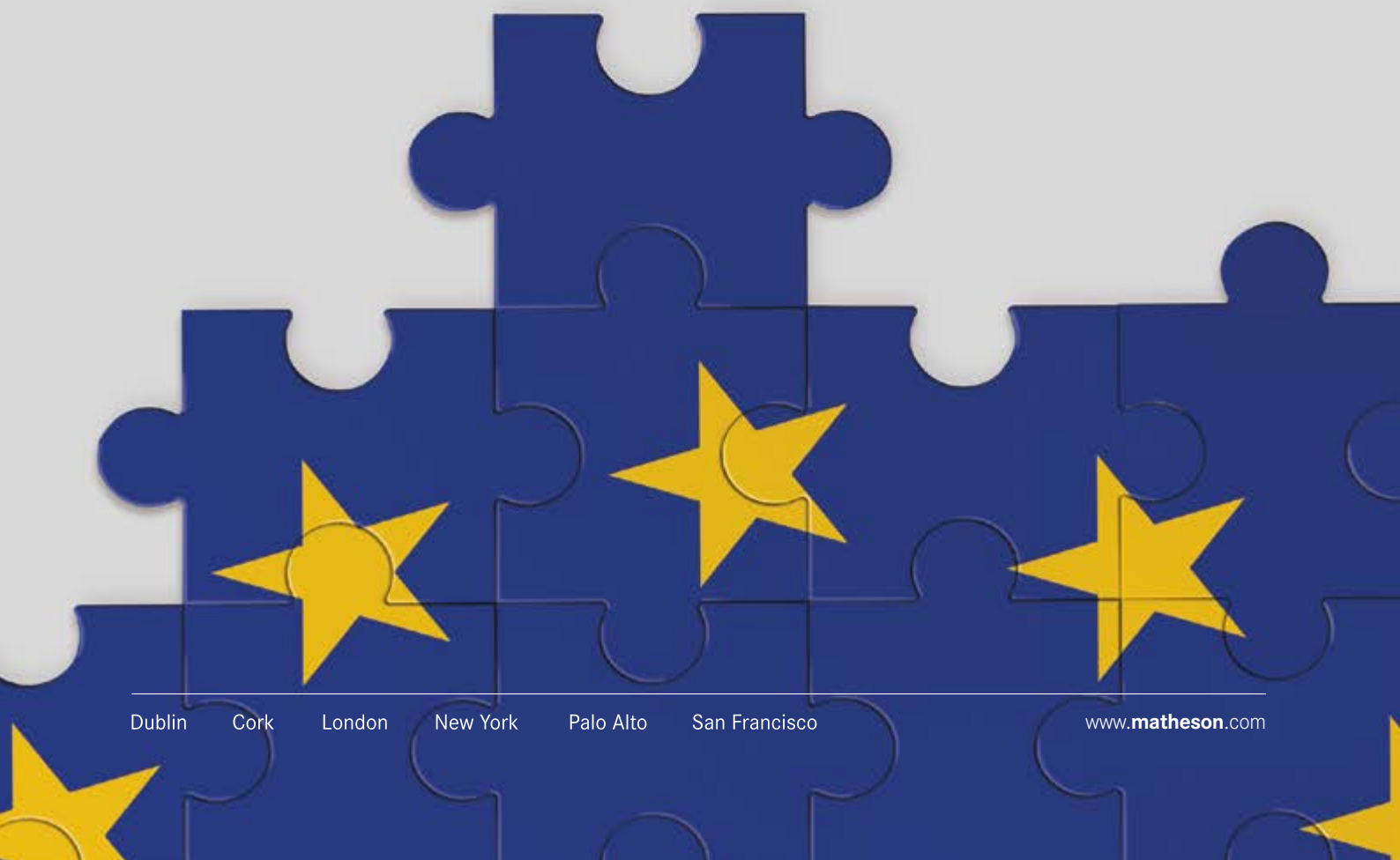




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The EU-UK Brexit Deal and Financial Services – Where do Things Stand Now?



