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Brexit: Options for Banks from the UK to Access the EU Market

UK banks who want to maintain an access to the EU market after BREXIT are currently assessing their options. The prospect of a free trade agreement with the EU remaining uncertain, they cannot rely on such an agreement before taking a decision. The present paper sketches the three main options – i. e. servicing EU clients directly from the UK, creating a branch or establishing a subsidiary – comparing their benefits and restrictions under the GATS rules and the free movement of capital and freedom of establishment under the EU Treaties. The focus is on traditional banking activities leaving aside investment services. Whilst acting through a EU based subsidiary appears to be the most promising option for UK banks who ambition to serve clients on a EU scale, the choice of location is not trivial as Member States are competing to attract such subsidiaries to their jurisdiction. The ECB in its supervisory role of the banking sector has already signaled that it will not allow such competition to result in a supervisory arbitrage.

The City of London's large financial sector is possibly *the* industry in the United Kingdom benefiting the most from the EU's internal market. Once the United Kingdom leaves the European Union, its banks and financial service providers will lose their European passport. The United Kingdom will become a third country under current and future EU regulations governing the financial sector. The freedom of establishment, as well as the freedom to provide services, throughout the internal market granted by the Treaty on the Functioning of the European Union (TFEU) will no longer be available to them. In order to continue to serve their European customers, UK banks and financial service providers will be compelled to assure themselves that they retain continuing access to the EU market by relying, primarily, on the national laws of the various Member States. For those UK banks and financial service providers who do not yet have a subsidiary in a Member State that they can use as a hub to reach out to customers throughout the EU, Brexit demands that they find a new way to retain access to the EU market.

The potential ways to retain access vary slightly, depending on the precise status of the particular regulated financial-service provider.[1] Existing EU regulations relating to credit institutions, investment firms, asset managers, UCITS or other alternative investment fund managers, payment-service providers, and electronic-money institutions do not, in fact, contain exactly the same provisions regarding firms from third countries. Only the most recent regimes (i. e., those provided by MIFID 2 and AIFMD) contemplate EU-wide access to the internal market by third-country firms, which is based on an equivalence system monitored by the European Commission. For credit institutions and UCITS managers, no such EU-wide access is currently available.

In the present contribution, we focus on the options that credit institutions may choose to rely on for their traditional banking business (i. e., taking deposits, making loans, exchange services, and payment services) that fall under the scope of CRD IV,[2] the framework EU regulation for the exercise of banking activities. Investment services offered in the EU, which many banks offer in addition to their core banking activities, are primarily governed by MIFID 2 and will not, therefore, be covered here.

Moreover, the precise conditions under which banks from either side of the Channel will ultimately have access to the financial markets on the other side will depend on the agreement that the EU and the UK ultimately reach to govern their future relationship post-Brexit.[3] Today, however, it remains uncertain whether or on what terms an agreement will be found to provide continued access of the various firms of the financial sector from both the UK and the Member States to the newly separated financial markets on the opposite sides of the Channel. Speculating, here, on those terms does not make any sense, particularly as current reactions from the concerned entities indicate that they are not willing to wait to find out if an agreement can be reached between the EU and the UK and what their options will be under such an agreement: they are clearly ready to take decisions now on how to organize themselves to assure their continuing access to the markets they want to serve. Thus, for the time being, we can simply ignore the impact of any EU/UK Brexit agreement.

Nevertheless, even if we put aside any such potential agreement, financial sector relationships will still be determined by the rules of the World Trade Organization. In the field of financial services, this means that access to the EU and UK markets falls under the scope of the General Agreement on Trade in Services ('GATS') and its Annex on financial services. Among those rules, the most-favoured nation clause will certainly play a key role in any such access. Countries, such as the United States, Canada, Switzerland, the special administrative region of Hong Kong, and Singapore, whose financial industries all maintain close ties with the financial sector within the European Union, will undoubtedly pay close attention to the conditions under which financial firms from the UK may operate in the EU after Brexit in order to assess if they can claim to benefit from the same conditions under that clause.

