

BREXIT – an Italian perspective

The UK-EU Trade and Cooperation Agreement and the impact on the Financial Services sector

After 10 months of intense negotiations, multiple missed deadlines and disagreements, on Thursday, 24 December, 2020 the United Kingdom and the European Union (also the “Parties” and each a “Party”) reached a historic agreement on a post-Brexit economic and social partnership that will govern their relationship from 1 January, 2021 when the United Kingdom left the EU single market and the customs union.

The UK-EU Trade and Cooperation Agreement (“TCA”) covers the financial services provision only in Part Two, Heading One, Title II, Section 5 (pages 107-111) and page 2 of the Declarations.

According to Article 5.38 of the TCA “financial service” means any service of a financial nature offered by a financial service supplier of a Party and includes the following activities:

(i) insurance and insurance-related services:

(A) direct insurance (including co-insurance);

(B) reinsurance and retrocession;

(C) insurance intermediation, such as brokerage and agency; and

(D) services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services;

(ii) banking and other financial services (excluding insurance):

(A) acceptance of deposits and other repayable funds from the public;

(B) lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;

(C) financial leasing;

(D) all payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;

(E) guarantees and commitments;

(F) trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:

(aa) money market instruments (including cheques, bills, certificates of deposits);

(bb) foreign exchange;

(cc) derivative products including, but not limited to, futures and options;

(dd) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;

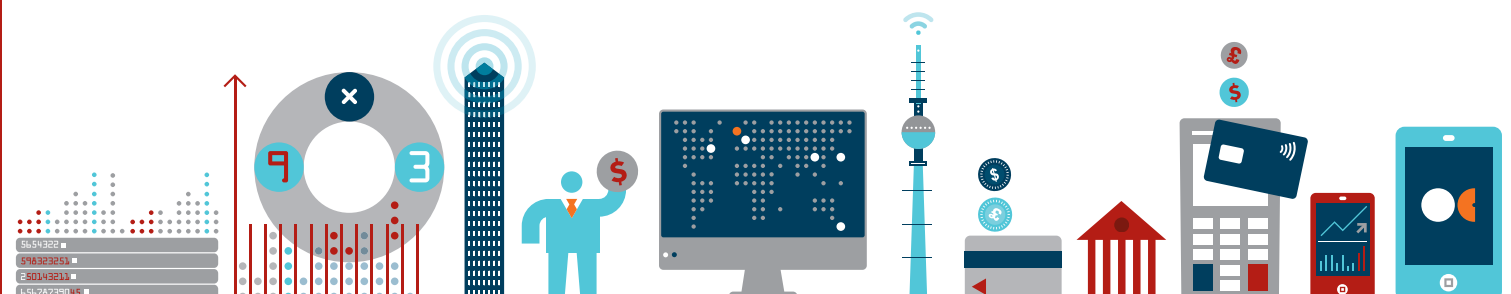
(ee) transferable securities; and

(ff) other negotiable instruments and financial assets, including bullion;

(G) participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;

(H) money broking;

(I) asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;



(J) settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;

(K) provision and transfer of financial information, financial data processing and related software; and

(L) advisory, intermediation and other auxiliary financial services on all the activities listed in points (A) to (K), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

TCA rules

The TCA does not provide special privileges for either Party despite the similarity between UK and EU financial regulations at the time of Brexit. In fact, apart from the definition describe above, the TCA only provides for:

