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Luxembourg Newsflash - 27 February 2019

Brexit: the Luxembourg emergency legislation

On 31 January 2019, the bill of law n°7401 (the “Bill”) was issued on measures to be taken in relation to the financial sector in case of the withdrawal of the United Kingdom (“UK”) and North Ireland from the European Union (“EU”) (“Brexit”).

Said Bill relates to the scenario where, on 29 March 2019, no withdrawal agreement has been entered into between the UK and the EU (“No-deal Brexit”). In a No-deal Brexit scenario, actors of both the UK financial sector and the UK investment funds sector would no longer be able to rely on the European passport to provide their services to EU clients, neither on a cross-border basis nor by way of the establishment of a branch (or appointment of agents). According to the Bill, this situation could lead to financial instability and market turmoil. Along with other European Member States, the Luxembourg government has adopted the Bill to mitigate these risks.

In this context, the Bill notably grants both the *Commission de Surveillance du Secteur Financier*, the Luxembourg financial supervisory authority (“CSSF”) and the *Commissariat aux Assurances*, the Luxembourg authority in charge of the supervision of the insurance sector (“CAA”), with a series of powers to take temporary measures (1) and furthermore extends certain protective rules of the Settlement Finality Directive (Directive 98/26/EC) to third country systems (2).

Powers to take temporary measures

The Bill gives the CSSF power to continue to apply for a maximum period of 21 months as of 29 March 2019 (*i.e.* until end of December 2020), the EU passporting provisions for the freedom to provide services and the freedom of establishment in favour of UK-based institutions (credit institutions, investment firms, payment institutions and electronic money institutions) when providing their services into Luxembourg. This derogatory regime is only available for (i) contracts concluded before 29 March 2019 and (ii) for contracts concluded thereafter where they have a close link to contracts concluded before 29 March 2019. The preparatory works specify that such a close link may e.g. exist in case of “life-cycle events” affecting an existing contract.

Similar powers have been granted to the CAA in relation to the freedom of services and freedom of establishment of UK-based insurance actors (insurance and reinsurance companies). The Bill is less clear in relation to insurance distributors.

As regards the investment funds sector, although the Bill also grants powers to the CSSF to apply the same grandfathering period including the derogatory regime referred to above, the situation is somewhat more complex. As a result, the Bill (which is still subject to comments) might need to be updated as regards the investment funds aspects. Indeed, as regards Luxembourg UCITS management companies and Luxembourg AIFMs, these are governed by a specific set of rules deriving from the UCITS Directive and AIFMD referring in particular to the concept of collective asset management and providing for specific requirements in case of delegation.

In this context it is important to note that even without the Bill, the delegation of portfolio management of UCITS/AIFs to UK based investment managers will continue to be possible as a result of the no-deal Brexit MOU with the FCA. Indeed, as ESMA announced on 1 February 2019 that ESMA and the EU/EEA securities regulators agreed on a no-deal Brexit MoU with the FCA (which will only take effect in case of a no-deal Brexit scenario), this shall mean in practice with respect to Luxembourg UCITS and AIFs, that investment management/portfolio management functions may continue to be delegated to UK based entities on behalf of such Luxembourg UCITS and AIFs.

Extension of the settlement finality directive protections to third country systems

The protection of payment and securities settlement systems (« Systems ») against the insolvency of a Luxembourg participant as provided for in the Settlement Finality Directive in favour of EEA systems will be extended to third country systems which are admitted to a list managed by the Luxembourg Central Bank.

Admission to such list is granted by the Luxembourg Central Bank upon request of a participant or a system provided the latter (i) meets the criteria of the first indent of the definition of « system » of the Settlement Finality Directive, (ii) is governed by the laws of a third country and (iii) is supervised or subject to the oversight of a supervisory authority of a State whose central bank holds an equity stake in the Bank for International Settlements.

Third country systems will also be treated alike EEA systems for purposes of the Luxembourg law enacting the Bank Resolution and Recovery Directive (Directive 2014/59/UE).

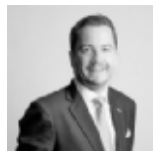
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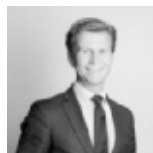
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