



## SPAIN INTRODUCES POST-BREXIT RULES FOR UK FINANCIAL FIRMS

The Spanish government has published a new Royal Decree-Law aiming at protecting the interests of citizens and businesses who may be affected by the end of the transitional period on 31 December 2020 and the UK becoming a third country for all purposes as of 1 January 2021.

Among the measures included are some specifically related to the financial sector and financial entities that have been put in place in order to strengthen legal certainty and customer protection and to avoid any risk to financial stability.

### 1. INTRODUCTION

The United Kingdom ceased to be a member state of the European Union and became a third country on 31 January 2020, following ratification of the Withdrawal Agreement ending 47 years of membership.

However, the Withdrawal Agreement provided for a transitional period from its entry into force until 31 December 2020, during which EU law continued to apply in and to the UK, with certain exceptions. The main purpose of the Withdrawal Agreement was to provide a period for citizens and businesses to prepare for the new situation and a framework of stability for the negotiation of an agreement on the future relationship between the EU and the UK. Those negotiations concluded on 24 December 2020, following a compromise on a Trade and Cooperation Agreement, a Security of Information Agreement and an Agreement for cooperation in the peaceful uses of nuclear energy between the two parties.

In this context, the Spanish government has published Royal Decree-Law 38/2020, of 29 December ("**RDL 38/2020**"), aimed at protecting the interests of citizens and businesses who may be affected by the end of the transitional period on 1 December 2020 and the UK becoming a third country for all purposes as of 1 January 2021.

Among the measures included in RDL 38/2020 are some specifically related to the financial sector. They have been put in place in order to strengthen legal certainty and customer protection and to avoid any risk to financial stability.

This client briefing focuses on those measures specifically related to financial entities and the financial sector that are contained in article 13 of RDL 38/2020.

### Key issues

- Contracts for the provision of financial services in Spain entered into by UK-regulated entities before 1 January 2021 will, as a general rule, remain in force following that date.
- UK entities must obtain a new authorisation under the relevant third-country authorisation regime (a) to amend, renew and, in certain cases, service existing contracts or (b) to enter into new contracts.
- The existing authorisation of UK entities will remain in force until 30 June 2021 in order to enable an orderly termination of existing contracts or a transfer thereof to an entity duly authorised to provide financial services in Spain.
- In the case of UK run-off insurers, that period may be extended under certain conditions until 31 December 2022 in order to manage existing portfolios of insurance contracts in run-off.
- The relevant competent authorities may take additional measures in order to guarantee legal certainty and to safeguard the interests of the users of financial services that could be affected by the UK's exit from the EU.

## 2. FINANCIAL SERVICES

### 2.1 General contract-continuity principle

Article 13.1 of RDL 38/2020 sets out a general contract-continuity principle applicable to existing contracts concluded before 1 January 2021. The article indicates that contracts for the provision of banking, securities, insurance or other financial services in Spain entered into by UK-regulated entities (whether through a Spanish branch or on a purely cross-border basis) (the "**Affected Entities**") before 1 January 2021 (the "**Existing Contracts**") will, as a general rule, remain in force following that date.

It appears that Gibraltar-regulated entities are left out of the scope of the above-mentioned general contract-continuity principle (as well as the rest of the provisions of article 13 of RDL 38/2020), since no express references to Gibraltar-regulated entities is made – where in the former law, Royal Decree 5/2019 (as defined below), intended to deal with a "hard Brexit", there was an express mention of those Gibraltar-based entities –, and this is also the Bank of Spain's interpretation<sup>1</sup>.

### 2.2 New authorisation required to amend Existing Contracts or to enter into new ones

Article 13.2 of RDL 38/2020 provides that after 1 January 2021 Affected Entities will become subject to the relevant third-country authorisation regime (without prejudice to the contract-continuity principle set out in article 13.1) and that, accordingly, they must obtain a new authorisation under the relevant third-country authorisation regime:

- a) to renew Existing Contracts;
- b) to amend Existing Contracts in a way that entails the provision of new services in Spain or affects essential obligations of the parties;
- c) in those cases in which the activities linked to the servicing of the Existing Contracts require authorisation; or
- d) to enter into new contracts.

The article further clarifies that any activity relating to the servicing of Existing Contracts that does not fall under items a) to c) above will not require a new authorisation.

While it is clear from the foregoing that, generally, no new regulated services may be provided in Spain as of 1 January 2021, it is less straightforward to determine what activities linked to the servicing of Existing Contracts can be deemed activities that require authorisation. The position of the Bank of Spain in this respect seems to be quite strict, and it mentions as examples that maintaining existing deposits will constitute an activity requiring authorisation until the funds are returned to the client. In the case of loans, the Bank of Spain's understanding is that, where the only activity consists of receiving payments from the borrower, the Affected Entity is not carrying out an activity requiring authorisation<sup>2</sup>, which seems to suggest that servicing undrawn loans or revolving facilities require such authorisation.

Those financial services providers who have not done so already should also analyse what options are available for third-country authorisations for each activity. For example, (i) banks, investment firms and management companies could set up a third-country branch, apply for a cross-border authorisation or set up a subsidiary; while (ii) insurance companies can only set up a third-country branch or a subsidiary.

---

<sup>1</sup> See Informativa Note from the Bank of Spain of 3 January 2021 – Article 13 ("Continuity of Contracts"), Section 1 ("Financial Services"), of Royal Decree-Law 38/2020 adopting adaptation measures after the end of the transitional period provided for in the Withdrawal Agreement.

