

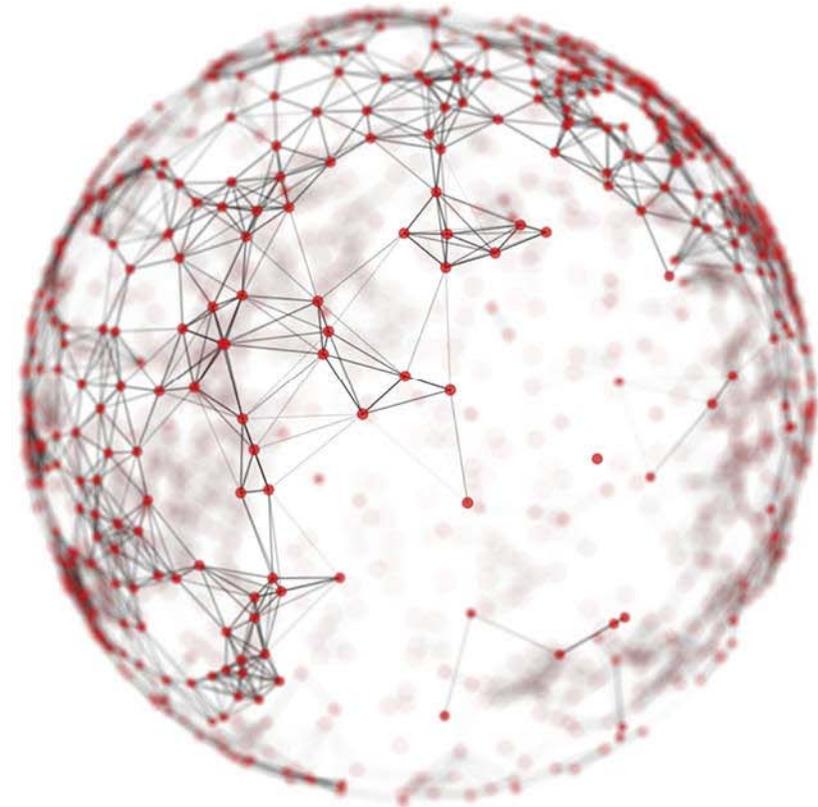
Your World First



Cross border banking and investment structures post MiFID II and Brexit

CMS Pan European Seminar

London - Friday 17 March 2017



Agenda and speakers

- Overview (Ash Saluja, CMS UK)
- Local EU jurisdictions
 - Jérôme Sutour (CMS France)
 - Andreas Feneis (CMS Germany)
 - Darragh Murphy (McCann Fitzgerald, Ireland)
 - Paolo Bonolis (CMS Italy)
- Perspective from a third country (Kaspar Landolt, CMS Switzerland)
- Looking ahead (Paul Edmondson, CMS UK)
- Q&A

Overview – looking at...

- Current EU/EEA framework
- How that will change on a “hard” Brexit
- What issues typically arise for third country firms
- What options are open to UK firms looking to do business in EU/EEA
- How EU/EEA firms can do business in the UK

What is the current EU/EEA framework (1)

Relevant EU legislation

- Capital Requirements Directive IV/Capital Requirements Regulation
- Payment Services Directive
- Markets in Financial Instruments Directive
- Alternative Investment Fund Managers Directive
- UCITS Directive
- Insurance Mediation Directive/Insurance Distribution Directive

Plus

- Distance Marketing Directive, E-Commerce Directive, Consumer Rights Directive etc.

What is the current EU/EEA framework (2)

EU passporting rights – doing business without a separate local licence

- Freedom of services (cross border services)
 - prudential requirements – home state regulation
 - conduct of business requirements – home state for cross border services but gold-plated/general good/consumer protection requirements often added
- Freedom of establishment (branch)
 - general flexibility about what activities are carried out locally and what activities are carried out in head office/other locations
 - prudential requirements – home state generally
 - conduct of business requirements – generally host state for branch activities
- Product based passports (e.g. UCITS/AIFMD)

What if the worst happens?

- A “hard” Brexit with no agreement – UK becomes a third country like China, Japan, Singapore, US and Switzerland
- UK (third country) firms and funds will immediately lose cross border services and branch passporting rights
- Existing EU branches of UK firms will not be covered by their FCA authorisation for prudential requirements – “full” approval by local regulators would be needed
- Groups with multiple EU regulated entities will need to consider how their EU sub-group is regulated (e.g. distinct consolidated capital requirements for EU sub-group, and proposal on EU holding companies being required for substantial operations)
- At EU level, only MiFID II and AIFMD explicitly address the ability of third country firms/funds to do business and no bilateral treaties exist in this area between UK and other EU Member States

Where do we start?

