FSMA
FINANCIAL SERVICES AND MARKETS AUTHORITY

Communication

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Provision of investment services and performance of investment activities in Belgium by companies governed by the law of the United Kingdom after entry into force of Brexit

Scope:

This communication is addressed to the following companies:

- investment firms and credit institutions governed by the law of the United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as the 'UK') or Gibraltar which have before the entry into force of the UK's exit from the European Union (hereinafter referred to as 'Brexit), established a branch in Belgium in order to provide investment services and/or perform investment activities or which have notified of their intention to provide investment services in Belgium under the freedom to provide services ;

- any investment firm or credit institution governed by the law of the UK or Gibraltar which intends to provide investment services and/or perform investment activities in Belgium after the entry into force of Brexit.

Summary/Objectives:

The present communication is for the purpose of:

- describing the system that applies in Belgium to investment firms governed by the law of the UK or Gibraltar after entry into force of Brexit;

- examining the issue of the impact of Brexit on the continuity of contracts in force, entered into in Belgium by investment firms governed by the law of the UK or Gibraltar. The present communication looks at this issue from the angle of administrative law, i.e. the impact of the loss of a European passport on the ability to continue the performance of such contracts for investment firms governed by the law of the UK that will no longer be authorized to carry on their activity in Belgium. The question of maintaining the validity of these contracts from the angle of civil law is not covered.

Structure:

Point 1 describes the context of this Communication. Point 2 describes the system that applies in Belgium to investment firms governed by the law of the UK or Gibraltar after Brexit. Point 3 examines the issue of the impact of Brexit on the continuity of contracts in force, entered into in Belgium by investment firms governed by the law of the UK or Gibraltar.

1. Context

Without prejudice to the exemptions provided for by MiFID[1], only investment firms and credit institutions may provide investment services or pursue investment activities within the European Union.

The term "investment firms", when used in the remainder of this communication, shall mean both of these types of investment service providers.

Currently, investment firms governed by the law of the UK are EEA investment firms[2]. By virtue of mutual recognition, these companies authorized as such by the UK, benefit from a European passport entitling them to perform their activity in the other Member States of the EEA, either under a right of establishment[3], or as part of the freedom to provide investment services and perform investment activities[4].

On 29 March 2017, the UK notified the European Council of its intention to leave the European Union by virtue of Article 50 of the Treaty on European Union.

The UK's exit from the European Union will take effect on the date of the entry into force of an agreement between the UK and the European Union or, failing such an agreement, two years after the aforementioned notification, i.e. on 29 March 2019[5].

The UK would therefore no longer be allowed to be a member of the European Economic Area from 29 March 2019. On this date, investment firms governed by the law of the UK should no longer be authorized to make use of the benefit of a European passport to carry on their activity within the European Union. The UK would have to be treated as a third country, and investment firms governed by the law of the UK would have to be treated as companies governed by the law of a country that is not a member of the European Economic Area.

The same conclusion applies to investment firms governed by the law of Gibraltar that benefit from a European passport, in the same way as investment firms governed by the law of the UK[6]. These companies are therefore targeted by the present communication in the same way as investment firms governed by the law of the UK.

The present communication was drafted based on the following assumptions:

1 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

2 European Economic Area.

3 i.e. either by establishing a branch in the host Member State or by calling on tied agents established in the host Member State (Article 35, MiFID).

4 Article 34, MiFID.

5 Subject to other arrangements negotiated between the UK and the European Union.

6 Gibraltar forms part of the European territories for whose external relations a Member State is responsible. On this basis, the provisions of the Treaty on the Functioning of the European Union and the Treaty on European Union apply to Gibraltar (Art. 355 of the Treaty on the Functioning of the European Union).

- on the date of entry into force of Brexit, the UK leaves the European Union and the European Economic Area with no specific deal agreed to between the British government and the European Commission ("hard Brexit");

- on this same date, no equivalence decision regarding the UK has been adopted by the European Commission, in accordance with Article 47 of MiFIR. In fact, it is only in the absence of such a decision that investment firms governed by the law of the UK will be subject in Belgium to the system under Belgian law applicable to investment firms governed by the law of third countries;

- the applicable legal and regulatory rules, both at a Belgian and European level, remain unchanged.

