

## GERMANY PREPARES FOR "NO DEAL BREXIT" – UPDATE

The German Federal Government has published a draft law to preserve market access for UK firms offering banking business or financial services in Germany under the European passport regime for a transitional period in case of a "no deal Brexit". The government draft is based on the draft prepared by the German Ministry of Finance in November (see our [Brexit briefing of 23 November 2018](#)). The draft includes certain additions and useful clarifications on the scope of this transitional regime.

### Amendments to the German Banking Act

**As per the ministerial draft, the Federal Financial Supervisory Authority ("BaFin") is empowered to implement measures allowing for the continued application of the provisions for branches and cross-border services under the EU passport regime for a transitional period.**

The draft law will only apply if there is no withdrawal agreement and, according to the reasoning, any regulation at European level would take precedence.

The draft now introduced by the Federal Government reflects recent political developments and feedback by market participants. The new wording provides instructive clarifications on the scope of application. A comparison of the wording against the previous version (in an unofficial convenience translation) is set out below:

"In the event that the withdrawal by the United Kingdom of Great Britain and Northern Ireland ~~withdraws~~ from the European Union becomes effective without at midnight on 29 March 2019 without having concluded an a withdrawal agreement on withdrawal from the European Union and the European Atomic Energy Community having been concluded pursuant to Article 50(2), second sentence, of the Treaty on the European Union, the Federal Financial Supervisory Authority may decide, in order to prevent disadvantages for the functioning or for the stability of the financial markets, that the provisions of subsections (1) to (9) are to be applied accordingly, fully or partially, for a transitional period following the withdrawal of up to 24 months following the time of withdrawal, to companies based in the United Kingdom of Great Britain and Northern Ireland that at the time of the withdrawal on 29 March 2019 conducted banking business or provided financial services in Germany through a branch in Germany or by providing cross-border services

### Summary

- Extension of EU passport for banking business and financial services for transitional period
- BaFin to implement transitional regime by way of general decree
- Licensable activities may be continued for a transitional period to the extent closely connected to existing contracts at the time of Brexit
- Targeted EU measures take precedence

# C L I F F O R D

## C H A N C E

pursuant to subsection (1). This only applies to the extent that such companies conduct banking business or provide financial services, which The first sentence applies to financial transactions entered into after 29 March 2019 only insofar as these transactions are closely connected to contracts transactions that existed at the time of withdrawal. The transitional period starting at the time of the withdrawal may not exceed a period of 21 months. The decision may also be issued and publicly announced by way of general decree without prior hearing."

### Key aspects

The key aspects of the government draft are the following:

With respect to activities after the withdrawal date, the draft law now provides that banking business and financial services may be continued to the extent these are closely connected to "contracts" (rather than "transactions" as in the previous draft) existing at the time of withdrawal. While the previously used term "financial transaction" was not defined, the scope of covered activities has now been clarified to refer to banking business and financial services, which clearly refers to all activities licensable under the German Banking Act. This is intended to ensure regulatory compliance to the extent that the performance of existing contractual obligations requires a licence in Germany.

While not defining the term "close connection" the reasoning for the draft law offers guidance as to its interpretation. A close connection would usually exist where the activity is legally or commercially connected to the relevant contract. An activity may be closely connected to an existing contract if it is undertaken in connection with the risk management in respect of such contract or because material changes to a contract (life-cycle events) may trigger licensing requirements. Expressly stated examples of activities that would be regarded as closely connected are (i) the conclusion of offsetting transactions in respect of existing risk positions, (ii) the entering into contracts following portfolio compression, (iii) the conclusion of customary subsequent transactions such as prolongations or (iv) the exercise of contractually agreed rights (such as options or conversion rights).

Further, it is now expressly clarified that any decision by BaFin may be made by way of general decree (*Allgemeinverfügung*). As per the reasoning, any such measure may be withdrawn by BaFin at any time and may be subject to conditions. Moreover, BaFin may shorten the transitional period of 21 months.