- What is our EU business footprint?
 - what services/products are we offering to EU clients or providing from an EU location?
 - what are the relevant activities and where are these carried out?
 - how did this originate (reverse solicitation, solicitation, ongoing servicing)?
 - what distribution channels/means of communication do we use (face to face, telephone, internet, post, webchat etc)?
 - what types of clients are we dealing with (consumers/individuals, corporates, partnerships, trusts, funds, regulated entities etc)?
- What activities will require us to have a license or be regulated?
 - Not all services/products are regulated in all parts of the EU and/or dealings with certain types of customer will be exempt (e.g. corporate lending/credit activities in certain jurisdictions)

Sample Cross-Border Questionnaire

Legend

RED = Cannot act

AMBER = can act subject to conditions in note

GREEN = can act

| | | Solicitation | | | | | Reverse enquiry | | | On-going servicing | | | |
|--|---|--------------|-------------------------|-----------|-------|-------|-----------------|----------|-------------------------|--------------------|-------|-------|----------------|
| | | location | Face to face In country | Telephone | Post | Email | Online banking | location | Face to face In country | Telephone | Post | Email | Online banking |
| <u>Advisory investment service</u> Products: shares, bonds, units in collective investment schemes, derivatives Service: advisory service, including personal recommendations and guidance | Review client's objectives | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN |
| | Carry out KYC/DD checks | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN |
| | Provide advice (including a personal recommendation) | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN |
| | Provide advice (without a personal recommendation) | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN |
| | Discuss products and services not yet taken | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN |
| | Discuss specific investment opportunities | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN |
| | Take instruction to execute transaction/provide service | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN |
| | Sign legal documents | RED | RED | RED | RED | RED | RED | RED | RED | RED | RED | RED | RED |
| | Provide performance report | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER |
| | Provide trade confirmation | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER |
| Refer client to qualified third party (e.g. lawyer, accountant) | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | |
| <u>Execution-only service</u> | Carry out KYC/DD checks | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN |
| | Take instruction to execute transaction/provide service | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN |
| | Sign legal documents | RED | RED | RED | RED | RED | RED | RED | RED | RED | RED | RED | |
| | Provide trade confirmation | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | |
| <u>Banking services</u> Products: current accounts, currency accounts, payment services, cheques | Review client's banking needs/objectives | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN |
| | Carry out KYC/DD checks | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN |
| | Provide banking statement | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER |
| | Discuss products and services not yet taken | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN |
| | Discuss/recommend debt consolidation | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN |
| | Sign legal documents | RED | RED | RED | RED | RED | RED | RED | RED | RED | RED | RED | RED |
| | Take deposits | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN | GREEN |
| Refer client to qualified third party (e.g. lawyer, accountant) | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | AMBER | |

What are the potential options?

- Use an EU authorised subsidiary – can passport across EEA
- Use an EU branch of a UK firm – no passport (except limited rights under MiFID II)
- In both cases
 - will need to be locally authorised (i.e. dual regulation for branches)
 - will need to determine the structure – will the local entity simply introduce/act as agent between EU/EEA client and the UK entity/office (e.g. intermediation structure), or will it deal/act as principal but outsource back to UK entity/office (e.g. fronting structure)?
 - local regulators will require local entity/branch to have substance
- Cross-border trading with EU from UK – without local authorisation in host state

Will MiFID II help?

- Only covers investment services/activities – many banking/financial services not within scope (including lending and deposit-taking)
- Third country firms will be permitted to provide certain services to eligible counterparties and per se professional clients in the EU without needing to establish a branch/obtain local authorisation subject to certain conditions:
 - European Commission has issued a decision that the home state is deemed ‘equivalent’ to the prudential and business conduct requirements set out in MiFIR, MiFID II, and CRD IV
 - home state must have a co-operation agreement in place with ESMA
 - must submit a “registration” application to ESMA
- EEA branches of third country firms may be entitled to passport

Will it be as hard for EU/EEA firms to do business in the UK?

- No “banking monopoly” in the UK, so corporate lending/credit activities are unregulated
- UK planning to keep the overseas person exclusion for investment business
 - can deal with UK clients with or through a UK authorised entity (i.e. intermediation generally works in the UK)
 - can deal with clients without soliciting business and/or soliciting business that does not breach financial promotion rules (i.e. wholesale/institutional business is easier)
- Grandfathering of UK branches of EEA firms?

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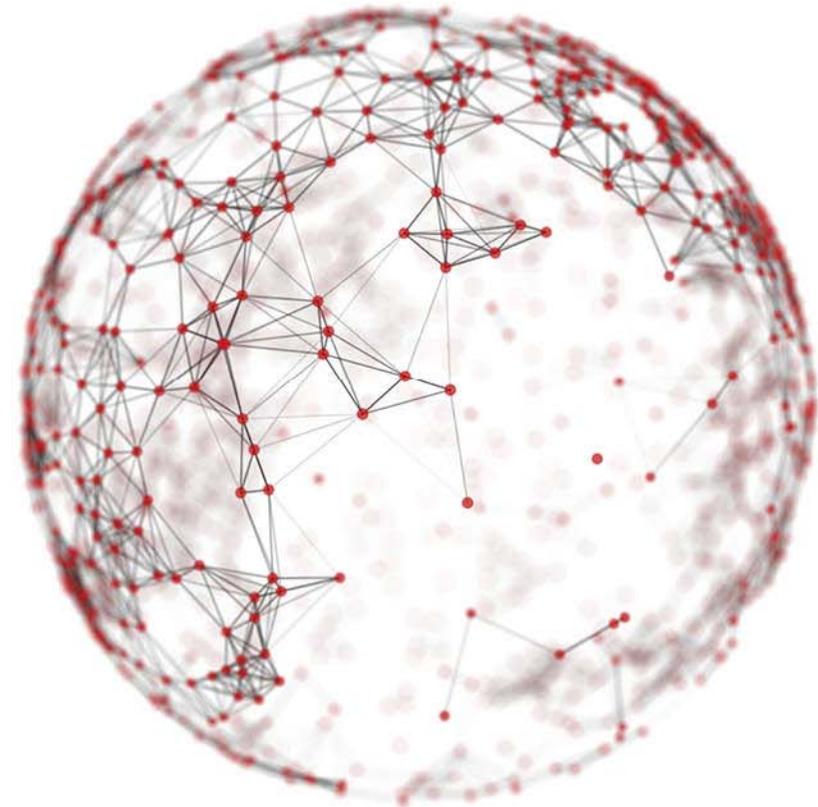


