU alternative investment funds.



Greece

Temporary permissions

There is no current provision for temporary permissions for UK firms after the Relevant Date. However, the Hellenic Capital Markets Commission (HCMC) has published a relevant announcement on 23 December 2020 providing that UK entities shall be construed as third country entities in a "no deal" scenario. In particular, in this announcement the HCMC confirmed that, in case an agreement between the EU and the UK is not concluded ("no deal" scenario), the credit institutions of the Directive 2013/36/EU, the undertakings for collective investment in transferable securities (UCITS) of the Directive 2009/65/EC, the alternative investment fund managers of the Directive 2011/61/EU, which are based in the UK and currently offer their investment products or exercise their activities in financial instruments or have UCITS or AIFM shares in Greece, shall not freely pursue their activities in Greece from 1 January 2021 onwards, since the UK will be construed as a third country. Hence, the process under which the aforesaid entities were authorised to offer their services and products in the EU Member States will be differentiated – under the current legislation, an investment firm or a credit institution of a third country may offer its services in Greece, after having established a branch in Greece and after having been granted the relevant authorisation by the HCMC or the Bank of Greece respectively.

As matters develop, it is likely there will be specific regulations enacted regulating the post-Brexit period soon.

Insurance and reinsurance undertakings

Pursuant to article 92 of L. 4764/2020 (GG A' 256), insurance undertakings, which are based in the UK and are exercising their insurance activities in Greece – either by having physical presence in Greece or on a cross-border basis – prior to the Relevant Date, may pursue their activities up until 31 December 2021, so that the continuity of the contracts concluded before the Relevant Date is secured, including both the servicing of said contracts and the repayment of the relevant insurance claims. It should be noted that the UK-based insurance undertakings may not conclude new contracts for the provision of insurance services in Greece, or renew/extend the insurance coverage which is provided by virtue of contracts concluded before the date of withdrawal. Similarly, reinsurance entities, which are established in the UK and are carrying out their reinsurance activities in Greece before the withdrawal date, may pursue their activities up until 31 December 2021. During this transitional period, the legal and regulatory framework on insurance/reinsurance undertakings established in Member States shall apply to the UK insurance/reinsurance entities *mutatis mutandis*.

Reverse solicitation

There is no specific guidance provided by the Greek regulator on reverse solicitation. Article 42 of MiFID II introducing the issue of reverse solicitation has been transposed as is in the Greek legislation by virtue of L. 4514/2018. It is likely the Greek regulator (Bank of Greece and/or the Hellenic Capital Markets Commission) will opine on this issue in the post-Brexit period.

Ireland

Temporary permissions

The Central Bank of Ireland (CBI) and the Department of Finance have worked together to establish a Temporary Run-Off Regime (TRR) for UK and Gibraltar insurers and insurance intermediaries (including ancillary insurance intermediaries) (UK Firms), in order to protect their Irish customers, by ensuring that policies written before 31 December 2020 (Relevant Date) can continue to be serviced post-Brexit.

Under the TRR, UK Firms are permitted to continue administering their existing portfolio in Ireland, for up to a maximum period of 15 years from the Relevant Date, provided the conditions of the TRR (below) are met. This time period allows for orderly termination of activities in Ireland, while ensuring minimum disruption to Irish policyholders. The TRR applies to life and non-life contracts of insurance but does not apply to reinsurance contracts.

The following conditions must be met by a relevant UK Firm, if they wish to avail of the TRR:

- the Firm must be authorised as an insurer, or registered as an insurance intermediary, in the UK or Gibraltar and have started business in Ireland either on a freedom of establishment or freedom to provide services basis before the Relevant Date;
- the Firm must have ceased to conduct new insurance contracts and/or new insurance distribution business in Ireland on or before the Relevant Date;
- the Firm must exclusively administer its existing portfolios in order to terminate activity in Ireland, after the Relevant Date; and
- the Firm must comply with the general good requirements.

UK Firms are required to notify the CBI that they wish to avail of the TRR no later than three months after the Relevant Date by completing a notification form. Failure to notify does not necessarily preclude a Firm from availing of the TRR. However, if the UK Firm fails to notify the CBI, it can exercise its supervisory powers and prevent a UK Firm relying on the TRR.

