



Câmara de Comércio e Indústria
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BREXIT AND THE FINANCIAL SECTOR: LEGAL ASPECTS

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SUMMARY OF THE LEGAL REGIME FOR BREXIT

WITHDRAWAL TREATY

https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf

Bilateral UE27-UK: **585 pages**.
Ratification by both parties, 1st UK Parliament, 2nd EU27 Parliament + EU27 Council. Regulates:

- i. Citizens' rights acquired by nationals of both parties
- ii. Transition regime: 29.3.2019-31.12.2020
- iii. Financial provisions.

Commission Communication 13.11.2018

https://ec.europa.eu/info/sites/info/files/brexit_file_s/info_site/communication-preparing-withdrawal-brexit-preparedness-13-11-2018.pdf (26 pages)

SERIES OF EU COUNCIL AND EU PARLIAMENT DECISIONS ADAPTING EU LAW

- i. EU Treaty provisions UK affecting the UK
- ii. Adaptations to Secondary EU legislation



UK Parliament: *EU (Withdrawal) Act 2018*

http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf

- i. Abrogates the *European Communities Act 1972*
- ii. Converts the current EU *acquis* into British Law
- iii. Delegates in the UK Government the adoption of laws and regulations adapting technically the EU *acquis* to the British legal system
- iv. Delegates in the parliaments of Scotland, Wales and Northern Ireland the technical adaptations of the *acquis* within their devolved areas of competence.
- v. *Implementation Bills* implementing the above.

CHRONOLOGY: THE PATH TOWARDS BREXIT

July 2018: UK Government White Book: 98 pages. Option for “*Soft-Brexit*”: follows ± the Canada/EU Association Treaty; continuity of the EU *acquis* to be adapted during a transition period ending on 31.12.2020.

Last EU Summit on Brexit: 13.12.2018.

January 2019: Vote in the UK Parliament

February 2019: Vote in the EU Parliament (at least 20 MSs representing 65% of EU population)

March 2019: Final vote by the EU27 Council.

29.3.2019: entry into currency of the Withdrawal Treaty; Transition period starts: EU *acquis* still applies, subject to adaptations.

31.12.2020: End of Transition period



IMPACT OF BREXIT IN FINANCIAL SERVICES (1)

POST-2020 BANKING

- **CRD₄** shall not apply in the UK. Until then the EU legal regime for banking is retained. After 2020 the UK has opted for subsidiarization (affiliates) over *branching*; possible US model for “*bank holding companies*”.
- By end 2019 BoE requires **re-authorization** of banks, based on CRD₄ and “*international standards*”.
- Capital assets and other **bailinable assets**: Post-2020 enforceability risks for AT₁, AT₂ & SNP when issued by EU banks under UK law & jurisdiction.

UK FINANCIAL INFRASTRUCTURES

- Until 2021 UK financial infrastructures may continue to operate on €-denominated assets subject to **EMIR**.
- Post-2020 EMIR amended: UK infrastructures critical to the € to move to the EU & subject to ESMA.
- Payments.- Post-2020 **PSD₂** passporting rights end in EU-related services; **equivalence decisions** will apply.

POST-2020 CAPITAL MARKETS

- **Investment Funds**:
 - UCITs Directives cease to apply.
 - UK-located managers of EU funds will need to establish themselves in the EU.
- **Prospectuses**: Post 2020 EU-wide *passporting rights* for bonds and prospectuses shall end.
- **Mergers and State Aid**.- When affecting EU markets: subject to EU Competition Law discipline and ECJ jurisdiction.
- **Market Abuse/ Short-selling**.- ESMA will retain its powers whenever EU markets are affected.
- **Investment Services**.- MiFiD₂/MiFir/ AIFMD: post-2020 shall cease to apply; UK-EU *cross-border* services shall be subject to **equivalence decisions**.
- **Rating Agencies**.- ESMA shall retain supervisory and disciplinary powers for ratings on EU assets and companies.