Doing business in France as a third-country firm

Jérôme Sutour

Partner – Head of Financial Services

CMS Bureau Francis Lefebvre



Providing regulated
activities in France
as a third country
firm

Providing regulated services in France as a third-country firm

Banking services in France

The French monetary and financial Code (the “**FMFC**”) which has transposed the European directives provides that it is prohibited for any entity **other than a credit institution** to carry out banking transactions on a regular basis. It is moreover prohibited for any entity other than a credit institution to receive term deposits (Article L. 511-5 of the FMFC)

Investment services in France

It is also prohibited for any individual or legal entity **other than an investment service provider** to provide investment services to third parties in the normal course of their business (Article L. 531-10 of the FMFC)

Insurance mediation in France

For insurance mediation services, it is needed to be registered by the ORIAS (Articles L. 511-1 *et seq.* of the French insurance Code)

By principle, any entity wishing to carry out regulated activities in France has to:

- Be authorised by the French regulator to provide regulated services in France; or
- Exercise its activities via the passport regime if it is established in another EU member State.

In conclusion, a third-country firm is not authorised to provide regulated services on a cross-border basis without a local licence.

Providing regulated services in France as a third-country firm

Local branches of third country credit institutions:

- Directive 2013/36/EU (the “**CRD IV**”) and the French ordinance transposing the CRD IV both enable third-country credit institutions to provide banking services in France through a local branch (Article L. 511-10 of the FMFC).
- Any third country firms branch shall obtain an authorisation by the ACPR to conduct their banking services in France.

Local exemptions: Some local exemptions are provided for by the EU directives and transposed into the FMFC:

- **Financial investment advisors:** No need to be authorised by a French regulator, but must be habitually resident, or established in France (Article L. 541-2 of the FMFC). Financial investment advisors are only authorised to provide certain investment services (investment advices), and are not subject to the passport regime.
- **Intermediaries in banking transactions and in payment services:** No need to be authorised. Intermediaries in banking transactions and in payment services may not provide banking services (Articles L. 519-1 *et seq.* of the FMFC).

The representative office option (for investment firms and credit institutions):

- a representative office must limit its activities to information, liaison and representation assignments. A representative office may not carry out regulated activities or transactions. Similarly, a representative office may not engage in direct marketing.
- Before opening a representative office, the ACPR must be notified.
- French law has a very narrow approach of which activities a representative office may carry out in France.

Providing regulated services in France as a third-country firm

With MiFIR and MiFID 2 (entry into force on 3 January 2018), there is a new regime:

- To provide investment services to retail clients or to clients treated as professionals on request, a third country firm has to establish a branch (Article L. 532-48 of the FMFC after transposing MiFID 2).
- A third country firm may provide investment services to eligible counterparties and per se professional clients on a cross border basis where such firm is registered with the European regulator (ESMA) (Article 46 of the Regulation (EU) n°600/2014 (the“**MiFIR**”)).

Providing regulated services in France as a third-country firm

Providing regulated services through a local intermediary

- By principle providing investment / banking services requires a French regulated firm or a passported European Economic Area (“**EEA**”) firm
- Given that providing investment / banking services requires to be authorised in its own country for its own services or products, a non EEA firm should establish a branch in the country in which the entity would provide investment / banking services.
- Recital 43 of MIFIR:
 - UE investment firms or credit institutions are authorised to receive investment services from a third-country firm but only at their own exclusive initiative.
 - A client may receive investment services from a third country firm through the mediation of a UE credit institution or investment firm but only at the client’s own exclusive initiative.

Providing regulated services in France as a third-country firm

Getting a local licence for credit institutions and investment services providers:

- Once a complete application is filed, the ACPR has 6 months to make its determination. In the case of additional information requested, the time taken for the ACPR to take its decision may not exceed 12 months as of receipt of the initial request.
- Some conditions must be fulfilled:
 - Effective management of the activity of the branch shall be carried out by at least 2 persons (Article L. 511-13 of the FMFC).
 - Ensure a sound and prudent management

Outsourcing to an investment services provider / credit institution in a non EEA country

- Definition of outsourcing: regulated or important activities assigned to a third party in a sustainable manner on a habitual basis, through various means, namely outsourcing or sub-contracting; canvassing; or through a tied agent
- General requirements must be fulfilled: written agreement, the regulated entity may be able to monitor the outsourced activities and manage the risks related to such activities, business continuity plan.
- Additional conditions to outsource regulated or important activities to a third-country provider for the portfolio management service provided to retail clients:
 - The investment services provider / bank is authorised in its country of origin and is subject to prudential supervision.
 - a cooperative arrangement between national regulatory authorities operates.