<sup>2</sup> *Ibid.*

## 2.3 Temporary validity of the existing authorisations until 30 June 2021

Article 13.3 of RDL 38/2020 provides that, notwithstanding the need to obtain a new authorisation in the events set out in section 2.2 above, the Affected Entity's existing authorisation will remain in force until 30 June 2021 (the "Transitional Period") in order to enable an orderly termination of Existing Contracts or a transfer thereof to an entity duly authorised to provide financial services in Spain.

As far as the provision of investment services is concerned, the Spanish Securities Market Commission (the "CNMV") has confirmed that to clients must be covered by an Investors Compensation Scheme in order to benefit from this Transitional Period. If the Affected Entities do not provide such coverage, they must accede to the Spanish Investors Compensation Scheme (*Fondo de Garantía de Inversiones*). Otherwise, the CNMV will require the immediate closing of positions and termination.

Contracts entered into after 1 January 2021 are out of the scope of this Transitional Period and, therefore, Affected Entities will not be allowed to enter into new contracts thereafter, if and until a new third-country authorisation is granted to them.

## 2.4 Special temporary validity of the existing authorisation regime for run-off insurers

Article 13.3 of RDL 38/2020 adds a special rule applicable to Affected Entities managing Spanish run-off portfolios ("**Run-off Insurers**"). Specifically, it provides that the authorisation granted by the competent UK authority will retain its validity until 31 December 2022 (so not only until 30 June 2021, as indicated in section 2.3 above) for the sole purpose of allowing Run-off Insurers to manage ("*gestionar*")<sup>3</sup> "those existing portfolios of insurance contracts in the process of ending their activities", provided that such Run-off Insurers develop a contingency plan, which must be expressly authorised by the Spanish insurance regulator, the Directorate General for Insurance and Pension Funds (the "DGSFP").

Both the content of that contingency plan and the overall process for the DGSFP to authorise it remain unclear. Doubts also arise as to what would happen with authorisations of Run-off Insurers managing insurance contracts with obligations (e.g. payments under the contracts to be made by the Run-off Insurers) that extend after 31 December 2022 and have been granted with the special temporary extension of their authorisations by the DGSFP. Absent a clear position from the DGSFP, it is arguable that in the latter cases the Run-off Insurers would need to be authorised under the relevant third-country authorisation regime by 31 December 2022 in order to keep servicing their Spanish run-off businesses following that date.

## 2.5 Supervisory measures may be adopted by the competent authorities

Article 13.4 of RDL 38/2020 provides that the relevant competent authorities (Bank of Spain, CNMV and DGSFP) may, in the exercise of their supervisory duties, require Affected Entities to provide any required documentation or information. A failure to provide such documentation or information in a timely manner may result in a loss of the temporary validity of the existing authorisation, which, following notice to the Affected Entity, will trigger the possibility of imposing sanctions on the Affected Entity for breach of authorising requirements.

In addition, article 13.5 of RDL 38/2020 provides that the relevant competent authorities may, within the remit of their respective powers, take additional measures in order to guarantee legal certainty and to safeguard the interests of the users of financial services that could be affected by UK's exit from the EU. Therefore, it will also be vital to follow up on how the Bank of Spain, the CNMV and the DGSFP interpret article 13.2 of RDL 38/2020.

## 3. SECONDARY IMPLEMENTING REGULATIONS

---

<sup>3</sup> It is arguable that by "manage" ("*gestionar*"), the DGSFP is referring to those actions that an insurer must take to ensure fulfilment of the contractual obligations in the Existing Contracts, including the handling of claims, payments and surrenders. See Informative Note from the DGSFP of 30 December 2020.

RDL 38/2020 authorises the Spanish Government to enact as many secondary regulations as it deems necessary for the implementation and execution of the provisions of RDL 38/2020.

#### **4. REPEAL OF ROYAL DECREE-LAW 5/2019, OF 1 MARCH**

Royal Decree-Law 5/2019, of 1 March, adopting contingency measures in case of withdrawal of the UK from the EU without agreement under Article 50 of the Treaty on European Union ("**RDL 5/2019**") never entered into force because the Withdrawal Agreement was ultimately concluded. RDL 38/2020 clarifies any remaining doubts, indicating that RDL 5/2019 is expressly repealed.

#### **5. ENTRY INTO FORCE**

RDL 38/2020 entered into force on 1 January 2021.

## CONTACTS



**Jaime Velázquez**  
Partner

**T** +34 91 590 9444  
**E** jaime.velazquez  
@cliffordchance.com



**José Manuel Cuenca**  
Partner

**T** +34 91 590 7535  
**E** josemanuel.cuenca  
@cliffordchance.com



**María Luisa Alonso**  
Counsel

**T** +34 91 590 7541  
**E** marialuisa.alonso  
@cliffordchance.com



**Natalia López**  
Counsel

**T** +34 91 590 9410  
**E** natalia.lopez  
@cliffordchance.com



**Miguel Barredo**  
Lawyer

**T** +34 91 590 7593  
**E** miguel.barredo  
@cliffordchance.com



**Juan Valcárcel**  
Lawyer

**T** +34 91 590 9421  
**E** juan.valcarcel  
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, 10 Upper Bank Street,  
London, E14 5JJ

© Clifford Chance 2021

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street,  
London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to [nomorecontact@cliffordchance.com](mailto:nomorecontact@cliffordchance.com) or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.