

10.04.2019

Briefing note. Article 19 (Financial services) of Royal Decree-Law 5/2019 on contingency measures ahead of the withdrawal of the United Kingdom from the European Union without the agreement envisaged in Article 50 of the TEU

Introduction

The United Kingdom's departure from the European Union entails the automatic loss of the benefits of EU passporting rights. In consequence, if there is no transitional period such as that provided for in the Withdrawal Agreement, British financial institutions will have to adapt to the arrangements envisaged in the legislation applicable to third-country institutions in order to be able to continue providing financial services in Spain.

Article 19 of Royal Decree-Law 5/2019 of 1 March 2019 on contingency measures ahead of withdrawal by the United Kingdom of Great Britain and Northern Ireland from the European Union without the agreement envisaged in Article 50 of the EU Treaty (hereafter, the RDL) sets out measures for the financial sector, seeking to ensure legal certainty and to safeguard financial stability and the interests of financial services customers.

Specifically, Article 19 of the RDL establishes a framework to ensure the continuity of contracts for provision of financial services in Spain by institutions established in the United Kingdom.

First, the RDL states that pre-existing contracts will remain valid and with full effect after the United Kingdom's departure, even though British financial institutions will have lost their EU passporting rights (Article 19(1)). The RDL also sets out the cases where, without prejudice to the above, new authorisation will be required to manage pre-existing contracts and thus ensure their continuity (Article 19(2)).

Second, for the cases in which new authorisation is required to manage pre-existing contracts, the RDL provides that the authorisation initially granted by the competent British authority will provisionally remain in force for a period of nine months from the date of entry into force of the RDL. This is to allow institutions to terminate or transfer the contracts or to request authorisation in Spain to operate as a Spanish or third-country institution (Article 19(3)).

The RDL provides for no other contingency measure in this area, which means that British financial institutions will be unable to provide new financial services in Spain

without the corresponding authorisation. In other words, British financial institutions will have to cease all activity in Spain that does not stem from a pre-existing contract and refrain from entering into new financial services contracts in Spain from the date on which the United Kingdom effectively leaves the European Union without an agreement.

1. Scope of Article 19 of the RDL: existing contracts for provision of financial services in Spain under EU passporting rights

Article 19 of the RDL refers to financial services contracts that were entered into prior to the United Kingdom's departure from the European Union and that extend beyond the exit date, allowing financial institutions authorised or registered in the UK to provide services in Spain under EU passporting rights.

Thus, for example, it does not apply to contracts entered into between British financial institutions and natural or legal persons established in Spain for financial services that have not been provided in Spain by a branch in Spain or under the freedom to provide services.

2. Authorisation required once the United Kingdom has left the European Union

Under Article 19(2) and (3) of the RDL, British financial institutions will need authorisation not only to enter into new contracts but also to manage pre-existing ones, in order to:

- (i) renew pre-existing contracts;
- (ii) make amendments to pre-existing contracts that entail providing new services in Spain;
- (iii) make amendments that affect essential obligations of the parties; and
- (iv) in all cases in which activities relating to management of pre-existing contracts require authorisation.

In the above-mentioned circumstances, existing contracts may be managed in two ways: under the authorisation initially granted by the competent British authority, which may remain in force for a period of nine months pursuant to the conditions established in Article 19(3) of the RDL; or under new authorisation in Spain or in any other EU Member State for provision of financial services in Spain.

Although the authorisation initially granted by the competent British authority only covers management of pre-existing contracts, new authorisation would enable British financial institutions to enter into new financial services contracts from the date of that authorisation.

3. Existing contracts: management activities that require authorisation

Article 19(2) of the RDL draws a distinction between: i) the mere performance of pre-existing contractual obligations that are not tantamount to providing a financial service, and thus not affected by the loss of passporting rights; and ii) other circumstances in which certain developments related to the contract require authorisation (such as renewal of or substantial amendments to the contract and, in general, any activities relating to management of the contract that require authorisation).

Thus, for example, receiving deposits or other repayable funds from the public entails providing a financial service on an ongoing basis, until the funds are returned to the depositor. Accordingly, British financial institutions will need authorisation to be able to continue to provide that service. In consequence, once the United Kingdom has left the European Union, these contracts will have to be managed either under the authorisation initially granted by the competent British authority, pursuant to the conditions established in Article 19(3) of the RDL, or under new authorisation in Spain or in any other EU Member State for provision of financial services in Spain.

Another example, in the case of lending, is that the mere fact of a borrower making loan repayments under a pre-existing contract, following the United Kingdom's departure from the European Union, will not require new authorisation, provided that no management activities are performed other than receipt of such payments.

4. Transitional arrangements

The authorisation granted by the competent British authority will provisionally remain in force in all cases in which new authorisation is required to manage pre-existing contracts. It cannot in any circumstances be used to enter into new financial services contracts.

British financial institutions may continue to pursue activities relating to management of pre-existing contracts that do not require authorisation, with no need to avail themselves of the transitional arrangements provided for in Article 19(3) of the RDL.

There is no provision in the RDL for British financial institutions to give advance notice to the Banco de España of their intention to avail themselves of those transitional arrangements.

They shall, however, have a period of nine months from the date of entry into force of the RDL to adapt to the arrangements envisaged in the legislation applicable to third-country institutions or, alternatively, to relocate or terminate their contracts if they no longer wish to pursue their business in Spain.