Marketing practices
and reverse
solicitation

Definition of marketing

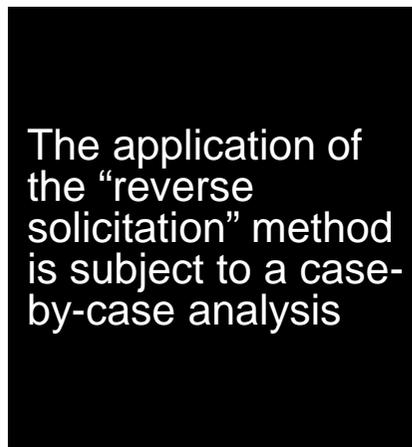
- In France: the marketing of financial instruments is defined by the Autorité des marchés financiers (the “**AMF**”) as “*the presentation of a financial instrument by a variety of means (advertising, solicitation, advice...)*” in order to incent investors to subscribe or to buy the relevant financial instrument.
- The AMF specified that a website may constitute a “mean of communication” (in the context of a public offer). The same applies for a communication via a social network.
- By principle, it is prohibited for any person to market financial instruments, advise on banking products, investment services, banking services, payment services, etc. on a regular basis in France without being duly authorised or benefitting from the EU passport regime, unless it benefits from specific local exemptions as permitted in the relevant EU directives.



A definition covering
a wide range of
practices

The reverse solicitation method

- The reverse solicitation (or passive marketing) may be constituted by the following elements:
 - The client buys or subscribes a financial instrument, or benefits from financial services, banking services, payment services, etc. without being subject to a prior solicitation.
 - The service is provided following the client's genuine unsolicited request.
- Any reverse solicitation is not subject to French marketing rules (in particular marketing procedure of shares/units of funds in France)
- This scenario may apply to any types of clients (retail/professional, business/corporate/institutional).
- However, any "reverse solicitation" approaches by French investors must be completely unsolicited. Regulatory risks may arise from the decision to rely on reverse solicitation as a marketing method in France, since the reverse solicitation is a "rebuttable presumption":
 - The "reverse solicitation" from the client must be adequately documented.
 - The "flow of business" based on reverse solicitations must be as limited as possible.



The application of the "reverse solicitation" method is subject to a case-by-case analysis

The contribution of MIFID II

- MiFID II and MIFIR provisions confirm that a third-country firms may freely provide investment services in an EU member State provided that the services are received by the clients at their own exclusive initiative (recital 111 of MIFID II). This does not apply where a third-country firm solicits clients or potential clients in the EU or promotes or advertises investment services or activities.
- In such circumstances, the third country firm is not obliged to act in France through a branch duly authorised by the ACPR (article 22 of MIFID II, transposed into French law under Article L. 532-51 of the FMFC).
- Conditions to consider an investment service as provided at the initiative of a client (Recital 85 of MIFID II):
 - The client does not request it in response to a personalised communication from or on behalf of the firm, which contains an invitation or is intended to influence the client in respect of a specific financial instrument or a specific transaction.
 - The communication (if existing) by its very nature is general and addressed to the public or a larger group or category of clients or potential client.
- Entry into force in France of this provision: 3 January 2018

The impact of Brexit

The impact of Brexit on the French regulators (1/3)

French regulators and government bodies have implemented specific procedures to facilitate the move to France:

- *"the AMF is pursuing its objective to make the Paris financial market more attractive by launching AGILITY, a program which purpose is to assist UK investment firms with the French licensing process. It will provide a range of services, notably helping financial firms already regulated in the UK, to be easily authorized in France. With 2WeekTicket pre-authorisation, they can begin the process of opening offices in France in just two weeks."*

The impact of Brexit on the French regulators (2/3)

The AMF's 2WeekTicket Agility program:

- **Eligibility:** company supervised by the FCA which scope of activities exclusively fall under the AMF remit (equivalent to that of the FCA).
- **Procedure:**
 - Filing the most recent file submitted to the FCA;
 - Fill in the 2WT form (available at the bottom of the page); and
 - Mail them to the 2WeekTicket Desk at 2WeekTicket@amf-france.org
- **What does a pre-authorisation mean?** The pre-authorisation indicates that the AMF has not identified any major obstacle (two weeks review).
- **Advantages:**
 - Dedicated English-speaking AMF coach; and
 - Delivery of the full authorisation within two months after obtaining the pre-authorisation.

The impact of Brexit on the French regulators (3/3)

ACPR:

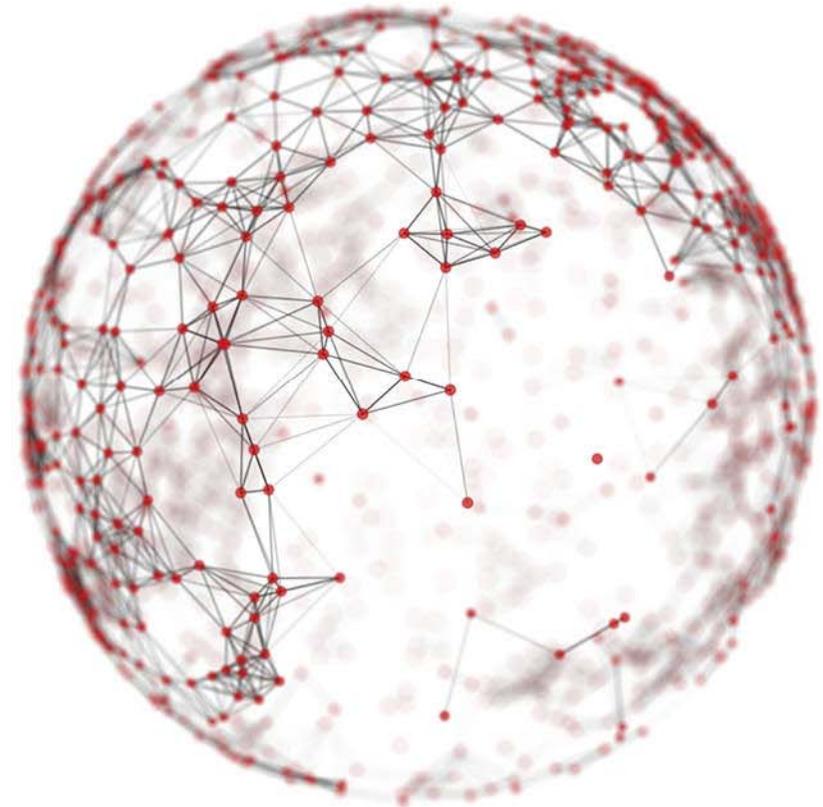
- **Eligibility:** company supervised by the IMRO/FCA which scope of activities exclusively fall under the ACPR remit (equivalent to that of the IMRO).
- **Procedure:**
 - Mail the request for information to brexit-acpr@acpr.banque-france.fr.
- **Advantages:**
 - Dedicated English-speaking ACPR coach.
 - Facilitated review.