In this setting, then, the options for UK banks intending to serve customers established in the EU, once they are no longer able to avail themselves of the European passport, are limited to a choice between: (i) making direct offers from their offices in the UK, (ii) creating or acquiring a subsidiary in a Member State, or (iii) establishing a branch in a Member State. These three options do not, obviously, offer the same possibilities as they do not entail the same type of investment. The purpose of the present contribution is to highlight, briefly, the advantages and limitations of each of the three.

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1 International Regulatory Strategy Group, The EU's Third Country Regimes and Alternatives to Passporting, London, 2017.

2 Capital Requirements Directive (2013/36/EU) (CRD) and Capital Requirements Regulation (575/2013) (CRR).

3 As to a possible outlook for a future agreement as seen from a UK perspective see for instance the joint report from CMS and Legatum Institute Special Trade Commission: A New UK/EU Relationship in Financial Services – A Bilateral Regulatory Partnership, available at https://cms.law/en/content/download/295826/…/1/…/CMS%20LI%20Brexit%20FS2.pdf.

I. Making Direct Offers

Even after the UK has left the European Union, a citizen from a Member State will certainly not be prevented from opening a bank account or taking a loan from a bank in the UK while visiting the UK, provided that he approaches the bank himself without having been contacted beforehand. But, this is obviously not the situation we have in mind when contemplating how such services might be offered by a UK bank to a broader EU-customer base. In order to actively serve EU citizens, a UK-based bank will have to argue that its services are, in fact, offered and performed in the UK and not on a cross-border basis. For traditional banking activities, such as opening and maintaining deposit accounts, the argument is supported by the criterion on which the European Commission has relied in its interpretative communication on the second banking directive in order to determine the place where a given activity occurs. For the European Commission, the place of provision of the characteristic performance, as defined under the Rome I Regulation on the law applicable to contracts, also offers, in this respect, a highly relevant criterion. For activities such as taking deposits, providing payment services, or even offering loans, that criterion generally points to the place of establishment of the bank (i. e., in our case, to the UK).

But, Member States are not compelled to follow the same approach. They may decide that any offer addressed to or targeting clients residing on their territory falls under their jurisdiction. As the UK financial-conduct authority has pointed out, the position of Member States in this respect varies from one to the other and many do not accept the criterion of the place of provision of the characteristic performance as otherwise suggested by the European Commission.[4]

The temptation, for a Member State, to claim jurisdiction over a service provided by a bank from a third country to a local client is particularly high when said bank has actively marketed its services on or towards the territory of that Member State. In this case, the Member State's mandate to provide adequate protection for its citizens and residents, particularly if they are consumers or nonprofessionals, is at stake. Unsurprisingly, therefore, most if not all EU Member States will likely consider that, by actively targeting clients established in their countries, a bank from a foreign country does not merely offer an activity from its location, but rather offers it on a cross-border basis. To the extent that the service enters their jurisdiction, they will likely determine the conditions under which they judge such activity to be permissible. As a bank from a third country cannot avail itself of the freedom to provide services, each Member State enjoys full discretion to take this position.[5]

Member States are equally free to decide whether they allow a foreign bank to address local clients from abroad at all and, if so, to specify the requirements under which they will tolerate it. Those requirements are likely to vary from one Member State to another and do not depend on any European standard, at least for traditional banking activities. Some Member States, notably, take a more relaxed view of the circumstances under which a third-country bank may deal with a client in that Member State on the basis of 'reverse solicitation' (i. e., the hypothesis that the client initiated the relationship). Others give preference to the place of residence of the client and only permit banks who have been specifically authorized to do so to deal with such clients. The conditions under which such an authorization may be granted also vary between Member States; some require a minimum-level of local establishment, whilst others allow that a foreign bank may, at least on an occasional basis, deal with local clients as long as it is established in a country with an adequate supervisory system over its banking sector.

The ability of UK banks to continue to serve customers in the EU from their home-base following Brexit remains highly dependent on the attitude that each Member State adopts in relation to cross-border services from banks established in third countries.[6] The UK's right to take a broad view on the connection of traditional banking activities to the place of establishment of the bank by following the characteristic performance criterion promoted by the European Commission, will be of little help, as the UK will not be in a position to impose that criterion on the Member States. In their relationships with third countries, each Member State enjoys full discretion to claim jurisdiction over cross-border banking activities undertaken for local clients.

