

A photograph of the Tower Bridge in London, viewed from the River Thames. The bridge is illuminated with blue lights, and the sun is setting behind it, creating a warm glow and reflecting on the water. Several small boats are visible on the river in the foreground.

***“Financial BREXIT:
To be, or not to be ... licensed.”***

Financial Law

BREXIT



**HOFFMANN
LIEBS
FRITSCH
& PARTNER**

RECHTSANWÄLTE mbB

“Financial BREXIT: To be, or not to be ... licensed.”

What British banks and financial services providers should consider with respect to their future financial transactions in Germany

A. Starting position

BREXIT is certain. Great Britain's (UK) membership of the EU will end automatically two years after it declares its withdrawal unless the EU and UK agree otherwise in the course of withdrawal negotiations. UK is therefore expected to leave the EU in spring 2019. The legal consequences of withdrawal are not yet known in detail. The British government is, however, seeking a so-called hard BREXIT i. e. leaving the EU and the EU single market. This will inevitably mean leaving the EEA as well.

B. Consequences for British banks and financial services providers with business operations in Germany

In the case of a hard BREXIT, the consequences are likely to be significant for all British banks and financial services providers conducting banking transactions that require a licence or who provide financial services in Germany with their own branch office or by way of cross-border services on the basis of the so-called **European branch or services passport** (e.g. deposit-taking, lending, participation in securities issues and related services, trading for own account or for account of customers, portfolio management and advice, factoring, financial leasing, payment services etc.). **The consequence of a hard BREXIT would be the loss of the European branch or services passport. This raises the question about the supervisory basis on which British banks and financial services providers (including other international financial institutions that carry out their European business through UK) can conduct their financial transactions in Germany as of spring 2019.**

► What has applied so far to the conduct of financial transactions that require a licence in Germany?

Principle: Conducting financial transactions in Germany or from abroad to Germany is subject to prior authorisation from the ECB/BaFin [Federal Financial Supervisory Authority] (Section 32 KWG [German Banking Act]).

EEA exception: European branch or services passport for EEA Member States (Section 53b KWG)

Banks and financial services providers with a registered office in another EEA state (this currently includes UK) may conduct financial transactions that require a licence in Germany through a branch office or by way of cross-border services without additional authorisation from the ECB/BaFin, if they are licensed by the financial supervisory authority in their home Member State (in UK: the PRA/FCA). **British banks and financial services providers operating in Germany have hitherto primarily made use of this exception.**

Third countries: The situation is completely different for banks and financial services providers with registered office in so-called **third countries** (= non-EU/non-EEA countries, e. g. Switzerland). They can conduct financial transactions that require a licence in Germany only with a **licence from the ECB/BaFin** and they require a **physical presence in Germany** to do so.

► What will apply after BREXIT?

It is not yet certain what supervisory regulations will apply after BREXIT. The following scenarios may be considered, but the “worst-case scenario” outlined below is so far the most likely. The same applies to the business activities of British banks and financial services providers in other EU Member States after BREXIT.

1. Worst-case scenario for British banks and financial services providers:

UK leaves the EU and the EEA without bilateral agreements for the financial sector

Consequence: UK will become a third country for supervisory purposes. British banks and financial services providers with business activities in or to Germany will require a **licence from the ECB/BaFin and a physical presence in Germany**. This is a very realistic scenario in the case of a hard BREXIT.

Important: Anyone conducting financial transactions that require a licence in Germany after BREXIT, also from abroad, without having an admissible status for supervisory purposes, is liable to prosecution under German law and also risks the closure and winding up of its business operations by the financial supervisory authority!

2. Best-case scenarios for British banks and financial services providers:

(a) UK leaves the EU but remains a member of the EEA

Conceivable: The European branch or services passport is in principle retained, furthermore no additional authorisation from the ECB/BaFin is required.

But: The line taken by the British government to date (hard BREXIT) excludes this scenario because EEA members must grant each other freedom of movement for workers and freedom of establishment (EEA Agreement).

(b) UK leaves the EU and the EEA. Bilateral agreement EU/UK in the financial sector (possibly corresponding application of the provisions of the European branch or services passport)

Conceivable: UK will become a third country for supervisory purposes but no additional authorisation from the ECB/BaFin required because of a possible special arrangement (possibly commensurate with the European branch or services passport).

But: The fact that the European branch or services passport will only apply if the British bank or British financial services provider is supervised by the PRA/FCA **in accordance with EU directives** excludes this. After BREXIT it is difficult to imagine that the PRA/FCA will apply European supervisory law to British financial institutions. The EU will not accept deviations from European supervisory law because of the risks of regulatory arbitrage and distortions of competition that can be expected.

C. Act now!

It is currently probable that UK will leave the EU **and** the EEA in spring 2019. Special bilateral agreements for the financial sector are not currently foreseeable. British banks and financial services providers that have hitherto operated in Germany on the basis of the European branch or services passport will, therefore, have to prepare for the fact that they may require a **licence from the ECB/BaFin and** additionally a **physical presence in Germany** as of spring 2019 **in order to avoid penalties and regulatory sanctions.**

► What is to be done: await the outcome of withdrawal negotiations or act immediately?