The required notification forms, which must be submitted by March 2021, are published on the CBI's website: [here](#). UK Firms availing of the TRR are also subject to ongoing reporting requirements. A public register of firms availing of the TRR will be available on the CBI's Register.

The CBI may withdraw the temporary authorisation or registration if:

- the UK Firm does not continue to satisfy the conditions for the TRR; or
- the CBI is not satisfied with the progress made by the UK Firm towards terminating its business within the maximum of 15 years from the Relevant Date.

Legislation

Part 10 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Act) amends the European Union (Insurance and Reinsurance) Regulations 2015 and the European Union (Insurance Distribution) Regulations 2018 (IDR) to provide for the TRR.



Italy

Banking sector¹

Article 22 of Law Decree No 183 of 2020 clarifies that UK banks operating in Italy and UK e-money institutions operating in Italy through branches – provided that they have submitted, by the date when the Law Decree comes into force (the Relevant Date), an application to be authorised as third-country firms, though such authorisation has not yet been granted or refused – can continue the activities or services they were already providing before the end of the transitional period, until the authorisation is issued, and in any case for no more than six months after the end of the transitional period. Operations are only allowed for activities for which authorisation has been requested and are limited solely to the management of existing contracts. New clients cannot be acquired and existing contracts cannot be modified. During this period, UK banks and UK e-money institutions with a branch are regulated as third country intermediaries.

UK banks and UK e-money institutions operating with a branch must provide adequate information to clients on the effects of Brexit on existing contractual relations (article 22, paragraph 5).

Financial Intermediaries providing investment services and activities²

On condition that they applied, before 31 December 2020, for a new authorisation to operate in Italy as a non-EU country firm, it is permitted that UK investment firms may carry on the activities performed before the end of the transitional period until such time as the authorisation is either granted or refused, in any case no later than 30 June 2021. During such period the operation is limited to the activities for which an authorisation is sought and to the outstanding contractual relationships. The investment firms that are allowed to continue their operation as referred to above are subject to the national regime applicable to the firms of non-EU countries.



¹ <https://www.bancaditalia.it/compiti/stabilita-finanziaria/informazioni-brexit/com-intermediari-31122020/index.html?com.dotmarketing.htmlpage.language=1>

² http://www.consob.it/documents/46180/46181/com_int_20210102_EN.pdf/c6e06898-744f-45b3-8cb6-562c66f09b45

Those investment firms that operate under the regime of the freedom to provide services are forbidden from providing their services to retail clients (as defined in article 1, paragraph 1, point m-duodecies of the Consolidated Law on Finance) and to professional clients upon request (as defined in article 6, paragraph 2-quinquies, point b, and paragraph 2-sexies, point b, of the Consolidated Law on Finance).

All UK investment firms providing investment services in Italy shall give their clients adequate information about the consequences of the Brexit on the outstanding contractual relationships.