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Introduction

After years in the making, Brexit has completed and the United Kingdom (the “UK”) ended the transition period with a deal (the “Brexit Deal”) as at 23.00 on 31 December 2020. As was widely predicted, the Brexit Deal was reached at the last minute with joint announcements from both leaders made on the afternoon of Christmas Eve. Given that financial services was not on the negotiating mandate, it was no surprise that it was not covered in any great detail in the Brexit Deal. Following on from the agreement which was reached between the two sides, UK Prime Minister Boris Johnson has been quoted as saying that, in so far as it concerns financial services, the Brexit Deal “perhaps does not go as far as we would like”¹.

What Does the Brexit Deal Say About Financial Services?

The Brexit Deal is comprised of a number of documents, including:

- **The Trade and Cooperation Agreement;**
- **Declarations;**
- An Agreement on Nuclear Cooperation; and
- An Agreement on Security Procedures for Exchanging and Protecting Classified Information.

Financial services is addressed on pages 121-125 of the Trade and Cooperation Agreement (as published in the Official Journal of the European Union) and page 2 of the Declarations.

The Trade and Cooperation Agreement

The main provisions of the Trade and Cooperation Agreement, relevant to financial services², can be briefly summarised as agreeing to the following:

1. Exclusive Boris Johnson interview: ‘From Bruges to Brexit, this is the end of the UK’s 30-year struggle’ **Sunday Telegraph, 27 December 2020**

2. Financial services are also referenced in a number of the general provisions of the Trade and Cooperation Agreement while particular references are made to certain financial services in other provisions, for example provisions relating to restructuring subsidies for banks, credit institutions and insurance companies and provisions on capital movements, payments and transfers. However, it should be noted that obligations on both parties to review their legal framework and work together on non-conforming measures do not apply to financial services.

- (1) A “prudential carve out,” allowing the European Union (“EU”) and the UK to impose their own financial regulations. However, should some developments “not conform” with the provisions of the Brexit Deal, they cannot be used as a means of avoiding either parties’ commitments or obligations under the Brexit Deal.
- (2) A “best endeavours” declaration to implement international standards in the financial services sector for regulation and supervision and for the fight against money laundering and terrorist financing. The following organisations are specifically referenced:
 - 1.1 The Financial Stability Board
 - 1.2 The Basel Committee on Banking Supervision
 - 1.3 The International Association of Insurance Supervisors
 - 1.4 The International Organisation of Securities Commissions
 - 1.5 The Financial Action Task Force
 - 1.6 The Global Forum on Transparency and Exchange of Information for Tax Purposes of the Organisation for Economic Cooperation and Development
- (3) A reciprocal agreement to allow newly established financial services from either the UK/EU to enter either the EU/UK, if it is a financial service which it would permit its own financial service providers to supply. However, this is based on the caveat 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)³
- (4) A reciprocal agreement that UK and EU self-regulatory organisations (exchanges and clearing houses) must admit financial services suppliers from the UK and EU on a non-discriminatory and “most favoured nation” basis.
- (5) A reciprocal agreement to permit access to UK and EU payment and clearing systems operated by public entities.

As can be seen from the foregoing, crucial issues such as passporting arrangements; equivalence determinations and an exclusive extension to the transition period for financial services were not included. In light of this, contingency plans by EU/UK financial service providers to ensure continued, unrestricted, access to the UK/EU through the establishment of new legal entities in the relevant jurisdictions have proven to be a prudent course of action. Of course, limited access to both jurisdictions is still permissible through the existing third country regimes and newly introduced run off regimes⁴ but these are not comparable to being authorised in those jurisdictions.

3. It should be noted that the relevant territory can determine the institutional and legal form through which the service may be supplied and require authorisation for the supply of the service. In the event that authorisation is required, a decision shall be made within a reasonable time and the authorisation may only be refused for prudential reasons

4. Such as the UK’s **Temporary Permissions Regime**, the **Temporary Marketing Permissions Regime**, the **Financial Services Contracts Regime** and the temporary run off regime dedicated to insurers and insurance intermediaries introduced by the Irish Government (for details on this, please see Matheson’s update [here](#).)

The Declaration

The Declaration looks to the future and briefly sets out the following in respect the parties' relationship in the area of financial services:

- “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.”