2. Belgian system that applies to investment firms governed by the law of the United Kingdom after entry into force of Brexit

On the date of entry into force of Brexit, investment firms governed by the law of the UK will be authorized to pursue, in Belgium, activity that they carry on in their home State, under the conditions provided for in Articles 13 to 14/2 of the Law of 25 October 2016[7].

These provisions describe the conditions under which third-country investment firms are authorized to carry on activities in Belgium either through the establishment of a branch on the Belgian territory or otherwise.

2.1. Establishment of a branch (Article 13 of the Law of 25 October 2016)

Third-country investment firms that intend to offer or supply investment services and/or perform investment activity in Belgium, by establishing branches, must first be authorized by a Belgian supervisory authority, which, depending on the case, will be the National Bank of Belgium[8] or the FSMA[9].

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7 Law of 25 October 2016 on access to the activity of investment service provider and on the legal status and supervision of portfolio management and investment advice companies;

8 Branches of foreign stockbroking firms governed by the law of a third country must obtain their authorization from the National Bank of Belgium in accordance with Article 603 of the Law of 25 April 2014. "Foreign stockbroking firms" should be understood to mean investment firms governed by foreign law which are, in accordance with the laws they are governed by, authorized to provide services or perform activity reserved under Belgian law to stockbroking firms, i.e. dealing on own account, underwriting financial instruments and/or placing of financial instruments without a firm commitment basis, operation of a multilateral trading facility (MTF) or of an organised trading facility (OTF).

9 Branches of foreign portfolio management and investment advice companies governed by the law of a third country must obtain their authorization from the FSMA in accordance with the conditions and procedures established in Article 84 of the Law of 25 October 2016. "Foreign portfolio management and investment advice companies" should be understood to mean investment firms governed by foreign law which are not authorized, in accordance with the laws they are governed by, to provide services or perform activity reserved under Belgian law to stockbroking firms (see above).

The conditions for this authorization are explained in Articles 84 et seq of the Law of 25 October 2016 and 603 et seq of the Law of 25 April 2014[10], transposing the provisions on the subject contained in MiFID.

2.2. Provision of services without an establishment in Belgium (Articles 14 to 14/2 of the Law of 25 October 2016)

Investment firms governed by the law of a third country that intend to offer or supply investment services and/or perform investment activities[11] in Belgium, without establishing a branch, are authorized to do so, with the provision that they adhere to the following conditions:

(i) These must be services or activities actually provided or performed in their home State;

(ii) These companies many only approach the following investors:

- eligible counterparties[12];
- "per se" professional clients, i.e. clients considered professional in accordance with the provisions of Section I of Annex II of MiFID, and not clients who may be treated as professionals on request;
- persons established in Belgium with the nationality of the home State of the company concerned or of a State in which this investment firm has established a branch.

(iii) Without prejudice to the international agreements binding Belgium, the FSMA is legally empowered to prohibit the provision of investment services in Belgium to companies governed by the law of third States that do not offer the same opportunities to access their market to companies governed by Belgian law (the principle of reciprocity).

(iv) furthermore, the provision of investment services to persons established in Belgium with the nationality of the home State of the company concerned or of a State in which this investment firm has established a branch is only authorized as long as for the investment services offered or provided in Belgium, the investment firm is subject, in its home State or in the State in which it has established its branch, to supervision equivalent to that to which investment firms governed by Belgian law are subject.

The existence of such conditions does not however imply that the companies concerned receive prior authorization from the FSMA. The investment firms concerned are obliged to identify themselves to the FSMA, specifying the envisaged activity in Belgium, and the categories of investors to which they intend to provide investment services.

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[10] Law of 25 April 2014 on the legal status and supervision of credit institutions and stockbroking firms.