Your World First



Doing business in Germany as a third-country firm

Andreas Feneis
CMS, Germany



Doing business in Europe as a third country firm - a local view Germany

Are third country firms (currently) able to provide services on a cross border basis without a local licence?

- Generally, third country firms need a German license to provide services in Germany (actively targeting German market)
- License can be applied for by branches or subsidiaries
- Provided that certain requirements are met (i.e. effective local supervision of relevant services, cooperation of local authority with BaFin) third country firms may apply for an exemption
 - Quite a few Swiss service providers act under such exemption

Doing business in Europe as a third country firm - a local view Germany

Does it make a difference as to the type of client e.g. retail/professional, business/corporate/institutional?

- There is no general exemption for certain types of clients, but BaFin accepts in its written supervisory practise specific scenarios that do not trigger a German license requirement
 - Intra group privilege
 - Deposits from CRR credit institutions
 - "Beauty contests" with respect to lending
- BaFin's focus is on the initiative
- In case of marketing AIFs to (semi-)professional clients in Germany the registration requirement for the AIF will only be triggered by an active marketing of the AIFM (distribution contract?)

Doing business in Europe as a third country firm - a local view Germany

How is reverse solicitation construed currently? What is considered solicitation in the internet age?

- No legal definition of reverse solicitation, but certain scenarios are accepted by BaFin:
- Services that are requested by clients at their own initiative do not trigger German license requirements
- Maintaining existing client relationships
- Online services should not address German clients (no specific German information, disclaimer, domaine name, language etc are indicators)

Doing business in Europe as a third country firm - a local view Germany

Does intermediation work for third country firms (i.e. use a locally regulated/passported EEA firm to act as agent for the third country firm)?

- BaFin qualifies this as providing the relevant services in Germany and license requirements are triggered
- Relevant is the business case (is there a distribution / marketing contract in place?)

Doing business in Europe as a third country firm - a local view Germany

How easy is it to get a local licence whether as branch or for local subsidiary? How much can be outsourced back to UK head office/parent company (i.e. outside the EEA)?

- Both ways are feasible, BaFin considers process for transforming an existing branch into a German license holding entity quicker, provided that business case remains similar
- Outsourcing solutions will be accepted, but BaFin expects real presence (no simple letter box)
- Main issues are risk management, solvency and liquidity

Doing business in Europe as a third country firm - a local view Germany

How do you see MiFID 2 changing the picture?

- 1:1 implementation (no additional major national obligations are introduced)
- Implementation of exemptions for professional clients/eligible counterparties that are registered
- Explicit confirmation of BaFin's competence for granting exemptions of license requirements

Doing business in Europe as a third country firm - a local view Germany

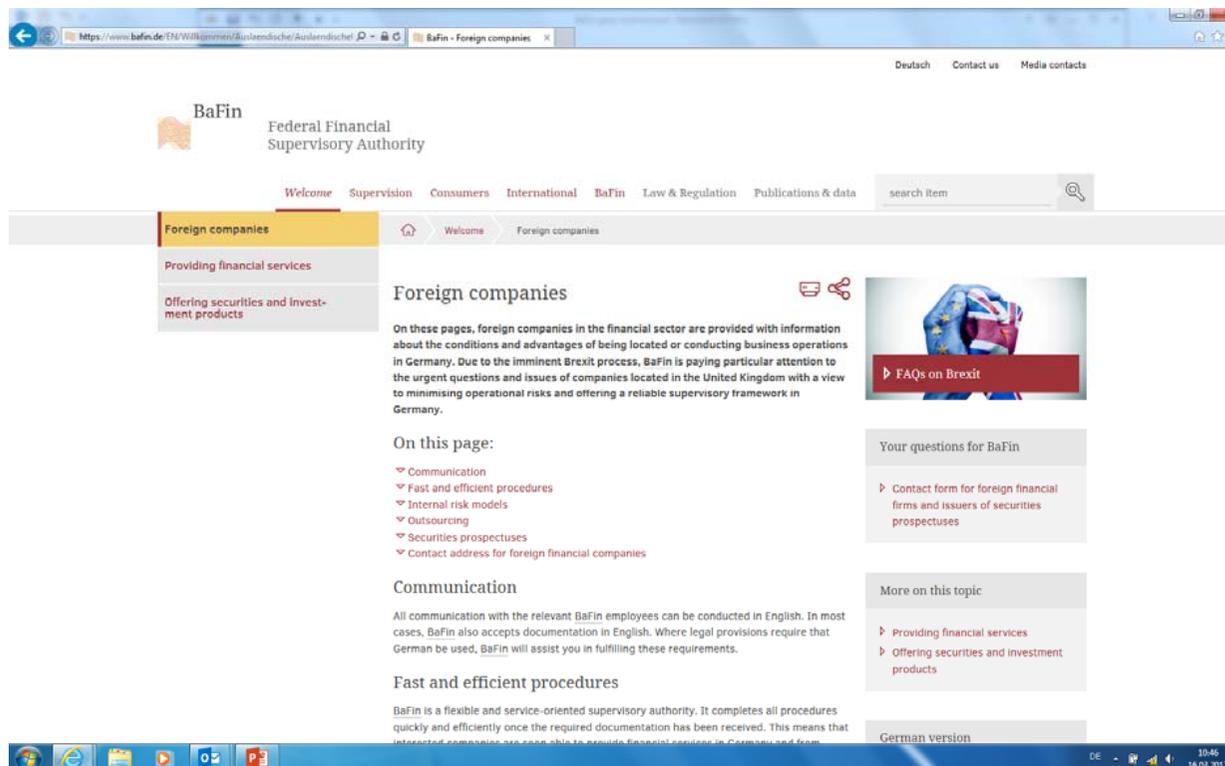
How do you see Brexit changing the picture? Are local regulators likely to be sympathetic to UK firms e.g. for legacy business?



