

The Draft Brexit-Supplementing Acts Grandfathering the European Passport Raise Questions

A few days back the German Federal Ministry of Finance (BMF) presented the "Ministerial Draft of an Act Supplementing the Act relating to Accompanying Provisions on the Withdrawal of the United Kingdom and Northern Ireland from the European Union" (MD).

The kafkaesquely worded title of the Act hides more than it reveals.

The MD – an amending act – has a threefold focus:

- in the German Insurance Supervision Act (*Versicherungsaufsichtsgesetz* – VAG), a transitional provision in the EU passport regime is to be inserted (Article 1).
- In the German Banking Act (*Kreditwesengesetz* – KWG), dismissal protection for those persons referred to as "risk bearers" is firstly to be restricted under German employment law.
- In addition – and this is the focus of the debate – a transitional provision is to be created for the EU passport regime for those banks subject to the KWG (Article 2).

By amending section 53b KWG, which is the key provision governing the European passport for banks domiciled in another EU/EEA Member State wishing to operate in Germany, the Draft is seeking legislation-altering effects in entering the debate over the continued existence of the EU passport for services from the UK.

This debate has been pursued under the watchword of "Contract Continuity". Here the question is raised as to how contracts entered into in times of EU membership with the legal entity domiciled in the UK may be continued by a new legal entity domiciled in another Member State.

Since the legal concept of partial universal succession (*Teilgesamtrechtsnachfolge*) is virtually unknown in the UK, it has to be determined which contractual relationships are to be transferred to the new entity in what way and how. Moreover, the difficult question as to whether and to what extent contracts between a customer in the EEA and a legal entity domiciled in the UK may be continued is also raised: on the one hand, a bank domiciled in the UK may have a contractual obligation to continue the contract with customers from the EU 27, but on the other hand this would no longer be permissible from a regulatory standpoint given the impending end to the EU passport.

Section 53b (12) MD – by its design – is to help resolve this dilemma. According to its provisions, section 53b (12) sentence 1 MD is to ensure that the EU passport applies during a transitional period also to banking transactions and financial services from the United Kingdom resulting from contracts entered into up to 29 March 2019. The German Financial Supervisory Authority (BaFin) will be authorised to allow the provisions governing the EU passport in Germany "to apply analogously" even as late as the end of 2020 provided that certain conditions are met.

The hitherto – subdued – criticism voiced with regard to the MD is being fuelled by a restriction in its application to financial transactions entered into after 29 March 2019. Such transactions will enjoy privileged status only if they are in a "close relationship to the time of withdrawal from existing transactions".

Here, it was first of all uncertain what is to be understood by financial transactions, which were not legally defined. Furthermore, the "close relationship with (...) existing transactions" was not worded with sufficient precision.

Doubts were also raised by the fact that the purpose earmarked for the provision of preventing adverse impacts on the functioning or stability of the financial markets result in administrative discretion being curtailed significantly. Where the end of the EU passport in the individual case triggers only "ordinary" disadvantages for the recipient or the provider of the services, BaFin would be barred from applying the legal basis for its acts.

On closer inspection it turns out that solutions are provided by legislation already in force.

Until now it was undisputed that "reverse solicitation" – i.e. cases in which a customer domiciled in the EU 27 approaches a bank domiciled in a third country – falls under the passive freedom of EU citizens to provide services secured under primary law. Continuation of contracts lawfully entered

into under regulatory law will therefore likely be covered under this aspect of the passive freedom to provide services.

This raises the question of whether section 53b (12) sentence 1 MD has any function at all other than to confirm a conduct of a State as required by European law. If not, this provision would be purely declaratory in character. The intended restriction whereby an administrative act of BaFin would be required in order to realise the passive freedom to provide services as a right protected as a fundamental freedom could be challenged on good grounds. Moreover, continuing business performed after Brexit relating to already concluded transactions would also be benefited by the passive freedom to provide services.

In this context it may therefore be questioned whether it would not also be possible to achieve the well-intentioned result of section 53b (12) MD with a clarifying administrative statement by BaFin to the effect, for example, that such cases would be covered by the passive freedom to provide services.

If BaFin had been left alone, such legislation work would not have been necessary; on the other hand, spectators like ourselves would have missed out on a little Kafka.

Convenience Translation Börsen-Zeitung