

BREXIT

Financing and Financial Regulatory Law aspects

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It is clear that Brexit will directly or indirectly have legal implications for companies doing business with UK-based companies. The withdrawal agreement that was concluded between the UK and the EU on 19 October 2019 (the **Withdrawal Agreement**) established a transition period until 31 December 2020 (the **Transition Period**). Dutch companies would be wise to anticipate the impact Brexit may have on them after this Transition Period ends, in order to minimise the negative consequences for their business operations. This brochure contains a brief overview of certain legal implications Brexit will have from a Dutch financing and financial regulatory law perspective.

Passporting

EU financial regulation is known for its passporting rights that are attached to certain local licenses. This means that for matters that have been harmonised at an EU level, financial institutions with a license obtained in an EU member state can operate in other EU member states on the basis of mutual recognition of their local licenses. Consequently, financial institutions do not have to apply for a separate local license in each member state where they want to provide services or establish a branch.

The loss of passporting rights of, for example, UK-licensed banks, investment firms, fund managers, insurance companies, and payment service providers causes uncertainty about whether they can continue to offer their services in the EU without having to take additional action. For the Netherlands, UK-licensed banks for instance will need to assess whether they are still able to lend or provide other forms of financing to consumers. If not, they may be required to step out of such loan agreements by making use of, for example, the 'illegality clause'. In the absence of any applicable exemption they may need to obtain a local license to be able to continue to lend and/or carry out activities, including ancillary activities. It is as yet unclear what the relationship between the UK and the EU after the Transition Period with respect to financial services will be. Also, after the Transition Period a transitional law regime may be implemented in order to minimise the

impact of the loss of passporting rights, not only for UK lenders lending into the EU, but also for borrowers benefiting from funding from the UK. After the Transition Period the UK will be treated as a so-called 'third country' (i.e. not an EU member state), which means it can seek equivalence treatment. However, this will require a case-by-case assessment as the EU equivalence framework is stipulated in specific provisions and does not provide for general access as does the mutual recognition principle.

Clearing

Within the EU a significant part of the interest rate derivatives are held by the London Clearing House (**LCH**). After the Transition Period clearing via the LCH will in principle no longer be permitted. However, on 21 September 2020, the European Commission pronounced that financial market participants would be given a further eighteen months to reduce their exposure to the LCH and other UK central counterparties (**CCP's**). After this period, it is expected that derivatives will have to be transferred to European CCP's.

Governing law & jurisdiction

A Dutch company that transacts with a UK based company typically agrees on what laws govern the relevant contract and the transactions performed thereunder, and on which court will have jurisdiction in case of disputes. English law has become the law market participants have come to rely on as the law that governs a large number of loan and other agreements. For example, the Loan Market Association (**LMA**) recommended form documents are generally governed by English law.

In principle such governing law clauses are valid and binding and judgments of the relevant courts will be recognised and enforced in the Netherlands and the UK, pursuant to EU Regulations (Rome I and Rome II Regulations and Brussel Ibis Regulation, respectively).

The Withdrawal Agreement provides that during the Transition Period the UK is to be treated as an EU Member State for the purpose of EU law, including the

Rome I and Rome II Regulations and the Brussel Ibis Regulation.

After the Transition Period, certain transitional provisions set out in the Withdrawal Agreement will continue to have effect provided that certain steps have been taken before the end of the Transition Period. For instance, the rules on applicable law under the Rome I and Rome II Regulations will continue to apply to contracts concluded before 1 January 2021, as will the rules on jurisdiction and enforcement of judgments under the Brussel Ibis Regulation as long as the relevant proceedings were commenced before 1 January 2021.

If the transitional provisions with respect to the rules on applicable law do not apply, not many things will change, as the UK has legislated to incorporate the Rome I Regulation and the Rome II Regulation into UK laws. These laws will come into force after the Transition Period. Consequently, after the Transition Period, UK courts will apply rules similar to those of the Rome I Regulation and the Rome II Regulation to determine applicable law. EU courts will of course continue to apply the Rome I Regulation and the Rome II Regulation.

If the transitional provisions relating to other EU Regulations do not apply, it will be more difficult to determine which regulations will apply after the Transition Period. This will depend among other things on whether the EU and the UK conclude further arrangements.

Bail-in

In the EU financial sector it is very common that finance agreements are governed by English law. After the Transition Period, entering into agreements that are governed by third country law may require financial institutions to include the bail-in clause in such agreements. The bail-in clause is stipulated by the Bank Recovery and Resolution Directive (**BRRD**) and applies to relevant agreements entered into since 1 January 2016 and certain pre-existing documents. Generally speaking, the bail-in clause ensures that the counterparty of the financial institution under the third country law governed agreement acknowledges that a BRRD 'resolution authority' can issue a rescue plan for the financial institution that may involve the

cancellation, conversion or write-down of the financial institutions liabilities, among which the claims of the counterparty. Thus, Brexit will lead to the amendment of English law governed agreements on large-scale.

LMA

With regard to Brexit, the LMA has not as yet made a lot of changes to its English law documentation. However, it did provide an updated form of 'designated entity clause' in February 2020. Such a clause is used in multi-jurisdictional transactions to allow lenders to appoint affiliates to replace the lender in specific loans, so that the initial lender does not have to transfer any part of its 'available commitment' to its affiliate. This makes it easier for lenders to stay compliant with any local and other licensing requirements.

The designated entity clause has gained popularity since Brexit. However, the designated entity clause is not a definitive answer to any potential difficulties arising from the impact of any loss of passporting arrangements as a result of the UK's withdrawal from the EU.

The LMA has indicated that it will be closely following developments regarding Brexit and will work to address any issues which could impact the loan market.

Our added value

HVG Law has a team of experienced lawyers that can advise on any of the above in the run-up and aftermath of Brexit. Law Alerts on the effects of Brexit in fields other than financing and financial regulatory law, such as corporate and commercial law, privacy law, healthcare law (manufacturers of medical devices) and employment law can all be obtained from our lawyers.

What HVG Law can do for you

We deal with all matters that keep an organisation in good shape. From reorganisations to acquisitions, from compliance to litigation. You will be doing business with lawyers and civil-law notaries who work together.

With you and with each other, at the highest level. We advise and litigate.



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