McCann FitzGerald

Briefing
The Brexit Deal:
Impact on Financial Services

INSTITUTE OF DIRECTORS IN IRELAND

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The 11th hour trade deal announced by the EU and the UK on Christmas Eve looks quite similar to a no-deal in so far as financial services are concerned. In particular, EU/UK firms have lost the right to passport, meaning that they can no longer provide financial services in each other's territories on the basis of their home country authorisation. Moreover, while the EU/UK have agreed to discuss how to move forward with equivalence determinations, it appears that these determinations will continue to be made on an exclusively unilateral basis, at least for the immediate future.

What is the Brexit Trade Deal?

The trade deal concluded between the EU and the UK (each a "**Party**" and, collectively the "**Parties**") is set out in the EU-UK Trade and Cooperation Agreement (the "**TCA**"), which comprises seven parts together with a number of annexes and protocols (here). The TCA has applied since 1 January 2021 on a provisional basis, pending the completion of the procedures necessary for its formal entry into force.

The TCA is supplemented by two further agreements, namely an Agreement on Security Procedures for Exchanging and Protecting Classified Information, which supplements the TCA, and a separate Nuclear Cooperation Agreement.

The European Commission (the "**Commission**") has published Q&A on the TCA (the "**Q&A**"), together with a number of related documents here.

What is in the TCA?

The TCA essentially comprises a free trade agreement covering a number of areas including: trade in goods and in services, digital trade, intellectual property, public procurement, aviation and road transport, energy, fisheries, and social security coordination. The TCA also deals with law enforcement and judicial cooperation in criminal matters, thematic cooperation and participation in EU programmes and is underpinned by provisions ensuring a level playing field and respect for fundamental rights.

Does the TCA deal with financial services?

Yes, the TCA contains a number of provisions which are relevant for financial services. In particular, Title II of Part Two of the TCA contains a number of general provisions governing investment and services, including financial services, as well as a specific section on financial services (at pages 121 – 125).

In addition the TCA contains provisions regarding restructuring subsidies for banks, credit institutions and insurance companies, provisions addressing anti-money laundering and counter terrorist financing and provisions on capital movements, payments, transfers and temporary safeguard measures.

The Parties have also agreed a Joint Declaration on Financial Services Regulatory Cooperation (the "**Joint Declaration**").

What is included in the specific provisions on financial services?

The specific provisions on financial services include:

- a significant prudential carve-out which states that nothing in the TCA prevents a Party from adopting or maintaining measures for prudential reasons;
- a provision facilitating the protection of the confidentiality of the affairs and accounts of individual consumers and any confidential or proprietary information in the possession of public entities;
- a commitment by the Parties to use their best endeavours to ensure that they implement and apply internationally agreed standards in the financial services sector for regulation and supervision, anti-money laundering and counter terrorist financing and for combating tax evasion and avoidance;
- a requirement for each Party to ensure that, where the Party requires membership of, participation in or access to a self-regulatory organisation to supply financial services in its territory, that organisation complies with requirements regarding national treatment and most-favoured nation treatment;
- where UK /EU financial service suppliers are established in the territory of the other Party, that Party must:
    - permit such suppliers to supply any new financial service that it would permit its own financial service suppliers to supply in accordance with its law, provided that the introduction of the new financial service does not require the adoption of a new law or the amendment of an existing law (this does not apply to branches);
    - grant such suppliers access to payment and clearing systems operated by public entities and to official funding and refinancing facilities available in the ordinary course of business.

What does the Joint Declaration say?

The Joint Declaration provides as follows:

> *"1. The Union and United Kingdom agree to establish structured regulatory cooperation on financial services, with the aim of establishing a durable and stable relationship between autonomous jurisdictions. Based on a shared commitment to preserve financial stability, market integrity, and the protection of investors and consumers, these arrangements will allow for:*
>
> > *- bilateral exchanges of views and analysis relating to regulatory initiatives and other issues of interest;*
> >
> > *- transparency and appropriate dialogue in the process of adoption, suspension and withdrawal of equivalence decisions; and*
> >
> > *- enhanced cooperation and coordination including in international bodies as appropriate.*
>
> *2. Both Parties will, by March 2021, agree a Memorandum of Understanding establishing the framework for this cooperation. The Parties will discuss, inter alia, how to move forward on both sides with equivalence determinations between the Union and United Kingdom, without prejudice to the unilateral and autonomous decision-making process of each side."*

Will UK/EU financial service providers be able to continue to passport their services into the territories of the other Party under the TCA?

