



BREXIT DEAL OR NO DEAL? - THE NETHERLANDS ANTICIPATE WITH LEGISLATIVE MEASURES.

The Netherlands is introducing a number of contingency measures to anticipate a potential no-deal Brexit, including (i) providing the Dutch Government with legislative tools to act quickly to mitigate unforeseen but unacceptable adverse consequences and (ii) ensuring that settlement systems currently designated by the UK will continue to qualify as systems within the meaning of the EU Settlement Finality Directive in case of an insolvency of a Dutch member firm. We also discuss the recent measure taken to provide temporary authorization for UK investment firms to continue cross-border business in The Netherlands in case of a no-deal Brexit.

The Dutch Brexit Omnibus Act

On 16 November 2018, a legislative proposal was submitted to Dutch Parliament in anticipation of a potential no-deal Brexit (the "**Dutch Brexit Omnibus Act**").

The Dutch Brexit Omnibus Act is a result of an inventory carried out by the Dutch Government to identify any amendments to the Dutch body of statutes required to address any undesired legal impact of a no-deal Brexit. This has led to a limited number of proposed changes. According to the Dutch Government, in most cases the existing Dutch legislative framework provides sufficient flexibility and scope to adequately amend laws and regulations to address the consequences of a no-deal Brexit, to take temporary measures or to implement Brexit related EU decisions.

According to the explanatory memorandum to the legislative proposal, three categories have been identified:

- Measures to address the 'known': measures needed irrespective of the existence and timing of a Withdrawal Agreement, which deal with a variety of specific topics as a result of the UK becoming a third country, such as the recognition of driving licenses and the registration of UK legal entities with sole activity in The Netherlands;
- Measure to address the 'known unknown': measures needed to be taken in particular areas but the contents of which are still unknown and depend on

Key issues

- The proposed Dutch legislative measures anticipating a hard Brexit hardly bring any concrete relief or guidance for businesses
- The main measure is the temporary power of the Dutch government to rule by decree (bypassing Parliament), enabling it to quickly repair any unforeseen adverse consequences of a hard Brexit
- An amendment to the Dutch settlement finality provisions will help Dutch firms retaining access to English payment and securities settlement systems (including CCPs) such as LCH, Swapclear, CREST and CLS
- UK investment firms may apply for cross border licenses in The Netherlands, in which case the full MiFID regime would apply. Such licenses have so far not been granted as the Dutch regulators are treating such applications with caution
- Own account trading in The Netherlands by UK investment firms is exempt from licensing requirements in The Netherlands (subject to certain quality requirements in respect of the counterparty).

the result of the withdrawal negotiations between the EU and the UK. These areas are in the domain of social security and healthcare insurance; the proposals in this category create a legal instrument for the Dutch Government to quickly and adequately implement any future measures;

- Measures to address the 'unknown unknown': measures yet unknown which may need to be taken to address unforeseen consequences in other areas. The Dutch Brexit Omnibus Act enables the Dutch government to act quickly and enact legislative measures in unforeseen and urgent situations to avoid unacceptable adverse consequences resulting from Brexit. Given the special nature of these powers, they can only be used up to 6 months after Brexit to take temporary measures which must be ratified by Parliament in due course. In addition, the temporary measures cannot conflict with the Dutch Constitution (*Grondwet*).

The Dutch Brexit Omnibus Act does not specifically include measures targeted at the financial sector. However, the 'carte blanche' referred to in paragraph 3 above could be used as legislative basis to address unforeseen consequences of Brexit in the financial sector.

Amendments of settlement finality provisions in the Dutch Bankruptcy Act

On 11 December 2018, Dutch Parliament adopted a legislative proposal to amend the settlement finality provisions in the Dutch Bankruptcy Act (*Faillissementswet*, the "BA"). These amendments will enter into effect at a time to be determined by royal decree (koninklijk besluit), but this is widely expected to be well before 29 March 2019.