For traditional banking activities, moreover, the UK will not be able to claim that European banks enjoy an unfair advantage in the reverse situation (i. e., when European banks address themselves to clients in the UK). Whilst for investment services, the UK offers a specific exemption for so-called 'overseas persons',[7] that regime is not applicable to traditional banking activities.

In sum, the option of making direct offers to EU clients appears to be extremely narrow and certainly too risky for any bank established in the UK to the extent it has ambitions to develop any substantial business with clients located throughout the European Union. The real choice is, therefore, limited to either creating a subsidiary or establishing a branch in a Member State, through which the bank will be able to serve its European customers.

II. Establishing themselves within the European Union

Whilst EU Member States are free to determine the conditions under which a UK bank may address and provide services to customers residing within their territories including, notably, requiring the UK bank to set up a permanent establishment within their jurisdiction (or to provide their service from such an establishment in another Member State), they cannot, at the same time, deny said banks the opportunity to do so.

Under the GATS rules, participating states are obliged to grant access to their markets to firms from other countries (GATS, art. XVI).[8] In the field of financial services, inclu-

4 FCA Handbook, SUP App 3.6.8G.

5 *Dassesse*, Localization of Financial Services: Regulatory and Tax Implications in Services and Free Movement in EU Law, in: Andenas/Roth (ed.), Oxford University Press, 2002, p. 383–393 (in particular n° 3).

6 To illustrate the differences between Member States, to serve clients in Germany UK Banks will in principle be required to establish licensed subsidiaries (*Nemeczek/Pitz*, The Impact of Brexit on Cross-Border Business of UK Credit Institutions and Investment Firms with German Clients [February 1, 2017]. Available at SSRN: https://ssrn.com/abstract=2948944), whilst in Luxembourg the Law of 10 April 1993 on the Financial Sector, as amended (art. 32(5) takes a more pragmatic approach providing for an solution of authorization as long as the services are provided on an occasional and temporary basis or of Luxembourg.

7 Art. 72 of the Financial Services and Markets 2000 – Regulated Activities – Order 2001.

8 For a general presentation of the impacts of the GATS on financial services provided from third countries in the EU, see the report of EU Parliament, Financial Services in EU Trade Agreements, available on the website www.europarl.europa.eu/RegData/etudes/STUD/2014/536300/IPOL_STU(2014)536300_EN.pdf and the study by *Slaughter* and *May*, Brexit and Financial Services, the GATS Option, www.slaughterandmay.com/media/2536339/brexit-and-financial-services-the-gats-option.pdf.

ding bank activities, that obligation is explicitly foreseen in the 'Understanding of Commitments in Financial Services'. The additional commitments undertaken by the European Union and its Member States on the GATS reinforce their obligation to allow broad access to the European market in a particular by way of creating permanent establishments, the so-called 'mode 3' under the GATS. Furthermore, the principle of national treatment (GATS, art. XVII) prevents the Member States from submitting such access to conditions that are shown to be more stringent than those applicable to local firms. Finally, the Member States must also respect GATS' most-favoured-nation rule and, thus, cannot discriminate against firms from different countries (GATS, art. II). As already mentioned, if the EU were to enter into a free-trade agreement with the UK as part of Brexit, this GATS rule may become of particular importance to countries like Switzerland, who have not yet managed to agree with the EU on either a general trade agreement or a sectorial agreement for financial services.

In the field of financial services, the precise effect of these general GATS principles, however, may be restricted by the so-called prudential carve out.[9] According to Paragraph 2(a) of the GATS Annex on financial services:

> Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.

Since the financial crisis, in particular, the scope of this financial service-provider exception has generally been interpreted broadly by national regulators. In its ruling in the case Argentina Financial Services (WTO case DS453), the appellate body, whilst not directly taking a position on the exact scope of the provision, recognized that the exception covers all types of measures affecting the provision of financial services and, further, that the provision can be invoked 'to justify inconsistencies with all of a Member's obligations under the GATS'.[10] The European Union explicitly supported this broad interpretation in its report submitted in this case.[11]