[11] It is clarified in the Draft Law on withdrawal of the United Kingdom from the European Union (Chamber of Representatives, Doc 54, 3554/001) that Article 14 of the Law of 25 October 2016 applies to the provision of investment services as well as to the performance of investment activities in Belgium.

[12] See Article 3 of the Royal Decree of 19 December 2017 containing further detailed rules to transpose the Markets in Financial Instruments Directive.

By way of this prior notification, the companies are authorized to commence their activity, but if the FSMA ascertains that one or another of the conditions are not met, it is entitled to oppose the provision of services or performance of activity in Belgium at any time.

Currently:

- in view of the announcement by the British government, relayed by the FCA on its website[13] of the introduction of a temporary permissions regime for inbound passporting EEA firms, the FSMA should consider that the reciprocity condition has been fulfilled, as long as this temporary regime is in force;

- As regards the equivalence of supervision, the FSMA should deem this condition to have been fulfilled as long as the current regime of supervision of investment firms under British law is maintained (thereby remaining based on the rules adopted by the UK as a Member State of the EEA as part of the transposition or implementation of the European rules on financial supervision).

Investment firms governed by the law of a third country that perform their activity in Belgium without the establishment of a branch, are obliged to comply with the legal and regulatory provisions, including the rules of conduct, that apply in Belgium to investment firms governed by Belgian law and to their transactions[14].

2.3. Procedures for investment firms active in Belgium and governed by the law of the UK

This point considered, the FSMA asks investment firms governed by the law of the UK that are active in Belgium, to inform the FSMA, as of now, if they intend to pursue their activity in Belgium and, if so, under which form (establishment of a branch or provision of services without establishing a branch).

If they have not yet done so, those that wish to establish or maintain a branch in Belgium are asked to submit an authorization dossier to the National Bank of Belgium or the FSMA, depending on the type of investment services or activity for which they are authorized in the UK[15].

The FSMA also asks companies that wish to commence or carry on the supply of investment services in Belgium under the freedom to provide services, without establishing a branch, and that fulfil the aforementioned conditions under Article 14 of the Law of 25 October 2016, to notify the FSMA thereof, specifying the envisaged activity in Belgium and the categories of investors to which they intend to supply their investment services.

These notifications must be sent using this form to the following e-mail address: e-notification.passporting2@fsma.be

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13 https://www.fca.org.uk/print/brexit/temporary-permissions-regime

14 See Article 14/1 of the Law of 25 October 2016.

15 See above for the distinction between foreign stockbroking firms and foreign portfolio management and investment advice companies.

These applications for branch authorization and these notifications of the freedom to provide services will, however, only have a legal effect when the UK leaves the European Union, and failing the application of a transitional period during which companies governed by the law of the UK would benefit from a European passport or equivalent authorizations. It is only then that the FSMA or the NBB will be able to take into consideration any applications or notifications.

Depending on the applications for authorization received, and with the provision that the legal conditions are complied with, the FSMA will proceed, at the earliest on the date of entry into force of Brexit, to update the lists it publishes of third-country investment firms.

Investment firms governed by the law of the UK and that are currently included in the lists published by the FSMA of investment firms governed by the law of an EEA Member State active in Belgium, that do not obtain the authorization for their branch or that do not notify of their intention to provide investment services in Belgium under the freedom to provide services, or that do not fulfil the conditions of Article 14 of the Law of 25 October 2016, will be deleted from the aforementioned lists held by the FSMA.

The companies concerned will no longer be authorized to offer or supply investment services and perform investment activities in Belgium from the date on which they were deleted from the list. Any pursuit of activity will be punishable with criminal and/or administrative sanctions.

3. Impact of Brexit on the continuity of contracts

Investment firms governed by the law of the UK that are authorized, post-Brexit, to pursue their activity in Belgium in accordance with the provisions detailed above, will be authorized to continue the performance of the contracts in force at the time of entry into force of Brexit and will be able, where applicable, to enter into new contracts with Belgian clients.

