# Germany Proposes Very Limited Temporary Permission Regime in Case of a Hard Brexit

**27 November 2018**

The German Federal Ministry of Finance has recently published a draft Act ("**Draft Act**") that introduces transitional arrangements to the German Insurance Supervision Act (*Versicherungsaufsichtsgesetz*) and the German Banking Act (*Kreditwesengesetz*) if the United Kingdom ("**UK**") withdraws from the European Union ("**EU**") on 29 March 2019 without having concluded a Withdrawal Agreement ("**Hard Brexit**").

The Draft Act intends to mitigate the negative effects of a Hard Brexit in the German financial sector by authorising the German Federal Financial Supervisory Authority ("**BaFin**") to grant UK insurance companies, credit institutions and financial service providers ("**MiFID firms**") a temporary permission until, at the latest, the end of 2020.

Whilst helpful, the Draft Act is limited in scope and it will not relieve UK firms from the need to consider and start implementing alternative arrangements for their activities in Germany in the event of a Hard Brexit. In particular, it will not apply to UK-based private equity fund managers who are marketing their funds in Germany. Key elements—and limitations—of the Draft Act include:

**Temporary permission only covers legacy business**. While the temporary permissions regime in the UK permits firms from the European Economic Area (EEA) to continue to provide services in the UK under their existing European passport for up to three years following a Hard Brexit, the proposed German regime is much less far-reaching. The Draft Act only seeks to prevent a "cliff edge", in which firms would have to cease business suddenly in order to avoid possible criminal sanctions. Therefore, the temporary permissions are only available to cover legacy business. The Draft Act would allow insurance companies, banks and financial services firms to service their existing contracts with German clients if those contracts were entered into before Brexit. Firms would have to wind down these contracts within the transition period or make arrangements to continue operations in line with either local laws or the rules for market participants from outside the EU.

In general, no new contracts could be entered into during the temporary permission period. However, UK credit institutions and MiFID firms may benefit from a temporary permission for financial transactions that are completed after 29 March 2019 insofar as these transactions are closely connected to transactions that already existed at the time of the UK's withdrawal from the EU.

**BaFin grants permissions on a case-by-case basis**. UK firms will not be covered automatically by the temporary permission, but will need to apply for it. The Draft Act permits BaFin to grant permissions on a case-by-case basis. BaFin will also determine the term of the temporary permission on a case-by-case basis, although the term may not exceed 21 months after Brexit. BaFin may also withdraw a temporary permission at any time.

**No transitional regime for fund managers and investment funds**. Unfortunately, the Draft Act does not cover UK fund managers who are marketing funds in Germany under the European marketing passport and whose marketing activities are ongoing at the time of Brexit. It remains to be seen whether BaFin will consider UK fund managers that continue to engage with potential investors who have received all marketing materials under the passport regime prior to Brexit as performing new "marketing" activities requiring a national private placement filing.

The Draft Act is a positive sign that the German government is willing to take measures to mitigate the negative impact of a Hard Brexit on the financial sector. However, the scope is rather limited and subject to the regulator's discretion. Therefore, UK institutions should be prepared in the event that a permission is not available to them and will, in any case, need to prepare for any new business they want to undertake in Germany. It is also regrettable that the Draft Act does not assist UK-based private equity fund managers who are midway through a fundraising.

The Draft Act is subject to amendment as it progresses through the legislative process, and it is to be hoped that changes will be made to help ensure a smooth transition for market participants in the case of a Hard Brexit.

* * *

Please do not hesitate to contact us with any questions.

**LONDON**

Simon Witney
switney@debevoise.com

John Young
jyoung@debevoise.com

Philip Orange
porange@debevoise.com

Eric Olmesdahl
eolmesdahl@debevoise.com

Gabriel Cooper-Winnick
gcooperwinnick@debevoise.com

**FRANKFURT**

Patricia Volhard
pvolhard@debevoise.com

Jin-Hyuk Jang
jhjang@debevoise.com

Johanna Waber
jwaber@debevoise.com