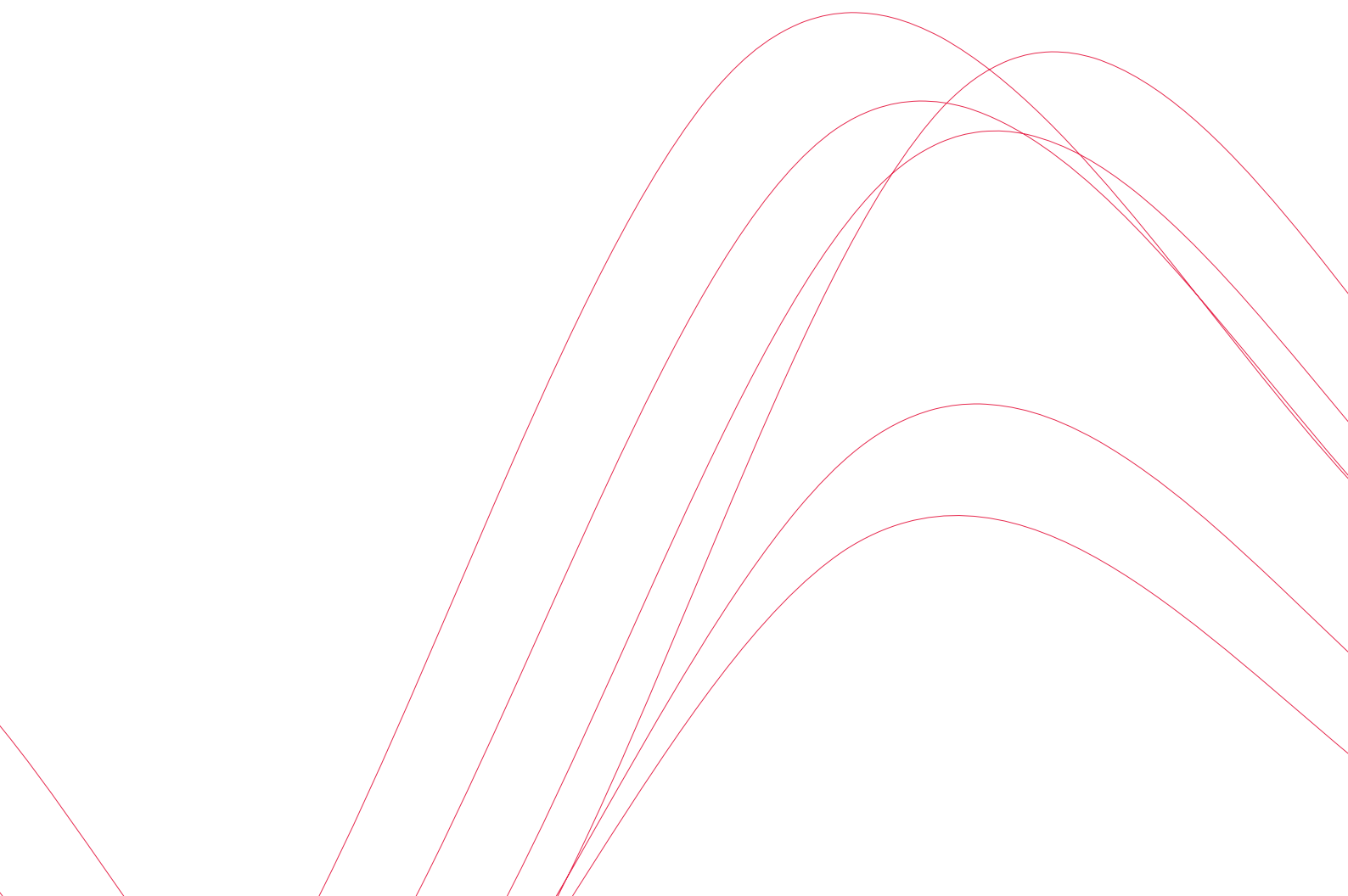
Insurance sector

No specific guidelines have been issued by the national competent authority (IVASS) but general rules laid down by article 22, paragraph 6 et seq. of Law Decree No 183 of 2020 apply. Therefore UK insurance undertakings at the end of the transitional period shall be de-registered. After the expiry of the transitional period, these undertakings shall continue

their activity within the limits of the management of the contracts and coverages in progress at that date without taking on new contracts, nor renewing existing ones, until the relevant expiry date or any other date indicated by the undertaking in the plan referred to in paragraph 8.19(b)(ii) below.

Reverse solicitation

Reverse solicitation schemes are generally applicable and recognised in Italy, provided that they can be qualified as effective and genuine: through a strict substance over form approach, adequate evidence must be given to the regulators that transactions in Italy are based on an exclusive initiative coming from clients which have not been previously solicited. As an exception to the authorisation procedure under applicable Italian law, reverse solicitation schemes cannot be used as systematic business model to approach Italian market/clients.



Luxembourg

Financial services

As a general rule, any UK credit institution would be subject to the Luxembourg rules applicable to third countries, as non-EU credit institutions which operate in Luxembourg are subject to the same authorisation rules as those applying to credit institutions governed by Luxembourg law (including the requirement to hold a Luxembourg licence, per Art. 32(1) of the Luxembourg law on the financial sector of 5 April 1993, as amended from time to time (LFS)).