- a standard “prudential carve out”, allowing either Party to adopt or maintain financial measures for prudential reasons in the area of regulatory capital and related prudential areas. Such measures shall be limited only if they fail to comply with the provisions of the TCA (Article 5.39: Prudential carve-out);
- a best endeavours commitment to ensure that internationally agreed standards in the financial services sector for regulation and supervision, for the fight against money laundering, the financing of terrorism and tax evasion and avoidance, are implemented and applied (Article 5.41: International standards);
- a commitment to permit established financial service suppliers to supply any new financial service subject to the same local licensing regime as local players, 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 (Article 5.42: Financial services new to the territory of a Party, first paragraph);
- a commitment to determine the institutional and legal form through which the service may be supplied and, where an authorisation is required, a commitment to provide such authorisation within a reasonable time, subject only to the prudential carve-out provided by Article 5.39 (Article 5.42: Financial services new to the territory of a Party, second paragraph);
- UK and EU self-regulatory organisations are required to admit financial services suppliers of either Party on a non-discriminatory and “most favoured nation treatment” basis (Article 5.43: Self-regulatory organisations);
- a commitment to grant to established financial service suppliers access to payment and clearing systems operated by public entities (Article 5.44: Clearing and payment systems).

The end of the passporting regime

Notwithstanding the above non-discrimination measures as well as the technical cooperation framework, as of 1 January, 2021, nothing in the TCA will prevent either Party from applying national regulations to non-EU financial service suppliers. This means that the current EU passporting regime, which allows the financial service suppliers that are authorised in any EU or EEA State to trade freely in any other State with minimal additional authorisation requirements, will end.

The EU passporting system is a pillar of the EU single market for financial services. The EU Member States, confident in the increasing harmonisation of standards of financial regulation and supervision across the EU, have opened their local markets to the provision of financial services directly from other EU Member States, or by making it easier to establish branches (instead of more complex and costly legally separate subsidiaries) of banks and financial services suppliers of other EU states.

This regime is not available to non-EU financial service suppliers which face significant regulatory barriers to providing cross-border financial services to customers and counterparties in many EU Member States. The loss of passporting rights therefore represents a major challenge for UK - based financial service providers, which, as of 1 January, 2021, will either have to comply with the different requirements of individual EU Member States or rely on the European Commission’s equivalence decision (which can be withdrawn by the EU) in order to continue to access the EU single market.

Consequences from an Italian perspective

In light of the above, from 1 January, 2021, as a result of the United Kingdom’s exit from the European Union, UK financial service providers and banks, as non-EU entities, will be able to continue providing financial services and activities in Italy only if authorised by the Italian national commission for listed companies and the stock exchange (“**CONSOB**”) or the Bank of Italy.

In the absence of the required authorisations, the UK investment service providers and banks were obliged to cease operations in Italy or transfer their activities to other authorised intermediaries within 31 December, 2020.

This was confirmed by the Italian Government that, in order to safeguard Italian customers, with Law Decree no. 183 dated 31 December, 2020 (“**Decreto**”), provided the interim measures applicable to the financial intermediaries and banks established in the United Kingdom which provide investment services and activities in Italy.

In particular, Article 22 of the Decree provides that UK financial intermediaries and banks operating in Italy through a branch – provided that, prior to 31 December 2020 they submitted a new application for authorisation to operate in Italy as non-EU entities – are allowed to continue providing the services already provided before 31 December, 2020 until the authorisation is either granted or refused by the competent Italian Authorities and in any case no later than 30 June, 2021 ("**Transitional Period**").

During the Transitional Period, UK banks and financial intermediaries are only allowed to carry out those activities for which the authorization has been requested and limited to the management of the existing relations. Therefore, the acquisition of new clients or the modification of outstanding relationships is not allowed.

Article 22 of the Decree also provides, *inter alia*, that:

(i) UK banks and financial intermediaries operating without a branch, under the regime of the freedom of providing services, are not allowed to provide investment services and activities to retail clients and to "professional clients upon request" (as identified, respectively, by Article 1, paragraph 1, letter *mduodecies* and Article 6, paragraph 2-*quinquies*, letter b) and paragraph 2-*sexies*, letter b) of the Italian Legislative Decree no. 58 dated 24 February, 1998;

(ii) during the Transitional Period, UK banks and financial intermediaries operating in Italy through a branch are subject to the national regulations applicable to non-EU entities and to the supervision of the competent Italian Authorities;

(iii) during the Transitional Period, UK banks and intermediaries operating in Italy through a branch are subject to the Italian compensation scheme and to the Italian alternative dispute resolution systems (ACF and ABF);

(iv) if the authorisation is refused, UK banks and financial intermediaries operating in Italy through a branch must cease the activities as soon as possible and in any case no later than three months from the notification of refusal, within a timeframe and in a way that does not prejudice their customers. During this period, they continue to be subject to the provisions applicable to non-EU entities and to the relative powers of the competent Italian Authorities.