No. As is clear from the above, since 1 January 2021, a UK/EU financial service provider no longer enjoys the right to set up establishments or provide cross border services into the other Party's territory on the basis of an authorisation obtained under its domestic law.

Broadly, under the TCA, UK/EU investors and firms will be able to set up establishments and provide services into the territory of the other Party subject to compliance with local (including EU) authorisation/licensing requirements. Moreover, the TCA provides that once authorised/licensed (where applicable), such firms and investors will benefit from national treatment – meaning no less favourable treatment than the most favourable treatment accorded by each Party to its own investors and firms.

Does the TCA deal with the right to enter and stay in the UK/EU for business purposes and/or the mutual recognition of professional qualifications?

Title II of the TCA contains provisions dealing with each of these issues. However, in so far as Ireland is concerned, UK nationals will enjoy additional rights under the arrangements for the so-called Common Travel Area (the "**CTA**"), which pre-dates

Irish and UK membership of the EU and is not dependent on it. In May 2019, the UK and Irish Governments signed a Memorandum of Understanding (the "**MoU**") reaffirming their commitment to maintaining the CTA in all circumstances.

Among other things, the CTA allows Irish and British citizens to move freely and reside in either jurisdiction and enjoy associated rights and entitlements including access to employment, healthcare, education, social benefits, and the right to vote in certain elections.

Regarding professional qualifications, the respective governments each commit in the MoU "*to ensuring that within their respective jurisdictions, comprehensive measures continue to be in place to allow for the recognition of such qualifications, covering all relevant professions, in accordance with their national laws.*"

What does the TCA say about data protection?

Under the TCA, for a period up to 1 June 2021, personal data can temporarily continue to be freely transferred from the EEA to UK-based data importers, without any requirement to implement additional safeguards that would otherwise be mandated by the GDPR. It is hoped, though not guaranteed, that within the specified period, the Commission will issue an adequacy decision (or decisions) in respect of the UK (see our related briefing here).

Does Brexit mean that a UK financial service provider that wants to provide financial services in an EU Member State will need to be authorised/licensed in that Member State?

Not necessarily. An individual Member State may permit the provision of certain financial services without authorisation/licensing requirements. For example, Ireland does not require a person to be authorised in Ireland in order to carry on commercial lending. Nor does a third country investment firm require authorisation under Irish law to provide investment services to eligible counterparties and per se professional investors subject to the fulfilment of certain conditions. In the case of insurance, Ireland has established a Temporary Run-Off Regime (TRR) for UK and Gibraltar registered insurers and insurance intermediaries which allows firms to run off their books of business for a time-limited period of 15 years.

In addition, most EU laws on financial regulation adopted in recent years allow third country firms to provide financial services into the EEA on the basis of an EU Commission assessment that the relevant third country's domestic regulatory framework achieves outcomes "equivalent" to those of the EU's framework. However, equivalence does not cover many core banking and financial activities, like accepting deposits, providing investment services to retail (non-professional) investors or payment services. Moreover, equivalence decisions can be withdrawn at short notice and may be affected by political considerations. In particular, one of the EU's priorities in the face of Brexit is to on-shore at least some of the financial services previously provided in the UK. For example, when announcing the equivalence decision for derivatives clearing referenced below, the Commission stated as follows:

> *"The heavy reliance of the EU financial system on services provided by UK-based CCPs [Central Counterparties] raises important issues related to financial stability and requires the scaling down of EU exposures to these infrastructures. Accordingly, industry is strongly encouraged to work together in developing strategies that will reduce their reliance on UK CCPs that are systemically important for the Union."*

How many equivalence decisions has the Commission taken so far with regard to the UK?

As of 1 January 2021, the Commission has taken two time limited equivalence decisions for derivatives clearing (for 18 months)(here) and settling Irish securities (for 6 months)(here). According to the Q&A, the Commission cannot finalise its assessment of the UK's equivalence in 28 areas pending further clarifications, in particular regarding how the UK will diverge from EU frameworks after 31 December 2020, how it will use its supervisory discretion regarding EU firms and how the UK's temporary regimes will affect EU firms.