However, the rules applicable to third countries are not uniform and some third countries enjoy a more favourable situation. Article 32-1(1) of the LFS provides for an exception for the provision of investment services in Luxembourg by third country firms whose prudential supervision is considered equivalent. Such equivalence can result from a decision of the EU Commission or from regulations set out by the Luxembourg Supervision Commission of the Financial Sector (*Commission de Surveillance du Secteur Financier*) (CSSF) and it allows the provision of investment services on a cross-border basis, without the obligation to establish a branch in Luxembourg. The CSSF Regulation N° 20-02 of 29 June 2020 (CSSF Regulation N° 20-02) has introduced a list of countries with deemed equivalent supervision.

On 23 December 2020, the CSSF Regulation N° 20-09 (CSSF Regulation N° 20-09) amended the CSSF Regulation N° 20-02 by introducing the United Kingdom the benefit from the Luxembourg national equivalence regime. Therefore, not only is a temporary permissions regime for UK Firms granted but a long-lasting one, noting nevertheless that the equivalence decision may be revoked where on or several conditions on which the decision was based are no longer met (as mentioned in article 2 of the CSSF Regulation N° 20-02).

Reverse solicitation

Regarding reverse solicitation, the CSSF Circular 19/716 on the provision in Luxembourg of investment services or performance of investment activities and ancillary services in accordance with article 32-1 of the LFS, as amended, reiterates the principle already included in article 32-1 of the LFS. This principle is that where an investment service is provided on the basis of reverse solicitation, the third country firm can provide investment services without establishing a branch or obtaining a decision from the CSSF (which is therefore an exception to the rule being that there is an obligation of a license applying to third countries firms), regardless of the type of client. The added value of CSSF Circular 19/716 is to clarify that the possibility of relying on reverse solicitation must be assessed by the third country firm continuously and for each individual service, taking into account the ESMA Q&A on MiFID II and MiFIR investor protection and intermediaries topics.

The CSSF Circular 20/743 on the amendment of Circular CSSF 19/716 makes minor amendments regarding reverse solicitation, which is sometimes explored as an alternative to a licensing requirement by third country firms providing an investment service to a Luxembourg client.

Please note however that, as mentioned above, the UK now benefits from the equivalence decision described above.

Insurance contracts

The Luxembourg Insurance Authority (*Commissariat aux Assurances*) (CAA) has not published an update since April 2020. At that time, in two information notices dated 2 April and 8 April 2020, the CAA clarified the impact of a hard Brexit and the related loss of the UK's status as a member of the European Economic Area on the application of the rules governing:

The investment of the assets underlying unit-linked life-insurance contracts (Information Notice LC 15/3); and

The deposit of the assets underlying the technical provisions of direct insurance undertakings (Information Notice LC 16/9).

The Information Notice LC 15/3 clarifies that, as of the Relevant Date, the UK will be deemed an OECD zone A country; and the UK's depending territories will be deemed countries outside the OECD zone A. As a result, any investments of assets underlying unit-linked

life-insurance contracts into external funds domiciled in the UK or UK-dependent territories; or financial instruments issued by issuers based in the UK or UK-dependent territories, will be required to comply with the specific thresholds/restrictions applicable to funds and issuers based in OECD zone A countries respectively in countries outside the OECD zone A.

Insurance undertakings are to take the new status of the UK and its depending territories into account when defining investments policies and setting-up internal funds for their clients.

The Information Notice LC 16/9 confirms that, as of 1 January 2021, the UK and its dependent territories will be deemed third countries within the meaning of the LC 16/9. As a result, any deposits of assets representing technical provisions with credit institutions established in the UK are required to comply with the rules of the LC 16/9 governing deposits of assets outside the European Economic Area.



The Netherlands

Temporary permissions

In principle, UK Firms without a license are no longer allowed to offer their services in the Netherlands from the Relevant Date, unless temporary permissions regimes for UK Firms, similar to that in the UK for European firms, are implemented.

