

THE NETHERLANDS / BREXIT: EXEMPTION REGULATION EXTENDED TO INCLUDE UK INVESTMENT FIRMS

Introduction

The Dutch regulation which exempts certain non-EU based investment firms from the MiFID licensing requirement in the Netherlands has been extended so that it will include investment firms based in the United Kingdom in case of a no-deal Brexit. A formal decision from the Dutch Minister of Finance is still required to activate the exemption.

The exemption will allow UK based investment firms to provide investment services and enter into own account trading within the meaning of the EU Markets in Financial Instruments Directive ("MiFID") without a local Dutch licence. The exemption is temporary in nature and will apply until 1 January 2021.

Making use of the exemption will require the UK firm to submit evidence of the fact that it is licensed and supervised in the United Kingdom for the services that it wishes to provide in the Netherlands.

Background

The Dutch Financial Supervision Act currently has a third country regime which imposes licensing requirements on non-EU based firms which provide investment services to Dutch clients on a solicited basis (such as investment advice, portfolio management and trade execution), or trade for own account in the Netherlands. A special licence is available under the Financial Supervision Act for cross border activities. The licensing process is similar to that of a full MiFID licence in the EU.

An exemption from this licence requirement has been in place since 2007 for investment firms that are based in the United States, Switzerland or Australia. It is a frequently used exemption that allows for the active marketing of provision of MiFID services to per se professional investors and for own account trading with professional counterparties.

Making use of the exemption requires registration with the Netherlands Authority for the Financial Markets and the Dutch Central Bank. Firms so registered are exempt from licensing requirements and certain prudential and organisational requirements. They are not exempt from market conduct rules.

Key issues

- UK based investment firms will be exempt from Dutch licensing requirements in case of a no-deal Brexit.
- The exemption will apply until 1 January 2021.
- The exemption covers MiFID services and own account trading only.
- Market conduct rules will apply.
- A formal activation of the exemption by the Minister of Finance is required.

Firms based in the United Kingdom

The United Kingdom will now be added to the countries that are in scope of the exemption. The purpose of this addition is to provide for a fall back in case of a 'no-deal Brexit'. For, in case of a withdrawal from the European Union by the United Kingdom without an arrangement on financial services, UK based investment firms would not be able to continue the provision of services to Dutch clients without a local licence.

The exemption from the licence requirement as it has now been created will allow UK firms to continue the provision of services (and solicit new business). This puts an end to uncertainty on regulatory breaches in case of continuation of existing (pre-Brexit) business and will allow for active marketing going forward.

In order to make use of the exemption the firm should be incorporated in the United Kingdom. The exemption is not available to London branch offices of firms which are incorporated outside the United Kingdom.

Entry into force

The exemption is not available yet to UK firms. The Minister of Finance is still to decide on the exact day on which the exemption will become available. This is because the exemption is intended to serve as a fall back in case of a "no-deal Brexit". Only if there is no arrangement between the European Union and the United Kingdom will the exemption be activated by separate decision of the Minister of Finance. It is therefore uncertain at this time if the exemption will be activated or when it will be activated.

Temporary in nature

The exemption will exist for a maximum period of two years. It will automatically fall away on 1 January 2021 and can be revoked by the Minister of Finance before that time.

Registration process

Making use of the exemption will require UK based firms to register with the Netherlands Authority for the Financial Markets and the Dutch Central Bank by completing standard forms. There is no standard period for the processing of the forms. Formally the firm may make use of the exemption once the relevant forms have been filed. The registration does, however, require that the UK firm submits evidence of the fact that it is licensed and supervised in the United Kingdom for the services that it wishes to provide in the Netherlands. This can be done by way of a letter or other form of statement from the regulator or by way of reference to the on-line register (in case that provides for the required details).

The Netherlands Authority for the Financial Markets will accept conditional registrations which means that registration is open for UK firms but that these are conditional to the Minister of Finance activating the exemption. The registration fee will be EUR 4,400. The registration with the Dutch Central Bank is of an administrative nature only and is without costs.

Scope

The exemption covers the provision of investment services and own account trading within the meaning of MiFID only, and provided Dutch clients are all per se professional clients. It does not allow for the provision of other (e.g. banking) services. Such other services will need to be assessed individually.

Other exemptions

The exemption regulation as it stands today already exempts third country firms that exclusively deal on own account in the Netherlands (provided certain criteria are met). Firms who exclusively deal on own account in the Netherlands will therefore already have the benefit of that existing exemption. The revised exemption will benefit firms who deal on own account and provide investment services in the Netherlands.

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