Under GATS' prudential carve out, a GATS state can undisputedly impose, for example, a defined level of own funds for any subsidiary created by a foreign bank, which is a standard requirement. On the other hand, imposing a capital endowment obligation on a branch of a bank from another country, applying the same capital requirements as those applicable in the state where the branch is to be established, could be criticized.[12] Banks in the UK are obviously bound by the same regulatory standards as those applicable throughout Europe by the CRD IV. Assuming that those requirements remain in force after Brexit, an EU Member State would be hard put not to consider them as equivalent to its own requirements. Thus, imposing a capital endowment on a branch of a UK bank may possibly be viewed, under such circumstances, as an intentional restriction on free trade that would not be covered by the prudential carve out. The EU and the UK should, rather, consider agreeing on a mutual recognition of the equivalence of their respective prudential requirements, pursuant to which foreign banks can operate in accordance with Article 3 of the GATS Annex. This would allow preferential treatment for banks from both sides setting up permanent establishments on the other side of the Channel, which would also be compatible with GATS' most-favoured-nation rule, save for it being available to other third countries offering the same level of assurance as to the regulatory treatment of that bank.

In addition to the GATS, it should be noted that the investment of a UK bank or investors into the EU necessary to create a permanent establishment in the form of a subsidiary or a branch are covered by the right of free movement of capital into the EU granted by the Treaties. Unlike the other freedoms within the internal market, the free movement of capital has an external effect, in the sense that investors from third countries are entitled to avail themselves of said freedom. They are simply not allowed to rely on the free movement of capital to circumvent the defined scope of either the freedom of establishment or the freedom to provide services, both of which are reserved to EU citizens, which the Court of Justice of the European Union rightly confirmed in its Fidium Finanz decision, a case directly addressing banking services offered by a Swiss firm to German clients.[13]

III. Choosing a Subsidiary or Branch

Creating a subsidiary versus establishing a branch corresponds, obviously, to quite different scenarios.

A subsidiary, naturally, will be nothing less than a full-fledged bank located in Europe in whatever Member State the parent bank selects. It will have to meet all prudential and regulatory requirements to operate as a credit institution, which – at the European level – are entirely harmonized under the CRD IV. Its licence will be granted by the European Central Bank. However, assuming that the proposed subsidiary does not reach the thresholds needed to fall under the ECB's direct supervision, the competent authorities of the Member State in which it has been created are empowered to exercise such supervision.

It will depend mostly on that authority, while still acting under the authority of the ECB who assumes the ultimate responsibility for the Single Supervisory Mechanism in the euro-area, to decide on the extent to which the subsidiary may rely on support and services provided by the parent bank in the UK. The natural temptation of the latter will be to leverage, as much as possible, the resources (financial, technical, and human) available at its headquarters in order to limit its investment in the subsidiary, as well as the subsidiary's operating costs. From a business point of view, broad outsourcing from the subsidiary to the parent company may make perfect sense. It may, for example, be far more efficient to rely on the parent bank's IT infrastructure rather than to build and maintain a completely separate infrastructure. Today, secure and fast cross-border networks al-

9 *Yokoi-Arai*, GATS' Prudential Carve out in Financial Services and Its Relation with Prudential Regulation, The International and Comparative Law Quarterly, Vol. 57, No. 3 (Jul., 2008), pp. 613–648.

10 See the WTO report available on the website docs.wto.org/dol2fe/Pages/FE_Search/ExportFile.aspx?id=228158&filename=r/WT/DS/453ABR.pdf, and specifically paragraph 6272 of the report.

11 See the WTO report available on the website docs.wto.org/dol2fe/Pages/FE_Search/ExportFile.aspx?id=228159&filename=r/WT/DS/453ABRA1.pdf.

12 *Panourgias*, Banking Regulation and World Trade Law: GATS, EU and Prudential Institution Building (2006): Bloomsbury Publishing. n° 3.1.2.1.