The purpose of these transitional measures is to enable UK firms to either continue their business by obtaining a license to conduct business in Germany in the same way as any other third country firms or to wind-down their German business in an orderly manner.

Finally, according to the reasoning, the powers granted to BaFin in the draft law do not prejudice the existing authorisation(s) of BaFin to grant individual UK entities permission to provide banking or financial services on a cross-border basis beyond the Brexit date, for example as an interim measure until a regular licence as applicable to any third country institution operating in Germany is granted or to provide for an orderly unwinding of business operations in Germany.

## **Background information**

The draft law contains additional provisions on, *inter alia*, tax and insurance supervision rules, as well as on the eligibility of certain UK located assets for cover pools of Pfandbrief issuers, building societies and insurance and pension schemes.

To access the government draft (in German), click on the link below:

[https://www.bundesfinanzministerium.de/Content/DE/Gesetzestexte/Gesetze/Gesetzesvorhaben/Abteilungen/Abteilung\\_VII/19\\_Legislaturperiode/2018-11-20-Brexit/0-Gesetz.html](https://www.bundesfinanzministerium.de/Content/DE/Gesetzestexte/Gesetze/Gesetzesvorhaben/Abteilungen/Abteilung_VII/19_Legislaturperiode/2018-11-20-Brexit/0-Gesetz.html)

## CONTACTS



**Dr. Marc Benzler**  
Partner

**T** +49 69 7199 3304  
**E** marc.benzler  
@cliffordchance.com



**Dr. Gregor Evenkamp**  
Partner

**T** +49 69 7199 3158  
**E** gregor.evenkamp  
@cliffordchance.com



**Dr. Christian Hissnauer**  
Senior Associate

**T** +49 69 7199 3102  
**E** christian.hissnauer  
@cliffordchance.com



**Dr. Alexandra Isaakidis**  
Senior Knowledge  
Management Lawyer

**T** +49 89 21632 8821  
**E** alexandra.isaakidis  
@cliffordchance.com



**Dr. Kai Krieger**  
Senior Associate

**T** +49 69 7199 3130  
**E** kai.krieger  
@cliffordchance.com



**Dr. Oliver Kronat**  
Partner

**T** +49 69 7199 4575  
**E** oliver.kronat  
@cliffordchance.com



**Kerstin Schaepermann**  
Counsel

**T** +49 69 7199 3270  
**E** kerstin.schaepermann  
@cliffordchance.com



**Dr. Helene Uffermann**  
Senior Associate

**T** +49 69 7199 3186  
**E** helene.uffermann  
@cliffordchance.com



**Dr. Thomas Voland**  
Partner

**T** +49 211 4355 5642  
**E** thomas.voland  
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. If you would like to know more about the subjects covered in this publication or our services, please contact the authors or your usual contact at Clifford Chance.

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, Mainzer Landstraße 46,  
60325 Frankfurt am Main, Germany

© Clifford Chance 2018

Clifford Chance Deutschland LLP is a limited liability partnership with registered office at 10 Upper Bank Street, London E14 5JJ, registered in England and Wales under OC393460. A branch office of the firm is registered in the Partnership Register at Frankfurt am Main Local Court under PR 2189.

Regulatory information pursuant to Sec. 5  
TMG and 2, 3 DL-InfoV:

[www.cliffordchance.com/deuregulatory](http://www.cliffordchance.com/deuregulatory)

Abu Dhabi • Amsterdam • Barcelona •  
Beijing • Brussels • Bucharest •  
Casablanca • Dubai • Düsseldorf •  
Frankfurt • Hong Kong • Istanbul •  
London • Luxembourg • Madrid • Milan •  
Moscow • Munich • Newcastle • New  
York • Paris • Perth • Prague • Rome •  
São Paulo • Seoul • Shanghai •  
Singapore • Sydney • Tokyo • Warsaw •  
Washington, D.C.

Clifford Chance has a co-operation  
agreement with Abuhimed Alsheikh  
Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends  
relationship with Redcliffe Partners in  
Ukraine.