

bankenverband

What does a “hard Brexit” mean for banks?

Position of the Bankenverband on the current state of negotiations



- Our association continues to regret the UK's Brexit decision. A close political and economic relationship between the EU and the UK remains in the mutual interest of both sides.
- In the course of the negotiations, the EU27 should continue to maintain close cooperation and protect the integrity of the European single market. Phase 1 of the negotiations should now be concluded quickly in order to move on to phase 2.
- The proposed idea of a transitional period during which the current rules remain in force would help German banks prepare for the withdrawal.
- If this transitional period cannot be agreed, the EU should adopt unilateral grandfathering arrangements in areas where "cliff-edge effects" may occur, such as data protection or derivatives clearing.
- The Association of German Banks expects up to 10,000 new jobs in Frankfurt am Main as a result of the relocation of activities from London.
- In our view, the EBA is best kept in Frankfurt am Main in the interests of continuity, along with many other advantages.



Negotiation rounds to date

Round 1 (June)	<ul style="list-style-type: none">▪ Agreement between EU and UK on<ul style="list-style-type: none">– two phases of negotiations (exit and the future)– three issues to be addressed in phase 1: rights of EU citizens, “divorce bill” and Northern Ireland
Round 2 (July)	<ul style="list-style-type: none">▪ EU presents its views on phase 1 issues, which UK notes subject to scrutiny
Round 3 (August)	<ul style="list-style-type: none">▪ UK publishes several position papers, e.g. on customs relations, Northern Ireland & Ireland, dispute resolution mechanisms, data protection, freight transport▪ With the exception of Northern Ireland, no paper deals with the exit issues currently under negotiation
Round 4 (September)	<ul style="list-style-type: none">▪ Speech by Theresa May on 22 September in Florence▪ No progress on any of the three topics in this phase
Round 5 (October)	<ul style="list-style-type: none">▪ “Sufficient progress” to enter phase 2 of the negotiations could not be identified▪ Preparations for phase 2 possible▪ Hopes for a breakthrough in December

Consequences of a “hard Brexit”

Baseline scenario

- (Possible) withdrawal agreement
- Free trade agreement later
- No transitional arrangements



No new rules on economic relations

Third-country access for EU27 institutions for new business as of 30 March 2019



No transitional arrangements

Existing business of EU27 institutions in the UK treated as third-country transactions as of 30 March 2019

German banks would like to see ...

... continued close relations with UK

... continued business relationships

... grandfathering of existing contracts

... a comprehensive economic agreement in the long term



Tackle most important legal problems at EU level

Problems affecting all industries

- (1) Data protection
- (2) Civil law and law of civil procedure (contract law, foreclosure, insolvency law, applicable law, choice of law and judicial enforcement of claims)

Problems specific to banking and financial regulation

- (3) Access to banking and securities markets
- (4) Regulatory capital requirements
- (5) Recovery and resolution regime
- (6) Derivatives and securities financing transactions

Need for action

Legal problems at EU level

- Grandfathering or transitional arrangements for existing business, e.g. as regards data protection or contracts subject to clearing

Transitional law for Germany

- “Brexit Law” with solutions for Pfandbrief law, for example, or clarifications regarding tax treatment if firms relocate

Increase the competitiveness of “GTC law”

- Restructure and limit the application of legislation governing general terms and conditions to contracts between companies and to bonds

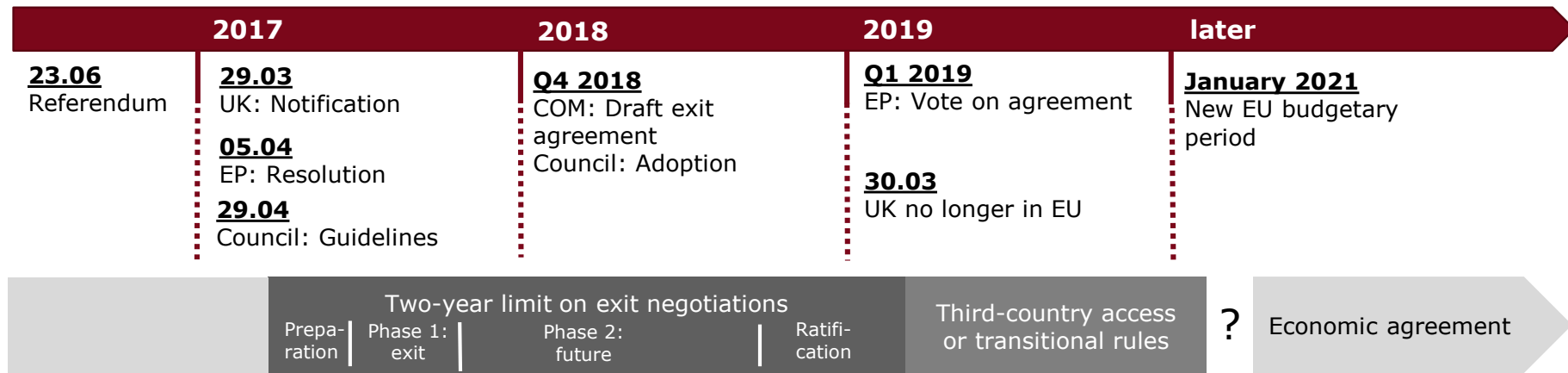
Make Germany attractive for relocations

- Exempt consolidated companies from requirement to file individual IFRS accounts
- Lighthouse projects such as looser dismissal protection rights for very highly paid employees or adaptation of the Working Hours Act to digitisation
- Lift the ban on deductions from the bank levy