IMPACT OF BREXIT IN FINANCIAL SERVICES (2)

LEGAL ISSUES

- **Jurisdictional changes.**- Post-2020 the EU-wide ECJ jurisdiction ceases (except for few situations defined in the Withdrawal Treaty) and British Courts become competent for UK-related matters. This entails changes in procedure and interpretation criteria. ECJ jurisprudence might be changed.
- **Conflicts of Applicable Law.**- Post-2020 the *Rome-I Regulation* ceases to apply in the UK; conflicts of Law with British counterparties to be decided by British Courts.
- **Cross-border Enforcement of Judicial Decisions.** Post-2020 the *Brussels-I Regulation* ceases to apply in the UK: mutual cross-border enforcement of civil and commercial matters ceases to apply; *exequatur* procedures are back.
- **Contract continuity.**- Brexit entails a change of circumstances with impact on conditions and results, unpredictable before 2016. Long-term contracts may become uneconomic, even frustrated.
- **Law applicable to Securities Held by an Intermediary.** UK will probably sign the 2006 *Hague Securities Convention* and apply the *lex contractus*, to favour UK markets (in particular, the *shadow banking* business). EU Law applies the *lex sitae* of the securities' custodian, in preference to the *lex contractus*.
- **Data Protection, Consumer Rights.**- Post-2020 the *EU Data Protection Regulation*, and the Consumer Protection EU *acquis* ceases to apply in the UK; UK Law applies.
- **Legal, Audit, Asset Management, Credit Rating, Investment, Insurance & Reinsurance, and Occupational Retirement services.**- Post-2020 respective EU Directives granting EU-establishment, professional titles mutual recognition & passporting rights cease to apply to professionals & firms. UK Law applies.

SOME POSITIVE ASPECTS OF BREXIT FOR THE EURO AREA (1)



BETTER MONETARY POLICY TRANSMISSION MECHANISM

Interference of City markets in the euro-area transmission mechanism:

- City panels fixing interest rates (*Libor/Euribor*)
- Impact on € of *Repos, Forex, and Swap* markets
- *Futures, Options & Swaps* over ECB' MRO rates
- Re-use of securities by intermediaries, and *shadow banking* impact on the €.
- Policy of risks collateralisation by LSE-LCH.
- Growing use of *algorithmic trading* (LSE + 50%)

Other City interferences relevant in the financial crisis:

- Pro-cyclical *short-selling* and *credit ratings* (e.g. Greece, Cyprus, Italy) since 2014 both now supervised by ESMA.
- Pro-risk remuneration of bankers (ECJ UK Case)

SOME POSITIVE ASPECTS OF BREXIT FOR THE EURO AREA (and 2)

LIMITS TO THE INCREASINGLY DOMINANT POSITION OF THE LONDON STOCK EXCHANGE GROUP (LSE)

- **2003** LSE acquisition of the **Paris** derivatives market: *Caisse Centrale de Compensation*, now *LCH Clearnet*.
- **2007** LSE acquisition of the de **Italian** Stock Exchange (*Borsa Italiana*, Milan), following the merger of the **11** regional stock exchanges of Italy.
- **2007** LSE acquisition of the **Italian** post-trading companies (*Cassa Compensazione* and *Monti Titoli*).
- **2000, 2005 y 2012**: Three LSE unsuccessful tries to acquire the conglomerate *Deutsche Börse-Eurex-Clearstream*, finally rejected by the European Commission on grounds of market concentration.

AGREEMENT FOR A POST-BREXIT "EQUIVALENCE REGIME" vs. "MUTUAL RECOGNITION"

- **Mutual Recognition** is the general **WTO** regime for cross-border services. The *Bank of England* asked for a **Mutual Recognition EU-UK** post-Brexit arrangement, to avoid being pasive "rule-taker" vis-a-vis the EU.
- The EU has succeeded to agree on a post-Brexit **Equivalence regime**: The EU examines the regulation and supervision of UK financial companies and determines whether they are "equivalent" to EU regimes.
- **National treatment**: Once an *Equivalence Decision* is adopted by the EU, UK financial companies may establish themselves in the EU and EU Law applies. UK companies are thus "**rule-takers**" for EU business.
- **Substantiality principle**: The EU requires real presence of non-EU financial companies active in the EU. **No**: instrumental affiliates, externalisation of key functions. **Yes**: real capitalisation, local governance.
- **Number of Equivalence decisions** so far adopted by the EU: 212, affecting 32 non-EU countries.

THANKS FOR YOUR ATTENTION!

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