Doing business in Europe as a third country firm - a local view Germany

How do you see Brexit changing the picture? Are local regulators likely to be sympathetic to UK firms e.g. for legacy business?

https://www.bafin.de/EN/Willkommen/Auslaendische/AuslaendischeUnternehmen_node_en.html



McCANN FITZGERALD



Financial services – what Ireland offers

Darragh Murphy, Partner

17 March 2017

Accessing Ireland from outside EU

- Ease of access differs for different sectors
 - no single regime governing third country access
- Once authorised in Ireland can passport throughout the EU
- Ireland frequently used as a hub for passporting



Existing access - general

Typically a jurisdictional test:

- cannot provide a regulated service in Ireland
- can provide services to Irish customers outside Ireland
- challenge around 'holding out' and targeting



Third country access - general

What is regulated – limited opportunities

- banking services (taking deposits from the public and PSD services)
- lending to Irish natural persons
- insurance mediation

What is not regulated – significant opportunities

- Lending to Irish legal persons



Third country access – investment services

Safe harbour exemption

- 3rd country entity
- no Irish branch
- customers are non-individuals

Article 42 MiFID 2 – reverse solicitation

- no goldplating anticipated
- availability of safe harbour exemption falls away following an equivalence decision



Future Access – MiFID II equivalence

- Irish *per se* professional clients or eligible counterparties subject to registration
- retail and opted-up professional clients
 - no determination yet if need to establish an Irish branch



Ireland – Key Advantages

- Pragmatic, experienced cross border regulator
- Not lowering the bar to attract firms post-Brexit – authorisation and regulation will be BAU
 - clear and transparent standards
 - no goldplating
 - consistent application of highest EU standards



Ireland – Key Advantages

- Experienced professional services environment
- English speaking
- Multinational and multilingual workforce
- Common law system





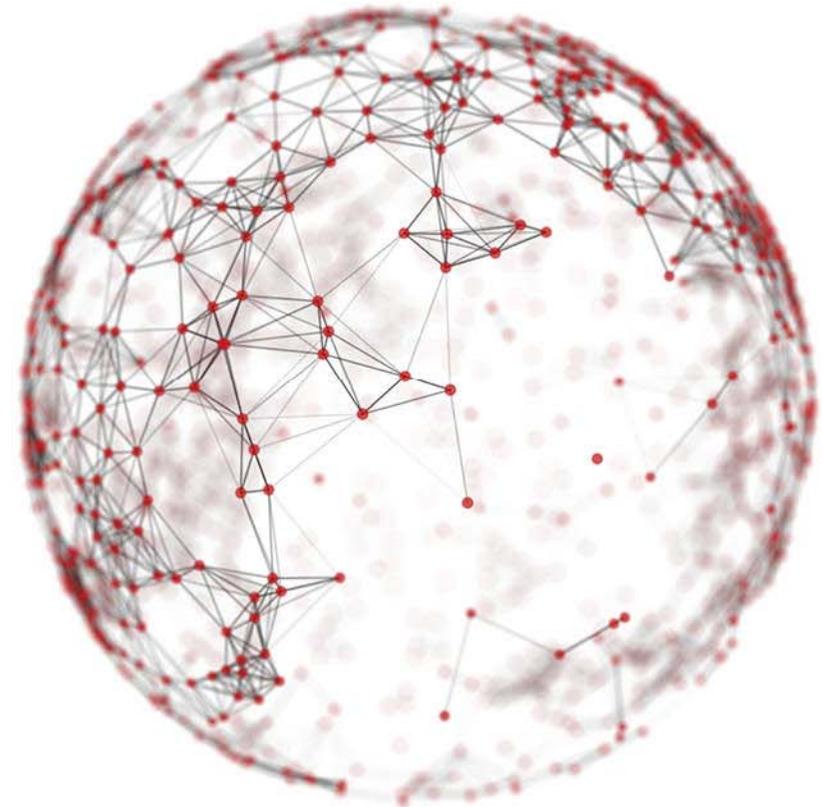
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Doing business in Italy as a third country firm

Current and future scenario

Paolo Bonolis
CMS, Italy



How TC firm can provide services in Italy

CURRENT SITUATION (I)

- **Banks**
- **Investment companies**
- **Insurance mediation**
 - Licence requirements
 - Cross border basis
 - Branch
 - Local subsidiary
- Applicable rules

Reverse enquiry principle

CURRENT SITUATION (II)

No definition of **reverse enquiry**

When a service is
deemed to be provided in Italy?