Financial institutions in the Netherlands are supervised through a twin peak model with tasks divided between the Authority for Financial Markets (AFM) (conduct supervision) and the Dutch National Bank (DNB) (prudential supervision). DNB is the relevant authority for, amongst others, market access for banks (together with ECB), insurers and payment service providers. AFM grants licenses to intermediaries and advisors, including consumer loan brokers and insurance intermediaries. Both the AFM and DNB have published their approach in supervision with regard to UK financial institutions after the Relevant Date.

AFM

The AFM has stated ([link](#)) that it will remove the UK Firms that did not obtain the appropriate license in the Netherlands or the EU from their registers. It is expected that in its supervisory role, the AFM will prioritize addressing situations in which the customers' interests are harmed and major implications arise.

DNB

DNB continuously called upon UK Firms to take timely preparatory measures to ensure compliance with the relevant Dutch laws and regulations after the Brexit transitional period. It is expected that also DNB will monitor financial institutions in accordance with its supervisory approach and enforcement policy. In this regard it is important to note that DNB's focus on stability in the financial sector.

Although there is no specific temporary permissions regime for financial institutions available in the Netherlands, there are currently a number of ways for certain UK financial institutions to continue their business operations in the Netherlands, albeit possibly in adjusted form as summarised below. Most of these options are also reflected in DNB's recently published factsheet ([link](#)).

Banks

UK banks can no longer provide banking services from the UK such as taking or holding deposits (saving and payment accounts) to retail customers in the Netherlands. However, services to specific groups of professional customers (professional market parties, PMP) can be continued as this does not fall under the banking prohibition. Professional market parties include for example Dutch banks, investment firms, insurers and pension funds. Also "*large denomination lenders*" may qualify as professional market parties. In short, at the start of the contract/agreement between the depositor and the bank, a deposit or deposits of at least EUR 100,000 need to be deposited at once by the customer in order to qualify as PMP. In the particular context of Brexit, where UK credit institutions were able to raise withdrawable funds under the applicable EU rules (and thus without the qualification as PMP being relevant), DNB takes a practical approach. These banks will be allowed to continue its services if a customer qualifies as a PMP at Relevant Date. If at that moment a customer has a deposit or deposits of at least EUR 100,000, this customer can be qualified as PMP and services with regard to that PMP customer may be continued.

Insurers

Currently, the Dutch Financial Supervision Act (Wet op het financieel toezicht) allows for cross-border service provision in the area of life and non-life insurance by third country insurers, after following a notification procedure with the DNB. However, it is envisaged to amend/revoke this notification procedure as part of the implementation of article 162 of the Solvency II Directive into Dutch legislation (introducing a ban on the provision of services in the EU by third country insurers) after which these cross border services will no longer be allowed. Insurers from third countries that have notified DNB before the entry into force of the amended legislation, can make use of an expected transition period of 24 months to wind-down existing cross-border business. As, since the Relevant Date, UK insurers are third country insurers, they are currently able to make use of this notification procedure. It is uncertain when the amended legislation will enter into force. Also, the anticipated transition period of 24 months is subject to parliamentary approval.

Investment firms

The Dutch government stated that it does not see the need to grant a (temporary) exemption for UK-based investment firms to provide investment services in the Netherlands after 2020. This is in accordance with the published communication by the European Commission, stating that it will not adopt an equivalence

decision in this area in the coming period ([link](#)).

However, under existing exemption rules applicable to third country investment firms, UK investment firms only trading for their own account in the Netherlands will be able to (continue to) operate in the Netherlands.



Norway

Temporary permissions

INSURANCE

Norwegian Financial Supervisory Authority assumes that insurance contracts that have already been entered into will remain valid after the end of the transition period and that this deadline in itself will provide no basis for terminating the contracts. Norwegian customer protection rules will still apply after the expiry of the transition period, e.g. the Insurance Contracts Act. After the end of the transition period, Norwegian insurance intermediaries will not have the opportunity to mediate insurance policies to UK insurers to a greater extent than to other countries outside the EEA. This applies to both new policies and renewals.