13 CJUE (Grand Chamber) 3 October 2006, Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht, Case C-452/04.

low the parent bank to run a banking subsidiary as a booking centre for clients located in different countries, all while relying on the parent bank's IT mainframe. Such technical solutions, however, must still comply with local regulations, particularly those relating to data protection and banking secrecy. Whilst, at the EU level, many of those rules find their source in common standards – specifically, the recently agreed-upon 'GDRP' – cross-border communication with third countries still raises delicate issues, as the Court of Justice of the European Union recently witnessed, once again, in the Schrems case.[14]

Moreover, the subsidiary's local supervisory authority will certainly oppose any attempt to outsource subsidiary activity to the parent bank in the UK if it is not comfortable with the level of activity (or substance) retained by the subsidiary. As a full-fledged bank, the subsidiary will have to maintain an autonomous governance structure, including all the essential management functions and a dedicated board of directors, as well as, most certainly, persons in charge of its risk, audit, and compliance functions. The exact scope of the minimum retained-substance requirements have not been defined at the EU level for the subsidiaries of third-country banks established in a Member State, thus, each Member State enjoys in this regard a certain level of discretion in defining the obligations that a given (subsidiary) bank on its territory will have to meet.

It is likely that the local supervisory authorities' expectations will depend on the exact scope of the business undertaken by the UK bank's subsidiary, the business model on which it relies, and the functional organization of the banking group to which it belongs. Attitudes may also vary depending on the structure of the banking sector in the particular Member State. The supervisory authorities in Member States that have a large, predominantly domestic banking market served by banks headquartered in that Member State may be far less inclined to adopt a flexible approach towards the subsidiary's outsourcing to the parent bank than supervisory authorities from Member States in which most banks are already subsidiaries of foreign groups that largely develop their activities on a cross-border basis. UK-based banks who contemplate creating a new base within the EU may prefer to settle their subsidiary in the Member State that appears the most open-minded regarding the potential to leverage the support of, and the delegation of specific tasks and activities to, the UK parent. In any competition that the Member States engage in to attract business from the UK in the wake of Brexit, this criterion could turn out to be a decisive element in the UK banks' choice of future location for their EU subsidiaries. The ECB has already warned that it will not tolerate a race to the bottom. As Mrs Lautenschläger recently stressed : „Any bank that operates in the euro area must be a "real" bank. And a "real" bank has adequate local risk management, sufficient local staff and operational independence. A "real" bank also does not permanently book all of its exposures back-to-back with another entity in the group; this would make it way too reliant and limit control over its own balance sheet."[15] The position that the ECB may take in this respect on intragroup exposures will be key.[16]

A UK-bank subsidiary, as a full-fledged bank, will have the right to avail itself of the European banking passport. Member States will most likely compete among each to attract such UK-bank within their territory. As long as the purpose of the EU subsidiary is not restricted to serving a primarily domestic market, but is, rather, to expand its offer of services throughout the internal market, the subsidiary can operate from any Member State and freely provide its services to citizens, residents, and firms anywhere in the EU. It could even branch out into various Member States while remaining, under the home-country-control principle, supervised by the competent authority of the Member State where it decided to establish its headquarters.

Branches of third-country banks, on the contrary, are not entitled to take advantage of a European passport. Indeed, branches are not endowed with a full banking licence, but merely operate under the licence granted to the foreign headquarters, even if an approval is required from the Member State where the branch is established. From the perspective of the EU regulations governing credit institutions, a branch remains a non-autonomous establishment of a foreign bank.

For that reason alone, to the extent that a UK bank wishes to implant a permanent establishment in a Member State as a hub for its European operations, its choice is really limited to creating or acquiring a subsidiary in a Member State, as only a subsidiary will be able to reach out to customers in all other Member States through the European passport that it can claim as a full bank in the EU. Branches of a third-country bank will, inevitably, have their activities tied to the Member State in which they are set up.

Conversely, a branch ordinarily entails a much-lighter investment and much-lower setup costs. This, however, does not appear to entirely reflect the situation for bank branches.

As already indicated, it must be noted in this respect that, first of all, the European banking regulation enshrined in CRD IV does not make provision for a third-country regime for branches like those that exist in the more-recent generations of directives and regulations governing other financial-sector activities. Such a third-country regime was introduced in the alternative investment managers fund directive and exists in its most-developed form (at least for investment firms) in MIFID 2. The solution offered in these texts recognizes that the regulatory and supervisory environment of a third country can be the equivalent of that existing under EU law. Subject to an equivalence decision from the European Commission, managers of alternative investment funds and investment firms of the relevant third country are allowed to create branches in the Member States under conditions that are harmonized at the EU level. Furthermore, branches of third-country investment firms are not restricted to serving only clients in the Member State of establishment, but are entitled to act on a cross-border basis.