In making these legislative amendments, The Netherlands makes use of a Member State option under the EU Settlement Finality Directive (98/26/EG; the "SFD") to designate payment and securities settlement systems (including CCP's) located in non-EU countries as having the benefit of the SFD's protections in case of an insolvency of a Dutch member firm. These protections include in particular an exemption from the 0-hour rule and apply in relation to transfer orders, security interests, default management processes and set-off and netting arrangements. The crucial protection afforded by article 8 SFD will also be extended to such non-EU systems, which means that the effects of any insolvency proceedings in respect of "participants" (which term includes Dutch banks, investment firms and clearing members) on their rights and obligations under or in connection with their participation in such a system shall be determined *exclusively* by the law governing that system. Article 8 aims to protect the orderly operation and the finality of settlements in payment and clearing systems by allowing such a system to rely on its own governing law to determine the effects of the insolvency of a participant.

At present, only Dutch systems designated by the Dutch Ministry of Finance or a system governed by the laws of an EU member state which has been notified by such member state to the EU Commission as a system under the SFD benefit from the insolvency protections under the Dutch settlement finality provisions. When the new law takes effect, the designation will be extended (on an automatic and generic but verifiable basis; no further decision or other formality by any Ministry of The Netherlands is required) to all third country

(i.e. non-EU) systems that are subject to supervision by a supervisory agency which meets the requirements to be set out in secondary legislation.

A draft secondary decree was published for consultation during December 2018 and all it requires is that the third country system is supervised by a regulatory or supervisory authority established in "*a State, other than an EU Member State, whose central bank [or other monetary authority] holds capital in the Bank for International Settlements*". It is also clarified that the BIS website will provide conclusive evidence for determining which States hold capital in the BIS. This means that systems currently designated by the UK under the current regime would qualify as systems from the date the law takes effect, a conclusion which is confirmed by the explanatory memorandum to the legislative proposal. This will help Dutch firms retaining access to such crucial English systems as LCH.Swapclear, CREST and CLS.

Temporary Exemption for UK Investment Firms in case of a no-deal Brexit

On 4 February 2019, the Dutch Minister of Finance amended the Dutch Exemption Regulation Financial Supervisions Act (*Vrijstellingsregeling Wft*, "**Exemption Regulation**") which exempts certain non-EU based investment firms from the MiFID licensing requirement in the Netherlands. The Exemption Regulation has been extended so that it will include UK based investment firms in case of a no-deal Brexit for a temporary period of two years until 1 January 2021 ("**Temporary Exemption**").

The Temporary Exemption is not available yet to UK firms. The Minister of Finance is still to decide on the exact day on which the Temporary Exemption will become available. This is because the Temporary Exemption is intended to serve as a fall back in case of a "no-deal Brexit". Only if there is no arrangement between the EU and the UK, the Temporary Exemption will be activated by separate decision of the Minister of Finance. It is therefore uncertain at this time if the Temporary Exemption will be activated and when. The Temporary Exemption will automatically fall away on 1 January 2021 and can be revoked by the Minister of Finance before that time.

The Temporary Exemption for UK investment firms covers the provision of investment services and own account trading within the meaning of MiFID only, and provided Dutch clients are all per se professional clients. It does not allow for the provision of other (e.g. banking) services. Such other services will need to be assessed individually.

Making use of the Temporary Exemption will require UK investment firms to register with the Dutch Financial Markets Authority (*Autoriteit Financiële Markten*, "**AFM**") and the Dutch Central Bank (*De Nederlandsche Bank*, "**DNB**") by completing standard forms. There is no standard period for the processing of the forms. Formally the investment firm may make use of the Temporary Exemption once the relevant forms have been filed. The registration does, however, require that the UK investment firm submits evidence of the fact that it is licensed and supervised in the UK for the services that it wishes to provide in the Netherlands. This can be done by way of a letter or other form of statement from the regulator or by way of reference to the on-line register (in case that provides for the required details). The AFM will accept conditional registrations which means that registration is open for UK investment firms but that these are conditional to the Minister of Finance

activating the Temporary Exemption. The registration fee will be EUR 4,400. The registration with DNB is of an administrative nature only and is without costs.

The Exemption Regulation as it stands today already exempts third country firms that *exclusively* deal on own account in the Netherlands (provided certain criteria are met). Firms who exclusively deal on own account in the Netherlands will therefore already have the benefit of that existing exemption. The Temporary Exemption will benefit UK investment firms who deal on own account and provide investment services in the Netherlands.

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