Investment services

On 20 December 2018, the Ministry of Finance adopted temporary regulations on investment activities and investment services provided by third-country firms to professional clients and eligible counterparties in Norway. The Ministry has decided to extend these temporary regulations, to the effect that UK firms that are permitted to conduct investment activities in Norway on 31 December 2020 on the basis of home state authorization and supervision under the EEA Agreement, will be permitted to continue to provide such investment services and activities to professional clients and eligible counterparties in Norway until 31 December 2022. The same applies to branches established in the UK, Northern Ireland and Gibraltar of firms that were permitted to provide such services in Norway on 31 December 2020.

Marketing of funds

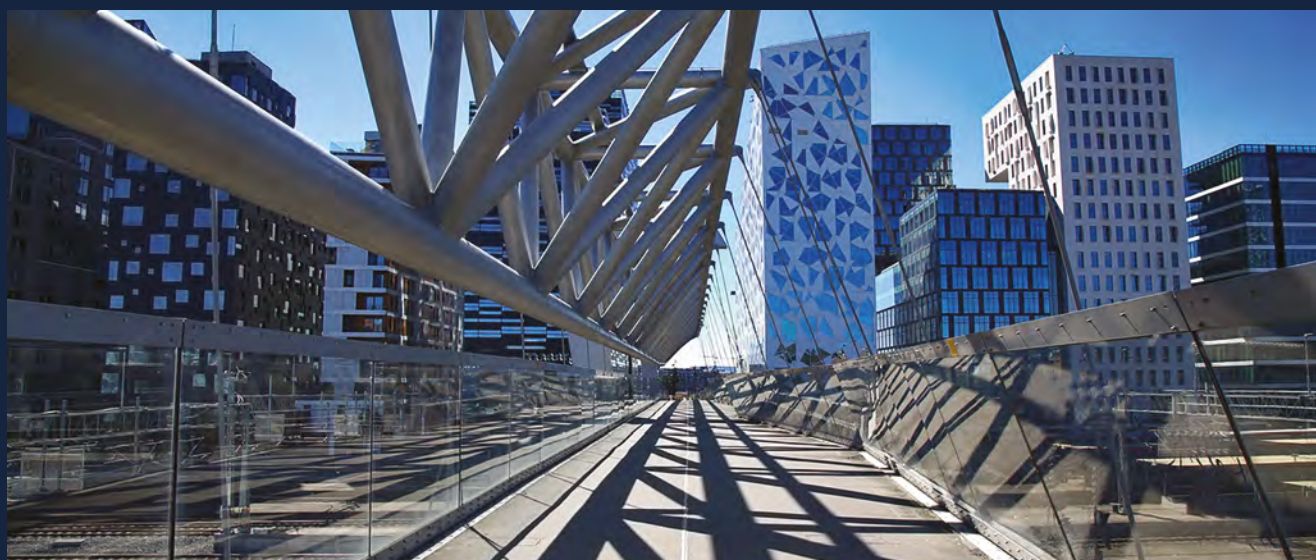
As of the relevant date, companies established in the United Kingdom can no longer rely on the rules on cross border activities in the UCITS Directive and the AIFMD that apply to the EEA, as a basis for conducting business in Norway. This applies to both marketing of funds and cross-border services. The right to conduct business in Norway under the notification regime will no longer apply, and Finanstilsynet will update the business register to reflect this (deregister companies and funds). Finanstilsynet opened for applications using a simplified application procedure, but the application period closed 6 December 2020.

Banking

In order to conduct business as a bank or financial undertaking in Norway from a state outside the EEA area, the establishment of a branch is required in accordance with the Financial Undertakings Act § 5-6. Such establishment requires permission from the Norwegian authorities.

Reverse solicitation

Norwegian Financial Supervisory Authority has published their support to the statement made by ESMA in which it reminds firms of the MiFID II rules on reverse solicitation following Brexit.



Portugal

Temporary permissions

The Decree-Law no. 106/2020 contains relevant contingency measures for UK financial services entities operating in Portugal considering the Brexit (“DL no. 106/2020”). Firstly, DL no. 106/2020 provides that the credit institutions, payment institutions and e-money institutions with registered office in the UK and operating in Portugal under the passport regime (“UK Credit and Payments Entities”) may continue to execute all the agreements entered into before the Relevant Date.