If you, as a British bank or British financial services provider, wish to ensure your “Business Model Germany” after BREXIT, you should **act immediately** given the narrow two-year timeframe. Only in this way can you secure your business model for the future. You will remain fully operational commercially and independent of politics and the outcome of negotiations in the withdrawal process. And you may wish to assure your clients already now, that you are well prepared for the worst-case scenario. As of now, you still have:

- the unlimited freedom to organise your future “Business Model Germany” as you wish for supervisory purposes (e. g. own licence, licence exemptions, acquisition of a licence holder, cooperation etc.).
- the choice of the best targets, the most interesting distribution partners, the most qualified managers/employees, the most attractive real estate etc.
- short decision-making procedures with the financial supervisory authority and the possibility of rapid processing of enquiries and licence applications (in the latter case, even without BREXIT, as a rule a period of at least 1 year must be planned depending on the transaction).
- the possibility of structuring your current contractual documentation through contractual provisions (BREXIT clauses) to ensure that a smooth transition is possible at a later date.

Start your BREXIT project immediately. The faster you act, the sooner you can continue to focus on your financial transactions in Germany irrespective of the outcome of withdrawal negotiations. If you act only at the end of the withdrawal negotiations, you will have lost valuable time. If it is certain that UK is leaving the EU **and** the EEA without a bilateral agreement for the financial sector and if a licence from the ECB/BaFin and a physical presence in Germany is required, you will have to implement all the above points under time pressure, in competition with rival companies and at inflated prices with whatever works fastest or “whatever is left over”. It is already evident that the financial supervisory authority at that time is no longer likely to be in a position in terms of capacity, given the many enquiries/applications for licences, to process them fast enough to ensure the continued existence of all cross-border business models on the market.

D. Our range of consultancy services

Hoffmann Liebs Fritsch & Partner Rechtsanwälte mbB with over 40 attorneys-at-law is based in Düsseldorf. We advise banks and financial services providers, small and medium-sized companies and international groups. We have longstanding and proven expertise in financial law and financial supervisory law. Our consultancy services include expertise on questions of licensing, questions of cross-border services and questions of financial sales law.

We would be pleased to examine for you the impact of BREXIT on your business model for supervisory purposes, to prepare an action plan with you and advise and support you in implementing your BREXIT project. This will ensure that your business model in Germany can be continued in a promising way and in conformity with supervisory law even after BREXIT. We will communicate with the financial supervisory authority on your behalf and, apart from advising you on financial law and financial supervisory law, we will provide you, as a law firm offering full service in all other project-related areas of law as well (company law, labour law, IT law etc.), with legal services “from one source”. As a medium-sized law firm, we work at all times with cost awareness for our clients. Flat hierarchies and a close-knit internal network allow us to make our clients, in particular small and medium-sized financial services providers as well who cannot or do not wish to afford large international law firms, attractively priced offers to implement their BREXIT projects. Our international network of ‘Best Friends’ with British law firms also enables us at all times to have project-related British legal topics addressed and assessed by British attorneys.

**We will make your BREXIT project our project.
Please contact us.**



About HLFP

The range of our consultancy services covers all legal areas of relevance to the practice of enterprises and public authorities:

- Financial Law and Financial Supervisory Law
- Labour Law
- Energy Law
- Company Law, M&A and Capital Market Law
- Industrial Property Rights and Competition Law
- Business, Commercial and Distribution Law
- Real Estate, Building and Public Procurement Law
- Insolvency Law
- IT Law / Data Protection
- Public Commercial Law
- Product Compliance / Product Liability
- Conduct of Litigation
- Special fields of Criminal Law
- Tax Law
- Environmental Law

Dates & facts

Established 1974

Lawyers: >40

International network

We work within a close network of 'Best Friends' with renowned law firms throughout Europe and in all key international business locations. We place particular emphasis on contact and cooperation with specialists in the legal areas covered by us. This means we can provide our clients with first-class, specialist advice for cross-border assignments and international projects throughout the world.

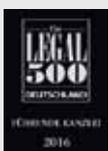


"Frequently recommended law office in D'dorf that is known for its full-service package for medium-sized companies – not just in the Rhineland area."

"Top-class. Legal advice at comparatively economical cost."

JUVE Handbuch Wirtschaftskanzleien

[Handbook of Commercial Law Firms] 2015/2016



"Hoffmann Liebs Fritsch & Partner Rechtsanwälte mbB has a 'very good reputation' and as a full-service law firm advises medium-sized companies, family businesses, cities and international corporations, frequently those in the energy sector. The 'fair remuneration' and 'the experience of the team' are particularly appreciated."

Legal 500 Deutschland 2016

Your contacts



Marcel Kirchhartz

P +49 211 51882-110

M +49 173 5401577

marcel.kirchhartz@hlfp.de



Dr. Roland Erne

P +49 211 51882-110

M +49 172 2911081

roland.erne@hlfp.de



**HOFFMANN
LIEBS
FRITSCH
& PARTNER**

RECHTSANWÄLTE mbB

**Hoffmann Liebs Fritsch & Partner
Rechtsanwälte mbB**

Kaiserswerther Straße 119
40474 Düsseldorf, Germany

P +49 211 51882-0

F +49 211 51882-100

duesseldorf@hlfp.de

www.hlfp.de