However, the question of continuity of contracts arises for those entered into prior to the entry into force of Brexit by investment firms governed by the law of the UK that are not authorized to pursue their activity in Belgium post-Brexit (for example those that provide investment services to Belgian retail clients and are not establishing a branch in Belgium).

These companies will no longer be authorized to carry on new investment activity or to offer or provide new investment services in Belgium, which will also to a certain extent affect their ability to continue the performance of the contracts entered into, in Belgium, prior to the entry into force of Brexit.

There are no European texts that specify the legal consequences of the loss of mutual recognition of authorizations, entries, registrations and any other form of authorization on contracts validly entered into prior to this loss.

However, if the continuity of these contracts is called into question, this could be problematic or detrimental to the clients or parties concerned, primarily for contracts that entail the ongoing provision of financial services.

These include contracts to provide investment advice or portfolio management services.

If their ongoing performance entails the provision of investment services on behalf of the investment firm, the performance of such contracts will no longer, after entry into force of Brexit, be able to be guaranteed by investment firms governed by the law of the UK which are no longer authorized to carry on their activity in Belgium.

The question as to the continuity of these contracts also arises for OTC derivative contracts (i.e. those that are not subject to transactions on trading platforms) to which investment firms governed by the law of the UK are parties.

This specific question is currently being examined at a European level and at the level of the different Member States, as well as that of their competent authorities.

Two situations can be distinguished between, each with different legal effects: firstly, the effect of the loss of the European passport on the performance of rights and obligations arising directly from the derivative contract (for example the payment of the price of the transaction, the delivery of securities, the exercise of an option, the transfer of collateral for a guarantee) and secondly, the effect of the loss of the European passport on the occurrence of certain events during the life cycle of the contract ("life-cycle events"). Examples of life-cycle events are: contract novation[16], rolling of an open position[17], unwind of contracts[18] or portfolio compression[19].

In these different situations, it should be examined to what extent the transaction constitutes performing a new investment activity or providing a new investment service, for which the investment firm is subject to the obligation to obtain authorization.

As regards the performance of rights and obligations directly arising from the derivative contract, investment firms governed by the law of the UK should be able to continue to hold and honour existing derivative contracts after Brexit without having to obtain a Belgian authorization, 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.

Given the similarity of some of these events to entry into a new contract, or at least substantial amendments to the contract in force, the occurrence of a life-cycle event during the contract term will be an additional source of legal uncertainty.

To avoid any uncertainty, a Draft law[20] empowers the King, upon the advice of the FSMA and the NBB, to take the necessary measures to safeguard the performance of contracts entered into prior to the

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16 *Tripartite agreement between parties to a transaction and a third party whereby the existing transaction is terminated and a new transaction is entered into between one of the parties to the late transaction (remaining party) and the third party.*

17 *Mutual agreement of parties to terminate a transaction and enter into a new one with a longer maturity.*

18 *Early termination of transaction by mutual agreement of the parties when done through an offsetting transaction to the transaction being unwound.*

19 *Termination or two or more offsetting transactions between the same counterparties, when replaced by a single transaction which notional amount equals the net notional amount of all compressed transactions.*

20 Draft Law on withdrawal of the United Kingdom from the European Union (Chamber of Representatives, Doc 54, 3554/001)

loss of recognition, in Belgium, of authorizations, entries, registrations and all other forms of authorization of persons or companies active in the financial sector governed by the law of the UK.

These measures could in particular consist of granting the required authorizations to companies governed by the law of a State that is not Member of the Union, or granting an equivalent to the existing mutual recognition regime in accordance with the law of the EU.

The King may also define, with respect to investment services, what life-cycle events are considered as implying the provision of a new investment service or the performance of a new investment activity in order to apply the system that allows their proper execution.

It is however still too early to make any statements on measures that may be adopted by the King 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 the King on the subject, the FSMA asks the companies concerned to provide proof of caution in their analyses. It would not be realistic to consider that everything will be able to remain the same despite Brexit, subject to the transitional measures or provisions adopted by the King in accordance with the aforementioned powers.