Italian Regulators' notices

The competent Italian Authorities (CONSOB and Bank of Italy), in addition to confirming the above provisions by means of press releases issued on 2 January, 2021, had already published in the previous months the guidelines that UK banks and financial intermediaries operating in Italy would have to comply with in the event of the United Kingdom's exit

from the European Union.

In particular, CONSOB issued several notices during 2020 and with the last one dated 2 January, 2021 advising that:

(i) the list of EU and non-EU investment service providers authorised to operate in Italy will be updated as of 1 January 2021, also providing adequate information about the UK investment service providers which will no longer be able to provide services in Italy;

(ii) the UK investment service providers were invited – by both the European Securities and Markets Authority ("**ESMA**") and CONSOB – to provide their customers, in a timely manner, with appropriate information about their investments,

(iii) and invited UK investment service providers' customers to verify the adequacy and completeness of the information provided.

The same principles were also confirmed by the Bank of Italy in the notices issued on 29 April, 2020, 9 November, 2020 and 15 December, 2020 in which the Authority, with regard to banks which provide investment services, invited the same to finalise their plans for the management of Brexit, and expected the operators to have already provided information to their customers about the impacts of the Brexit and managed the transition in a careful and orderly manner.

The Bank of Italy with the notice dated 2 January, 2021 confirmed that, after the end of the Transitional Period, the regulations applicable to the financial intermediaries for which the Bank of Italy is the competent Authority will depend on the type of intermediary and the activities performed, and in particular:

(a) UK banks and electronic money institutions operating in Italy through a branch which intend to continue operating in Italy as third-country firms will continue operating in Italy in accordance with, and within the limits provided for by Italian law, only if they have acquired a licence as a third-country intermediary before the end of the Transitional Period;

(b) UK electronic money institutions currently operating either under the freedom to provide services or through a network of agents, payment institutions, and asset management companies will be required by law to cease operations by the end of the Transitional Period or to transfer the activity to an intermediary authorized to operate in Italy;

(c) unlicensed UK banks and e-money institutions (for whatever reason) as well as UK banks providing investment services on a cross border basis to customers other than eligible counterparties and per se professional clients will have to cease operations by the end of the Transitional Period.

Finally, the Bank of Italy invited the operators to strengthen the assistance and communication tools and channels, including web-based ones, for customers (which should also continue to be active following the end of the Transitional Period). In particular, the Bank of Italy invited the intermediaries to indicate the contacts to which customers can refer and the procedures to be activated to receive assistance in relation to their specific needs or to submit reports or complaints.

Timing

The TCA has not yet been formally ratified. As far as the European side is concerned, formal approval (unanimity) of the European Council formed by the EU-27 Heads of State and Government (who must have the clearance from their respective Parliaments according to the Constitutions of the Member States) is necessary.

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This should take place from 1 January, 2021 and only after such final approval, will the EU sign the TCA which, however, before being officially ratified must pass the scrutiny of the European Parliament. Only after this further approval will the European Council ratify the agreement definitively. On the UK side, however, the TCA was approved by both the House of Commons and the House of Lords on 30 December, 2020.

In light of these steps remaining to be completed, for the moment the TCA comes into force only on a provisional basis until 28 February, 2021, by which date it should have obtained all the necessary approvals. If the TCA is not ratified by this date, then the UK will trade with the EU-27 on WTO terms and tariffs.

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