In addition, the UK Credit and Payments Entities may continue to provide services of an ancillary or instrumental nature to the pre-existing main agreement (entered into before the Relevant Date), assuming that these services do not constitute new operations or new agreements.

However, as of 1 January 2021, such UK Credit and Payments Entities will be considered third firms and must obtain an authorisation before Banco de Portugal in order to execute new agreements and carry out new operations in the field of financial services.

Investment firms and asset managers authorised in the United Kingdom may continue to operate in Portugal after 31 December 2020, provided they provide information to the Portuguese regulator until 31 March 2021 that they intend to (i) terminate the existing agreements; or (ii) request authorisation to maintain their activity in Portugal. The authorisation request shall then be submitted to the Portuguese regulator until 30 June 2021.

Investment firms and asset managers that do not comply with the requirements described in paragraph 1.4 may only execute the necessary operations for the termination of ongoing contracts and must cease activity in Portugal by 31 December 2021.

Funds domiciled in the United Kingdom that are marketed in Portugal may continue to be marketed after 31 December 2020, provided that until 31 March 2021 the respective manager submits certain information to the Portuguese regulator.

Portugal related insurance agreements executed with an insurance company established in the United Kingdom and that were executed before 31 December 2020 remain in force, but cannot be extended after 31 December 2020. In addition, until 28 February 2021 insurance companies shall send to the Portuguese regulator certain information on the existing agreements.

Reverse solicitation

In addition to guidelines established by European authorities, the limited information on this matter that was published by the Portuguese regulators states that the relationship must be established exclusively by the initiative of the customer, not being preceded by prospecting or advertising actions. The position of the Portuguese regulators regarding reverse solicitation may be considered a restrictive one.



Romania

Temporary permissions

Unfortunately, currently there is no temporary permission regime for UK financial services entities in Romania and once Brexit took effect on Relevant Date, they are now considered as entities from non-EU countries and are applied the corresponding legal regime.

The Romanian Financial Supervisory Authority published two recent communications on the legal regime applicable to UK financial services entities, as follows:

Announcement from 12 November 2020 at the attention of the UK investment firms and credit institutions in the Brexit context (link). The announcement states that:

"In accordance with Art. 39(1) of Directive 65/2014 EU {provisions transposed in Art. 122(1) of the Law 126/2018 regarding financial instruments}, a third-country firm intending to provide investment services or perform investment activities with or without any ancillary services to retail clients or to professional clients within the meaning of Section II of Annex II in other Member State, must establish a branch in the host member state. In respect to those above mentioned, UK investment firms and credit institutions have to submit to the Romanian Financial Supervisory Authority a request and the documentation for the authorization of the branch established on the Romanian territory in accordance with Article 40 of the Directive 65/2014/EU {respectively in Article 123 of the Law 126/2018}."

Statement from 18 November 2020 with regard to UK AIFMs regime after the Brexit transition period (link) whereby as of the Relevant Date UK AIFMs and AIFs as well as UK management companies are subject to the provisions/requirements regarding third country entities.

As regards specifically credit institutions, payment institutions and EMIs which fall under the supervision of the National Bank of Romania, the later issued a communication on 13 January 2020 (link) on the new operating regime for United Kingdom (including Gibraltar) entities providing banking, payment and electronic money services in Romania. The announcement states that:

"As of January 1, 2021, entities from the United Kingdom (including those authorized in Gibraltar) that provided in Romania banking, payment and electronic money services, through branches/agents/distributors or directly, no longer benefit from the single passport regime under the authorization of the competent authority of origin in the United Kingdom. Therefore, from 1 January 2021, they are treated as entities from third countries regarding the possibility to carry out activity in Romania through branches/agents/distributors or directly, requiring in this respect, an authorization granted by National Bank of Romania or by a competent authority from another EU Member State."

Reverse solicitation

As a general rule a third-country firm wishing to provide financial services or to perform investment activities (with or without additional services) to retail or professional clients in Romania must establish a Romanian branch which is authorised by the Romanian Financial Supervisory Authority (FSA).