- **banking and financial services**
- **Investment services**
- **Insurance mediation services**

Guidelines

- Consob Communications
- Bank of Italy Circular no. 285 December, 17 2013

New rules under MIFID II and MIFIR

- Harmonized regime for provision of services to **eligible counterparties** and ***per se* professional investors**
- **Retail** and **elective professional investors**
- Article 39 MIFIDII
- Article 46 MIFIR

Implementing measures

- **Consultation document**

Consultation ended on **August 15, 2016**

Opt in

Branch (retail and elective professional investors)

Harmonisation regime and licence requirements

for provision of services

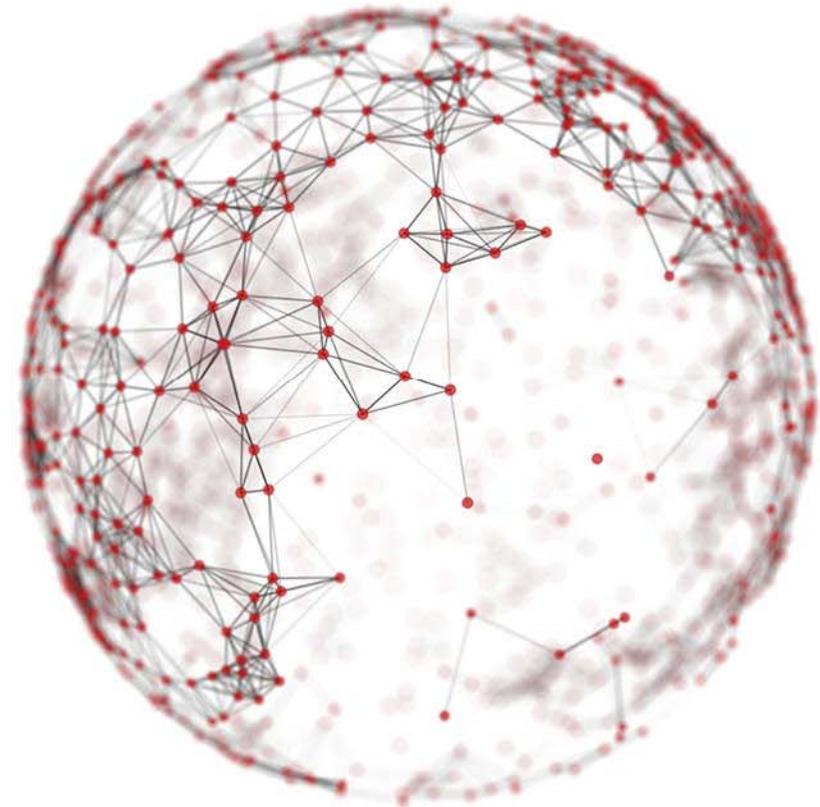
- on a cross border basis
- through a branch

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Perspective from a non-EEA jurisdiction (Switzerland)

Dr. Kaspar Landolt, LL.M.
CMS, Switzerland



Perspective from a third country jurisdiction that wants to do business in the EEA (1/3)

- Switzerland is not an EEA member state → no passporting
- Only two international agreements:
 - narrow sectoral agreement on non-life insurance between Switzerland and the EU (1989)
 - narrow bilateral agreement between Switzerland and Germany regarding the marketing/distribution of Swiss securities funds and German UCITS funds (2014)
- Positioning paper of FINMA on legal and reputation risks in connection with cross-border financial services (2010):
 - legal and reputation risks to be assessed appropriately
 - useful measures to eliminate or minimise risks to be taken
 - information obligations towards FINMA

Perspective from a third country jurisdiction that wants to do business in the EEA (2/3)

- Sample #1: Swiss investment funds or how to lose a once flourishing industry to Luxembourg (and Ireland)
- Sample #2: Swiss private bank that wants to provide services to German clients or a short story about arm twisting
- Sample #3: Swiss commercial bank that wants to lend into France or how things should not be done
- Sample #4: Swiss banker who banked a non-compliant client or about the clash of legal systems
- Sample #5: Swiss insurer that wants to cover risks situated abroad or how a regulator tightens the screws

Perspective from a third country jurisdiction that wants to do business in the EEA (3/3)

- FINMA Circular 2017/05 (business plan of insurers)
 - Swiss insurer that covers foreign risks must ensure and document that it is in compliance with foreign law
 - Situs of the risk is determined by
 - location of insured building;
 - registration of insured vehicle;
 - place where travel insurance is concluded; or
 - regarding other risks and reinsurance, domicile of policy holder
 - Documentation by (a) authorisation of foreign regulator, (b) ruling of foreign regulator, or (c) legal opinion of qualified lawyer
 - Effective as of 1 January 2017
 - FINMA is willing to find solutions with insurers to "legalize" pre-existing portfolios

How easy is it for EEA firms to do business in Switzerland? (1/2)

- Different regimes for different areas, no passporting
- Liberal regime for foreign banks and securities firms:
 - mere cross-border services not regulated
 - license requirement if "physical presence" in Switzerland
- More restrictive regime for some activities under AML regulations:
 - cross-border payment services with Swiss agents
 - distributing pre-paid cards through Swiss points of sale
 - entering into loan agreements in Switzerland or obtaining repayments thereunder in Switzerland
- Very restrictive regime for insurance products: authorisation required, save for (a) risks regarding deep-sea navigation, aviation, and cross-border transports, (b) risks located abroad, and (c) war risks