To date, nothing similar exists for branches of third-country credit institutions, payment service providers, electronic money institutions, or UCITS managers. Member States have full discretion to decide whether they will permit a bank from a third country to establish a branch within its territory rather than creating a subsidiary. Whilst this is generally not expressly stated in local laws, market intelligence indicates that supervisory authorities for banks in the Member States

14 CJUE (Grand Chamber) 6 October 2015, Schrems, Case C-362/14.

15 See comments of Mrs *Lautenschläger* in her introductory remarks at the Technical workshop for banks considering relocation in the context of Brexit, Frankfurt am Main, 4 May 2017, https://www.bankingsupervision.europa.eu/press/speeches/date/2017/html/ssm.sp170504.en.html.

16 See the information on „Relocating in the euro area" by the EBC, https://www.bankingsupervision.europa.eu/banking/relocating/html/index.en.html.

tend to have a clear preference for the latter, which is not surprising, as it is likely to be easier to exercise control over an entity enjoying legal autonomy rather than over a branch that operates under the authority of management located in the foreign headquarters.

To the extent that a Member State chooses to welcome the establishment of branches from third-country banks, it still enjoys full discretion to define and assess the conditions under which it will grant its approval. Such requirements, in that respect, are not harmonized at the European level (unlike the requirements that apply to the creation of a bank subsidiary). The CRD IV merely provides that Member States cannot authorize branches from third-country banks under more favourable conditions than those that apply to branches from other Member States.[17] In addition, the existing requirements oblige the Member States to notify the European Commission of the approval of any branch of a third-country bank. Although the European Commission once had the right to oppose or suspend any Member State's approval of such a branch for reasons of non-reciprocal treatment by said third country with respect to branches established by banks in the EU, that right was abandoned in the revision of the EU banking regulation in 2006 because it was deemed to be incompatible with the EU's specific commitments under the GATS for financial services.

An approximation, if not a 'uniformization', of the conditions under which a UK bank can establish branches in the different EU Member States, and vice versa, would certainly make sense and be a desirable development. That could be achieved through an agreement between the EU and the UK. Similarly, an agreement organizing post-Brexit cooperation between the EU and UK supervisory authorities should not be difficult to achieve, as such bilateral agreements already exist today.

Among the conditions for the establishment of a branch from a third-country bank, a potential capital endowment requirement is certainly the most critical. Branches from banks established in the EU can rely on the own funds collected at the level of the headquarters. They are, indeed, considered to be a part of the legal entity headquartered in the EU, which is the reason why they are not subject to supervision by the authorities in the Member State in which the branch is set up, but remain within the scope of supervision of the authorities of the bank's home country. Branches from banks headquartered outside the EU do not enjoy the benefit of such treatment. Member States seem to unanimously condition their approval of such branches on the same requirements as those applied to a full banking licence. Notwithstanding the fact that the branches are deprived of legal personality, they typically have to be endowed with capital at a level similar to that of a subsidiary, which, obviously, significantly reduces any advantages of creating a branch rather than a subsidiary. As noted above, imposing high capital endowments on branches from UK banks may however be critized under the GATS rules, as such a requirement could possibly exceed what is an acceptable trade restriction under the prudential carve out.

The main benefit of creating a branch can be summarized as the ability to restrict the functions carried out at the branch level to only those strictly necessary to develop its business. Depending on the business model followed by the bank, those functions could concentrate primarily on the on-boarding of clients and the management of client relationships, while leaving the booking centre and, more importantly, all the key management, governance, risk, audit, and central compliance functions to continue to be assured at the headquarters. Rules on minimum substance and restrictions on potential outsourcing applied to subsidiaries should not in principle, extend to branches. This could, of course, reveal an attractive flexibility that allows important gains in efficiency and a reduction in the operating costs of the local establishment.