However, pursuant to article 125 of the Law No 126/2018 on markets in financial instruments (Law No 126/2018) transposing article 42 of MIFID II, where a retail client or professional client established or situated in Romania initiates at its own exclusive initiative the provision of an investment service or activity by a third-country firm, the third country firm is not subject to the authorisation requirements by the FSA. Furthermore, under the Reverse Solicitation regime,

an exclusive initiative of a client established or situated in Romania does not entitle the third-country firm to market or to provide new categories of investment products to the client (ie in addition to those already solicited at the client's own initiative).

While neither the Law No 126/2018 nor the regulations issued by the FSA provide guidance on the actions or conducts that constitute an exclusive initiative of the clients and which could trigger the applicability of the reverse solicitation regime, the FSA is prone to make a case by case analysis and it is likely to follow the approach taken by ESMA within its Q&As on the matter of reverse solicitation.

Reverse Solicitation should not be assumed and the third-country firms should be able to provide records tracking the relationship with the client and in particular whether the client has taken the initiative to receive investment advice with respect to a new product. Performing any of the above activities in Romania or in Romanian language, through a website or any kind of app generally excludes the possibility of relying on the Reverse Solicitation regime.

We are not aware of any guidance published by the FSA on the subject of reverse solicitation providing additional clarification and information on this matter.



Spain

Royal Decree-Law 38/2020, of 29 December 2020, published in the Spanish Official Gazette on 30 December 2020, contains relevant contingency measures for UK financial services entities operating in Spain in light of Brexit.

Firstly, it provides that agreements for the provision of banking, securities, insurance or other financial services by virtue of which an entity authorised or registered by the competent authority of the UK provides services in Spain and that have been entered into before 1 January 2021, will remain in force under the contractually agreed terms.

However, as of 1 January 2021, such UK entities will be considered as third country firms for the provision of banking, securities, insurance or other financial services, and a new authorisation must be obtained by such entities in certain circumstances, in particular to enter into new agreements or renew existing agreements

Secondly, the authorisation or registration granted by the relevant UK authority to the UK entities referred to above will provisionally maintain its validity, until 30 June 2021, to carry out the activities necessary for (i) the orderly termination, or (ii) the assignment of the agreements entered into before 1 January 2021 to entities duly authorised to provide financial services in Spain under the contractually agreed terms.

According to the Royal Decree-Law, the authorisation or registration initially granted by the competent British authority to insurance undertakings will remain provisionally valid until 31 December 2022 to manage those existing portfolios of insurance contracts in the process of ending their activities, provided that (i) the relevant insurance undertaking provides a contingency plan; and (ii) this extraordinary situation is expressly authorised by the Spanish insurance authority (DGSFP).

Reverse solicitation

Regarding reverse solicitation, this is not legislated under the Royal Decree-Law. However, Royal Decree 217/2008 (in transposition of MiFID II) expressly establishes that third country financial institutions may provide financial services to Spanish clients at the initiative of the latter without needing a Spanish authorisation.

In addition, the Spanish Securities authority (CNMV) published in 2016 a Q&A document on collective investment schemes (CIS). This Q&A mentions that in the case of subscription of CIS via internet, it may be understood that the client is acting on his/her own initiative (unless advertising activities have carried out by the financial institution).

The reverse solicitation regime is subject to specific requirements, and UK Firms must comply under the rules as a third country.



1 <https://www.dlapipeintelligence.com/investmentrules/blog/articles/2020/brexit-contingency-measures-in-spain-continuity-of-financial-servicesagreements>.

Appendix 2: Contacts

Our DLA Piper contacts are:

	CONTACT
Austria	Armin Redl David Christian Bauer
Belgium	Isabelle Van Biesen Pierre Berger
Denmark	Patrick Krintel Johansen Martin Christian Kruhl
Finland	Kristiin Hirva
France	Sébastien Praicheux Luc Bigel Julien Vandenbussche
Germany	Elena Bachmann
Greece	Orestis Omran
Ireland	Eimear O'Brien
Italy	Danilo Quattrocchi
Luxembourg	Cindy Van Rossum
The Netherlands	Aline Kiers Paul Hopman
Norway	Camilla Wollan
Portugal	Goncalo Ribiero
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Spain	Enrique Hernandez Ricardo Plasencia