How easy is it for EEA firms to do business in Switzerland? (2/2)

- Complex regime for collective investment schemes:
 - offering to Super-QIs is not regulated
 - offering to QIs requires Swiss representative and Swiss paying agent
 - offering to Non-QIs requires, in addition to what is required for offering to QIs, registration of the product with FINMA
- New regime under the Swiss Financial Services Act:
 - RM of foreign financial services firms must register in Switzerland
 - exception for RM of prudentially supervised firms if services are only rendered to professional or institutional customers? Reciprocity?
 - aim: guarantee that supervisory rules of conduct are known and customers are treated appropriately
 - new rules for prospectuses

Will Brexit make a difference for UK firms looking to do business/get locally licensed?

- Brexit will not make a difference in this respect
- UK is already a third country
- Bilateral agreement?

How is Switzerland positioning itself ahead of MiFID 2?

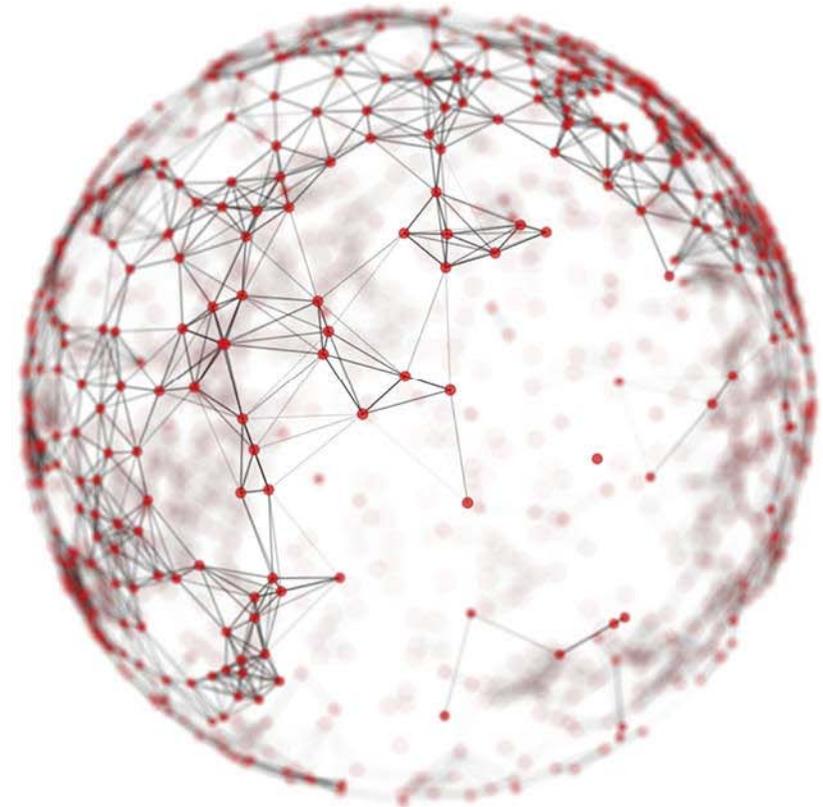
- Draft Financial Services Act (FSA) to ensure equivalence with "international standards"
- In terms of content, the rules are based on the EU directives (MiFID, Prospectus Directive, PRIPs project), with adjustments made to reflect "specific Swiss circumstances"
- Generally, the proposed rules do not go beyond EEA standards (no "Swiss finish"), but should still allow acknowledgment of equivalence under MiFIR
- BUT, the FSA is highly political and heavily debated in the Swiss parliament
- Expected to enter into force in 2018 at the earliest

Your World First



Looking ahead to a new UK/EU relationship in Financial Services

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CMS, UK



Looking ahead to a new UK/EU relationship in Financial Services

- The policy parameters
- The real issues for the FS industry
- A possible solution
- Navigating the course

Policy parameters

- Trade policy
- Regulatory policy
- Competition policy

The real issues

- Market access?
 - Recent FTAs provide market access for FS
 - And prohibit discrimination against foreign firms
 - But they allow a host state to impose its regulation
- Dual regulation is a substantial barrier to trade
- So dual regulation coordination (DRC) should be the priority
 - Could take many forms
 - But current EU equivalence regime far from sufficient

A possible solution: we need a DRC agreement

- Objective
 - Securing regulatory cooperation in broadest sense
 - To deliver effective regulation and reduce dual regulation
 - Cooperation on supervision and development of regulatory regime

- Key issues for the DRC agreement
 - The scope of DRC
 - The extent to which regulatory divergence is permitted
 - Withdrawing DRC

Another real issue - timing

- Financial institutions should not be required to make decisions in a vacuum
 - Need lead time to respond to change

- Interim measures may be required
 - WTO might provide market access
 - But doesn't deal with DRC
 - What might UK need to concede to obtain interim DRC?

- Grandfathering also a (less useful) option

Navigating the course: the CMS – Legatum matrix

- Enables firms to analyse rules for cross border business
 - Different FS sectors/products/services
 - Different modes of supply
 - Different types of client
 - UK to EEA and vice versa

- Enables plotting of
 - Current requirements: EU and domestic
 - The dual regulation that arises as a result
 - Current DRC in each area
 - The impact of withdrawal of DRC at Brexit
 - Proposed/agreed DRC measures to “soften the blow”

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