To complete the picture, it is necessary to mention a recent initiative from the European Commission that proposes to oblige non-EU global systemic banks (G-SIIs), having a certain presence in the EU through branches or subsidiaries, to create an intermediate EU-parent undertaking.[18] This initiative is inspired by and reflects the recent US requirement for large foreign banks to set up local intermediate holding companies (an 'IHC') in the United States. Issued on 23 November 2016, the proposal is currently being examined by the Council and the European Parliament. Due to its highly political dimension, it is difficult to foresee what a final text may actually look like.[19] Yet, at this stage, the proposal already seems to be supported by the ECB.[20] The Presidency of the Council of the European Union has acknowledged recently that a cost/benefit assessment of the proposal still needs to be done and that the proposal requires further discussions.[21]

The proposal's underlying idea is to make sure that, in case a non-EU G-SSI with substantial activities in the EU would need to be resolved, the entity holds – within the EU – sufficient internal loss absorbing capacity for its European operations and that any resolution process can be handled in an efficient way that protects the interests of the clients and stakeholders of the branches and subsidiaries established in the EU. The EU IHC requirement would apply to all G-SIIs headquartered outside the EU with a subsidiary in the EU and to any other third-country group that owns two or more institutions (credit institutions or investment firms) established in the EU with total assets of at least #30 billion (a highly contested rule proposed by the Commission is to take into account the assets of both subsidiaries and branches of those third-country groups in the calculation). Where qualifying third-country banking groups have established subsidiaries within the EU, these will need to be consolidated under an existing institution or new IHC.

Like the US IHC, the EU IHC will have to meet local requirements, including, without limitation, enhanced EU-prudential standards, EU regulatory-reporting and accounting standards, and EU-governance norms. These differ from those in the US and there is little prospect that the two sets of requirements will converge.[22]

17 Art. 47, Capital Requirements Directive (2013/36/EU).
18 Brussels, 23.11.2016 COM(2016) 854 final, Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures.
19 See for instance the letter by Financial Services Agency and the Bank of Japan sent on April 17, 2017 to the EC and the Council, http://www.fsa.go.jp/en/news/2017/20170508–1.html.
20 See the cautious yet supportive position taken by Mrs *Lautenschläger* in her introductory remarks at the Technical workshop for banks considering relocation in the context of Brexit, Frankfurt am Main, 4 May 2017 https://www.bankingsupervision.europa.eu/press/speeches/date/2017/html/ssm.sp170504.en.html.
21 Council of the European Union, Presidency Progress Report / Strengthening of the Banking Union, 12 June 2017, 9484/17).
22 For a rapid comparison, see memo by Norton Rose, http://www.nortonrosefulbright.com/knowledge/publications/146703/eu-v-us-intermediate-financial-holding-company-regimes.

Following the UK's exit from the EU, UK G-SIIs will fall within the scope of any future regime requiring the creation of intermediate EU-parent undertakings. They will eventually need to set up an EU holding entity for their subsidiaries and branches in the EU. Furthermore, the UK will no longer be an acceptable jurisdiction for the EU IHCs of other third-country G-SIIs, notably those from the US and China. A third-country subsidiary established in the UK, thus, can no longer serve as an EU IHC for the group. Only Member States may host such EU IHCs.

Brexit is definitely far from neutral for UK banks who wish to maintain substantial business relationships with clients throughout the EU. For those who have yet to establish a subsidiary to serve as their hub in one of the remaining 27 Member States, they need to do so quickly, as the process of obtaining a banking licence can be more-or-less lengthy. Waiting for a potential free trade agreement between the EU and the UK is not an option if business is expected to continue without disruption when the UK finally leaves. Setting up branches in one or even several Member States will only offer access to the domestic markets of those particular Member States, with no prospect of enjoying the benefits of a European banking passport. Moreover, serving clients directly from the UK is not a reliable option for traditional banking activities, as most Member States will only tolerate such activity within the narrow band of reverse solicitations. Whilst the creation of a subsidiary endowed with a European passport appears to be the preferable alternative for most UK banks, choosing the right location is not obvious. UK banks must consider the efficiency of supervisory authorities in the various Member States in dealing with the requests for new banking licences, as well as those authorities' attitudes regarding the right balance between local substance and leveraging the support and functions susceptible to being provided by the UK parent bank, which may well outweigh tax considerations. The ECB will make sure that banks across the euro area are supervised according to the same standards. Ultimately, the availability and cost of performing human-capital and the overall openness of a particular Member State towards people and families from other countries is also highly likely to play a key role in the UK bank's decision. As UK banks are currently assessing their options, it will not be long before we know how this plays out among the Member States eager to attract new banks from the UK. ■