While there is of yet no equivalence decision regarding UK trading venues for the purposes of the share-trading obligation or the derivatives-trading obligation set out, respectively under Articles 23 and 28 of the Markets in Financial Instruments Regulation 600/2014 ("**MiFIR**"), the European Securities and Markets Authority ("**ESMA**") has published guidance on the application of the share-trading obligation. See our related briefing here.

ESMA also published a statement (here) clarifying that the derivatives-trading obligations under Article 28 of MiFIR remained unchanged at the end of the transition period, meaning that market participants cannot use UK trading venues when complying with the Article 28 obligation unless and until the relevant equivalence decision is in place.

The characterisation of UK trading venues as third country trading venues will also affect the categorisation of transactions for purposes of Regulation 648/2012/EU ("**EMIR**") as a derivative transaction transacted on a UK regulated market will, in the absence of an equivalence decision with respect to that market, be treated as an OTC derivative for EMIR purposes.

Does the TCA cover equivalence decisions?

The TCA does not include any elements pertaining to equivalence frameworks for financial services. However, as set out above, equivalence is addressed in the Joint Declaration.

What should a UK financial services firm do if it wants to provide services or set up an establishment in Ireland?

As a first step, the UK firm should establish whether or not it requires authorisation to provide the relevant services. If it does, it will then need to make an application to the Central Bank of Ireland (the "**Central Bank**").

The Central Bank has published FAQs providing general information to financial services firms considering relocating their operations from the UK to Ireland, which are available here.

Will an Irish authorised financial services firm be able to continue outsourcing/delegating some of its functions to a service provider in the UK?

The Central Bank recognises the value of outsourcing/delegation arrangements but is concerned to ensure that such arrangements do not result in the relevant firm becoming an empty shell, and that the firm has sufficient oversight over those arrangements. As set out in its FAQ, when outsourcing is a feature of a firm's proposed business model, the Central Bank will expect that these arrangements are appropriately monitored and controlled and are fully compliant with all regulatory requirements.

Delegation is widely used in the Irish funds industry and there was at one stage some concern as to whether existing delegation arrangements would be able to continue post-Brexit and in particular whether the necessary cooperation agreements would be in put in place to facilitate the continued delegation of the investment management function to UK asset managers. However, as set out in our briefing here, in July 2020, ESMA confirmed that these cooperation agreements would be in place at the end of the transition period, and it has now published a number of memoranda of understanding ("**MoU**") between ESMA and EU national securities regulators on the one hand and the UK's FCA on the other, which may be accessed here.

Will an Irish authorised financial services firm be able to continue to provide services into the UK without further authorisation?

As part of the UK's preparations for Brexit, the UK Government established the Temporary Permissions Regime (the "**TPR**") for firms based in the EEA, and the temporary marketing permissions regime (the "**TMPR**") for EEA-based investment funds. The TPR and TMPR each allow relevant EEA based entities that were passporting into the UK on 31 December 2020 to continue operating in the UK for a limited period after the end of the transition period, subject to compliance with a notification requirement.

Alongside the TPR, the UK Government has created the financial services contracts regime (the "**FSCR**"). This allows, for a limited period, EEA passporting firms not in the TPR to continue to service UK contracts entered into prior to the end of the transition period (or prior to when they enter FSCR) in order to conduct an orderly exit from the UK market now that the transition period has ended.

The extent to which an Irish authorised firm will be able to provide services into the UK over the longer term will depend on applicable UK law.

What are the longer-term implications of the recent Brexit Deal for Financial Services?

The very limited nature of the financial services provisions in the TCA was largely expected and in our experience most financial service providers had factored in the loss of the passport to their Brexit contingency plans. The problem at the moment therefore is less the certainty of a hard Brexit for financial services and more the uncertainty surrounding how the EU – UK treatment of financial services is likely to evolve.

While in the Joint Declaration the EU and the UK clearly commit to a future dialogue on financial services, there is no clarity as to what shape this dialogue is likely to take and in particular whether and how it will impact on the EU's existing equivalence framework. Moreover, the TCA itself is not set in stone and, in particular, is to be reviewed every five years. Brexit therefore remains very much a process as opposed to a destination and the treatment of financial services is likely to wax and wane in tandem with the general state of EU/UK relationships. While uncertainty may be one of the worst outcomes for financial service providers, so far it appears to be the only certainty.

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