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**Briefing note.** Article 13 (“Continuity of contracts”), Section 1 (“Financial services”), of Royal Decree-Law 38/2020 adopting measures for adaptation after the expiry of the transition period provided for in the Agreement on the Withdrawal of the United Kingdom from the European Union.

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## 1. Introduction

The expiry on 31 December 2020 of the transition period provided for in the Agreement on the Withdrawal of the United Kingdom from the EU entails for British financial institutions the automatic loss of the benefits of EU passporting rights, as from 1 January 2021. In order to continue providing financial services in Spain, these institutions must adapt to the arrangements envisaged in the legislation applicable to the institutions of third countries.

Article 13 of Royal Decree-Law 38/2020 of 29 December 2020 adopting measures for adaptation after the expiry of the transition period provided for in the Agreement on the Withdrawal of the United Kingdom from the European Union<sup>1</sup> (hereinafter “RDL”) includes provisions for the financial sector that seek to strengthen legal certainty, protect customers and avoid any risk to financial stability.

Specifically, Article 13 of the RDL establishes a framework to guarantee the continuity of contracts for financial services provided in Spain by institutions domiciled in the United Kingdom. These temporary arrangements are designed to avoid disruption to the provision of services as a result of adaptation to the arrangements for third countries and, also, to facilitate the termination of contracts or their assignment to institutions duly authorised to provide financial services in Spain.

First, the RDL states that, despite the loss of EU passporting rights for British financial institutions, pre-existing contracts will remain in force and fully effective in the terms laid down by the RDL (Article 13(1) of the RDL).

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<sup>1</sup> Royal Decree-Law 38/2020 of 29 December 2020 adopting measures for adaptation to the third country status of the United Kingdom of Great Britain and Northern Ireland after the expiry of the transition period provided for in the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 31 January 2020.

Second, the RDL sets out those cases in which British financial institutions are required to obtain fresh authorisation in order to continue providing financial services in Spain from 1 January 2021 (Article 13(2) of the RDL).

Third, for activities subject to authorisation, the RDL provides that the authorisation granted by the competent British authority shall provisionally remain in force until 30 June 2021, so that institutions may carry out activities necessary to terminate pre-existing contracts or assign them to institutions duly authorised to provide financial services in Spain (Article 13(3) of the RDL).

The RDL does not envisage any other contingency measures in this area, so that British institutions must, as from 1 January 2021, cease all activity in Spain that requires authorisation, except that necessary for the orderly termination or assignment of contracts entered into before that date.

## **2. Scope of application of Article 13 of the RDL: existing contracts for the provision of financial services in Spain under EU passporting rights**

Article 13 of the RDL refers to financial services contracts entered into before 1 January 2021 that have a duration and effects extending beyond that date, under which an institution domiciled in the United Kingdom and authorised or registered by the competent British authority provides services in Spain using EU passporting rights.

Thus, for example, this provision does not apply to financial services contracts entered into by British institutions with natural or legal persons established in Spain if the services have not been provided in Spain, through a branch located in Spain or under the freedom to provide services.

Article 13 of the RDL does not apply to institutions domiciled in Gibraltar that are authorised by or registered with the competent Gibraltar authority.

## **3. Need for authorisation after the expiry of the transition period provided for in the withdrawal agreement**

Under Article 13(2) of the RDL, British institutions require fresh authorisation from 1 January 2021 in the following cases:

- a) to renew pre-existing contracts;
- b) to make amendments to such contracts that involve the provision of new services in Spain or that affect the parties' essential obligations;
- c) all cases in which activities linked to the management of pre-existing contracts require authorisation;
- d) to enter into new contracts.

Article 13(2) of the RDL distinguishes the mere performance of pre-existing contractual obligations, which does not amount to the provision of a financial service and is not affected by the loss of EU passporting rights, from other cases in which certain contractual events require that the contract continues to be covered by an authorisation. Such events include the renewal of a contract, substantial amendments to a contract and, in general, all management activities that require authorisation.

Thus, for example, the acceptance of deposits or other repayable funds from the public involves the provision of a financial service on an ongoing basis until the funds have been repaid to the depositor, so that British institutions must have authorisation to continue to provide this service. Accordingly, as from 1 January 2021, these contracts will have to be managed either under a fresh authorisation in Spain or in another EU Member State that covers the provision of this type of services in Spain, or else under the authorisation originally granted by the competent British authority, in accordance with the terms provided in Article 13(3) of the RDL.

Another example is the payment by a borrower of amounts due and payable under a pre-existing loan contract, following the United Kingdom's withdrawal from the European Union. Such payments will not require fresh authorisation, provided that no management activities are performed other than the collection of amounts due and payable.

#### **4. Temporary arrangements for the termination or assignment of pre-existing contracts**

Under Article 13(3) of the RDL, contracts entered into before 1 January 2021 will continue to be covered by the authorisation granted by the competent British authority until 30 June 2021 as regards all such activities as may be necessary for their orderly termination or assignment.

These temporary arrangements are established for activities linked to pre-existing contracts that require authorisation. Thus, until 30 June 2021, British institutions may manage contracts entered into before 1 January 2021 for the purposes indicated in the previous paragraph, but under no circumstances will these arrangements cover new activities.

Activities linked to the management of contracts for the provision of financial services that do not require authorisation may continue to be carried out without the need to abide by the temporary arrangements.

The RDL does not require institutions to give any advance notice to the Banco de España of their intention to carry out activities under the temporary arrangements provided for in Article 13(3).