

MOFO BREXIT BRIEFING

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BREXIT: IMPACT ON RESTRUCTURING AND INSOLVENCY FOR CREDIT INSTITUTIONS

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The process of Brexit will take many years, and the implications for our clients' businesses will unfold over time. Our MoFo Brexit Task Force is coordinating Brexit-related legal analysis across all of our offices, and working with clients on key concerns and issues, now and in the coming weeks and months. We will also continue to provide MoFo Brexit Briefings on a range of key issues. We are here to support you in any and every way that we can.

Following the referendum...and after Brexit

The UK's majority vote by referendum to leave the European Union will have no immediate effect on the law or practice of restructuring and insolvency in Europe for credit institutions. For the time being, the UK remains a member of the EU, and all existing EU-derived laws continue to apply in the UK. However, if the UK ceases to be a member of the EEA (or in the absence of any alternative arrangements being agreed between the UK government and the remaining EU Member States), insofar as a UK based financial institution undergoing some form of restructuring or formal winding up requires recognition in other EU Member States (e.g. because it has branches there), the UK's eventual exit from the EU will pose the following challenges.

Summary

Formal winding up tools

For a UK financial institution that undergoes a formal reorganization or winding up proceeding, it will be disadvantaged if it has branches or assets in other EU Member States or has issued securities under the laws of another EU Member State.

This is because the proceedings will cease to benefit from automatic recognition and relief across all EU Member States provided by The Credit Institutions Winding Up Directive (2001/24/EC) (CIWUD).

Joining the European Free Trade Association (EFTA) will, however, resolve this.

Recovery and resolution tools

Similar disadvantages will be experienced by UK credit institutions and other relevant firms in relation to so-called recovery and resolution tools (such as bail-in and good bank/bad bank arrangements). However, the UK may be able to negotiate a “third country” agreement with the EU Council as regards some matters covered by the Banking Recovery and Resolution Directive (2014/59/EU) (BRRD). Joining the EFTA will also resolve this.

Now for the detail

Formal reorganisation and winding up proceedings under the Credit Institutions (Winding Up) Directive (2001/12/EC) (“CIWUD”)

CIWUD provides rules for mutual recognition and effectiveness of reorganization and winding up measures in respect of a credit institution taken by European Economic Area (EEA) States (*e.g.* it will assist in ensuring that the measures will be applied to branches of an institution located in another EEA State).

No automatic recognition: The UK authorities lose automatic recognition across EU Member States (as well as members of the EFTA)

CIWUD, as implemented in EU Member States, will cease to extend recognition to the UK. As a result, the relevant UK authority (being the Bank of England, the FCA or PRA depending on the circumstances) may be required to apply for the opening of local proceedings for branches of the institution that are located in an EEA State. The benefits of the single proceeding facilitated by CIWUD will therefore be lost.

For UK measures to be granted recognition in relation to branches in other EU Member States, the following options apply:

- the UK could negotiate bilateral arrangements with the relevant EEA States individually, or
- the UK could seek to become a member of the EFTA (as CIWUD applies to the EFTA members).

Potential mismatch of recognition

On the other hand, unless and until the UK amends or repeals its own legislation implementing CIWUD, measures taken in EEA States would continue to benefit from recognition in the UK.

Recovery and resolution measures under The Bank Recovery and Resolution Directive (2014/59/EU) (the “BRRD”)

The BRRD grants powers to “resolution authorities” in EU Member States in respect of banks and certain other investment firms in their jurisdiction. These powers allow them to intervene at an early stage of a failing institution (including to use the controversial “bail-in powers” on creditors). The BRRD provides harmonization of those powers and mutual recognition and enforcement across all EU member states of their exercise. For example, if a Portuguese resolution authority exercises a bail-in power in respect of English law bonds issued by a Portuguese bank, this will be recognized in the UK; absent supra-national authority such as the BRRD, there would be limited ability for a foreign authority to interfere with rights and obligations governed by an English law instrument.

No automatic recognition: The UK authorities lose automatic recognition across the European Economic Area (EEA)

The principle of automatic mutual recognition of resolution measures will cease to apply and the issues noted above in relation to CIWUD will apply equally here also.

For UK measures to be granted recognition in other EU member states, in addition to taking the steps referred to in the CIWUD section above, it may be possible to negotiate a “third country” agreement. The BRRD allows the EU Council to negotiate agreements with countries outside of the EEA, facilitating the establishment of principles of cooperation and recognition between the EEA countries and these third countries.

Potential mismatch of recognition

As with CIWUD, unless and until the UK amends or repeals its own legislation implementing BRRD, the UK will continue to automatically recognise resolution measures imposed by EU resolution authorities.

Please do not hesitate to call with any question or concern you have. We’re here to help.

Further reading

You may also be interested in reading a briefing note that we have prepared on the impact of Brexit on restructuring and insolvency for companies:

[Brexit Briefing: Impact on Restructuring and Insolvency for Companies.](#)

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