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Annex: legal problems and
need for action in detail

Timeline



Assumed scenario
“Hard” Brexit
 Exit agreement
 Free trade agreement at later date
 No transitional arrangements



1st consequence
No new arrangements for economic relations
 Third-country access for EU27 banks for new business from 30.03.2019



2nd consequence
No transitional phase
 Third-country treatment of existing business of EU27 banks in UK from 30.03.2019



Need for action

- Tackle most important legal problems at EU level

1. Data protection

Problem

- Transfer of data from units in the EU27 to UK units and data processing by UK units for EU27 entities (and vice versa) will be subject to data protection rules for third countries
- Result: ban, unless special arrangements are made
- Affected:
 - client and staff data
 - data gathering in UK
 - data transmission and data processing by third parties (service providers/outsourcing) in UK

Importance

- Very high
- Will affect all business sectors and products
- Of interest to all industries

Solution

- Prerequisite for all solutions is that the UK ensures the same level of data protection as in the EU by converting the General Data Protection Regulation into British law
- Preferred solution: international treaty between the EU and UK with specific rules for the transfer of personal data (“safe harbour” agreement)
- Alternatively: adequacy decision by the European Commission under Article 45 of the GDPR
- Fallback position (though virtually impracticable, especially for existing business): provision of suitable safeguards under Articles 46 and 47 of the GDPR or exemptions granted under Article 49 of the GDPR (especially based on the consent of the data subject); problem: case-by-case solutions, high level of legal uncertainty, possible need to “repaper” existing contracts

2. Civil law and law of civil procedure

Problem

- Withdrawal from the EU will generally not affect the validity of existing contracts – though this will need to be checked on a case-by-case basis
- On the UK's exit from the EU, there will no longer be a common framework for cross-border cooperation or mutual recognition of measures in civil and commercial matters; result: considerable legal uncertainty and difficulties enforcing legal rights in agreements with a UK connection
 - Uncertainty about effectiveness/recognition of choice of law and jurisdiction
 - Uncertainty about which court has jurisdiction/possibility of competing proceedings
 - Recognition of secured titles and their cross-border enforceability much more difficult
 - Legal uncertainty and difficulties enforcing rights if a contracting party becomes insolvent (possible fragmentation of proceedings)

Importance

- High
- Will affect all business sectors and products
- Possible indirect effects on supervisory responsibilities
- Of interest to all industries

Solution

- Arrangements in exit agreement

3. Access to banking and securities markets

Problem

- EU banks will lose right of access to UK markets and vice versa
- UK branches of EU banks will lose right of access to UK and EU markets (possible need to obtain separate authorisation for each EU member state)
- Loss of supervisory approvals and exemptions for business with UK (serious implications for operations)
- Need to identify which activities by operational units in UK now require authorisation and which do not

Importance

- Very high
- Need to reapply for licences or undertake large-scale restructuring

Solution

- Prerequisite for all solutions is that EU law is converted into British legislation to ensure UK banking and securities law is equivalent to that in the EU
- Supervisory practices (use of supervisory discretion, swift clarification of interpretation issues, efficient procedure for obtaining new access rights)
- Grandfathering or transitional arrangements for existing business and access rights
- Creation of standard and comprehensive market access rights for UK branches of EU banks for business with an EU dimension
- As far as possible and feasible under the current legal regime: recognition of equivalence (problem: existing equivalence system is inconsistent and patchy)

4. Regulatory capital requirements

Problem

- Changes in valuations and risk weights as a result of the UK's new third-country status
- Loss of exemptions with serious implications for operations
- Need for extensive scrutiny, evaluation and adjustment as a result of changes in the conditions governing factors and elements involved in calculating capital requirements (e.g. RWAs, CVAs)

Importance

- Very high
- Will affect virtually all areas of operations and products (e.g. lending and deposit-taking, capital market operations, trade financing)

Solution

- Supervisory practices (use of supervisory discretion, swift clarification of interpretation issues)
- Grandfathering or transitional arrangements for existing business
- As far as possible and feasible under the current legal regime: recognition of equivalence (problem: existing equivalence system is inconsistent and patchy)

5. Recovery and resolution regime

Problem

- Possible substantial changes in MREL/TLAC ratios as a result of the UK's new third-country status if MREL/TLAC instruments under UK law lack the contractual recognition clauses needed to ensure eligibility (applies especially to bonds)
- Possible impact on recovery and resolution planning at some banks

Importance

- Very high

Solution

- Supervisory practices (use of supervisory discretion, swift clarification of interpretation issues)
- Grandfathering or transitional arrangements for existing business
- As far as possible and feasible under the current legal regime: recognition of equivalence (problem: existing equivalence system is inconsistent and patchy)

6. Derivatives and securities financing transactions

Problem

- Clearing obligation: loss of EU recognition of UK CCPs and thus danger of losing what is currently the most important clearing centre for EU banks
- Higher capital requirements and leverage ratio for EU banks' transactions with UK CCPs as a result of their new status as third-country CCPs
- Possible need to reassess intragroup exemptions from the clearing obligation and from margin requirements for non-centrally cleared OTC derivatives
- Reports to trade repositories: loss of EU recognition for UK trade repository

Importance

- Very high

Solution

- Grandfather and transitional arrangements especially important for clearing: virtually impossible to shift existing business from a UK CCP to an EU CC; becoming a new member of an EU CCP will be a complex and time-consuming process
- As far as possible and feasible under the current legal regime: recognition of equivalence (problem: existing equivalence system is inconsistent and patchy)