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Neues zu den aufsichtsrechtlichen Implikationen des Brexit

Nach der Referendumsentscheidung des britischen Volkes für den Ausstieg des Vereinigten Königreichs aus der Europäischen Union im vergangenen Jahr haben im Juni 2017 die Austrittsverhandlungen begonnen.[1] Nach dem aktuellen Stand der Verhandlungen lässt sich ein sog. Hard Brexit nicht ausschließen. Dies würde bedeuten, dass das Vereinigte Königreich ab dem 30.3.2019 nicht mehr dem europäischen Binnenmarkt angehöre. Beaufsichtigte Kredit- und Finanzdienstleistungsinstitute mit Sitz im Vereinigten Königreich müssen damit rechnen, künftig keine regulierten Geschäfte in anderen EU/EWR-Mitgliedstaaten mehr betreiben zu können. Zahlreiche Institute prüfen daher aktuell die Möglichkeit von Standortverlagerungen. Der Beitrag skizziert aktuelle aufsichtsrechtliche Entwicklungen, die die vom Brexit betroffenen Institute bei Standortentscheidungen beachten sollten.

Following Britain's referendum vote to leave the European Union last year, negotiations on the conditions of the withdrawal commenced in June 2017. As things stand, the negotiations might end up in a so-called hard Brexit. This means that the UK would leave the European single market. Supervised credit institutions and financial services institutions located in the UK must expect that it will not be possible to conduct regulated business in other EU/EEA member states in future. Therefore, numerous institutions are currently considering relocations. This article outlines the latest regulatory developments that should be taken into account by institutions affected by Brexit when deciding on relocations.

I. Einführung

Kredit- und Finanzdienstleistungsinstitute aus dem Vereinigten Königreich profitieren bislang regelmäßig noch vom sog. Europäischen Pass.[2] Der Europäische Pass ermöglicht es bestimmten Instituten, ihre aufsichtsrechtlichen Erlaubnisse aus einem Mitgliedstaat der Europäischen Union (EU) oder des Europäischen Wirtschaftsraums (EWR) dazu zu nutzen, ihre Dienstleistungen in anderen Mitgliedstaaten zu erbringen. Die Institute benötigen dann keine gesonderten Erlaubnisse der lokalen Aufsichtsbehörden, um regulierte Geschäfte grenzüberschreitend (freier Dienstleistungsverkehr) oder über rechtlich unselbständige Zweigniederlassungen (Niederlassungsfreiheit) durchzuführen.[3] In Deutschland ist der Europäische Pass insbesondere in § 24 a und § 53 b des Kreditwesengesetzes (KWG) umgesetzt.[4] Beabsichtigt ein Institut, in einem anderen Mitgliedstaat tätig zu werden, dann muss es dies der Aufsichtsbehörde des Heimatmitgliedstaates anzeigen. Diese bearbeitet den Vorgang und informiert die Aufsichtsbehörde des Zielmitgliedstaates. Die für die Aufnahme der Tätigkeit in dem anderen Mitgliedstaat geltenden Fristen hängen davon ab, ob es „nur“ um grenzüberschrei-

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1 Zum Austrittsverfahren s. *Thiele,* EuR 2016, 281; *Skouris,* EuZW 2016, 806.
2 Für Banken ist der Europ. Pass in Art. 33 ff. der RL 2013/36/EU v. 26.6.2013 (CRD IV) geregelt; für Finanzdienstleistungsunternehmen in Art. 6 III und 31 ff. MiFID I, (ab 3.1.2018 in Art. 6 III und 34 ff. der RL 2014/65/EU, MiFID II). Es gibt auch Vorschriften über das Passporting für Zahlungsdienstleister, Versicherungen und Kapitalverwaltungsgesellschaften.
3 Siehe dazu *Schwerdtfeger,* BKR 2010, 53 ff.; *Nemeczek/Pitz,* WM 2017, 120.
4 Siehe auch §§ 25 f. des Zahlungsdiensteaufsichtsgesetzes (ZAG), §§ 49, 54 des Kapitalanlagegesetzbuchs (KAGB) und §§ 58, 61 des Versicherungsaufsichtsgesetzes (VAG).