Conclusion and Next Steps

Having regard to the foregoing, it would not be a stretch to conclude that the Brexit Deal, from a financial services perspective, represents a “Hard Brexit” – no passporting and no equivalence determinations, with only an agreement to reach an agreement on a way forward.

In the days following the publication of the Brexit Deal, both parties made comments on the next steps for financial services.

The **EU Commission** (“**Commission**”), on the matter of equivalence, stated that more work is required before it is in a position to finalise its assessment of the UK's replies to the Commission's equivalence questionnaires in 28 areas⁵. The Commission went on to state that it “has taken note of the UK's equivalence decisions announced in November, adopted in the UK's interest. Similarly, the EU will consider equivalence when they are in the EU's interest.” These words are fully aligned with the EU's position since the beginning of the process – that it will not be pressurised into making decisions on equivalence, and indeed will only grant equivalence determinations in those areas where it is clearly in the interest of the EU, its financial stability and its investors and consumers. It should be noted that as of 1 January 2021, the Commission has made two equivalence decisions in respect of central counterparty clearing⁶ and settling Irish securities, however both are limited in duration.

5. It goes on to state that a series of further clarifications will be needed, in particular regarding how the UK will diverge from EU frameworks after 31 December, how it will use its supervisory discretion regarding EU firms and how the UK's temporary regimes will affect EU firms.

6. Please see Matheson's related update on this, [here](#).

Most recently, on 13 January 2021, the European Securities and Markets Authority (“**ESMA**”) was the first of the European supervisory authorities to issue a **public statement** on activities of UK firms in Europe, post the expiration of the transition period. In the statement, ESMA reminds impacted firms of the MiFID II rules on reverse solicitation, noting that it has observed “some questionable practices by firms around reverse solicitation”⁷. This statement reminds UK firms, in explicit terms, of what ESMA deems as unacceptable actions in this space. It will be interesting to see if the other European supervisory authorities consider a similar approach.

In his statement on 27 December 2020, UK Chancellor of the Exchequer Rishi Sunak said that the UK would seek to “do things a bit differently” on financial services after it had left the single market, but added he was hopeful both parties would work together and “that we will remain in close dialogue with our European partners when it comes to things like equivalence decisions.” The first part of Chancellor Sunak's comment, that the UK would seek to do things a bit differently, was clearly noted by those in Brussels. Almorò Rubin de Cervin, acting head of international affairs at the Commission's financial services unit, told a hearing at the European Parliament on 11 January, that “we need to take into account that this [agreement] happens in a context where the UK has said it might want to diverge significantly.”

In order to move forward on the drafting of a Memorandum of Understanding, extensive negotiations are anticipated. However, given the tenor of the recent comments by both parties, it is difficult to see how reaching an agreement, even on a direction of travel, can be achieved by the March deadline. We will of course be monitoring this and will keep you updated as the matter progresses. In the meantime, to understand more about whether equivalence is a solution for financial services in this scenario, please refer to Matheson's equivalence analysis [here](#).

7. It highlighted examples of firms “trying to circumvent MiFID II requirements by including general clauses in their Terms of Business or through the use of online pop-up ‘I agree’ boxes whereby clients state that any transaction is executed on the exclusive initiative of the client”.

Please get in touch with Darren Maher, Joe Beashel, Grainne Callanan and Louise Dobbyn or your usual Matheson contact should you require further information in relation to the material referred to in this paper. Full details of Matheson's Financial Institutions Group, Asset Management Group and Finance and Capital Markets Group together with further updates, articles and briefing notes written by members of these teams, can be accessed at www.matheson.com.

Further Brexit-related updates, articles and briefing notes may be accessed on our [Brexit Forum](#).

Contacts



Darren Maher

Partner

T +353 1 232 2398

E darren.maher@matheson.com



Joe Beashel

Partner

T +353 1 232 2101

E joe.beashel@matheson.com



Grainne Callanan

Partner

T +353 1 232 2050

E grainne.callanan@matheson.com



Louise Dobbyn

Partner

T +353 1 232 2094

E louise.dobbyn@matheson.com

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