

Brexit: a never-ending story

Following the two historic defeats suffered by Theresa May in her attempt to try to persuade the House of Commons to back the withdrawal agreement (the “**WA**”) that she negotiated and agreed with EU, there is still a total lack of clarity as to the outcomes of Brexit.

Given the persistence of the deadlock situation, on 20 March 2019 the PM has asked the 27 EU leaders to postpone Brexit beyond 29 March 2019 until 30 June 2019 and, during the European summit held the following day, the leaders have agreed on a plan to delay the Article 50 process. The UK has been offered a delay until 22 May 2019 (the day before voting in the European elections begins), if MPs approve the WA within 29 March 2019, but if they do not, the UK is allowed until 12 April 2019 to get the WA through or to “*indicate a way forward*” (the “**Extension**”). Moreover, on 25 March 2019, the MPs voted and approved the opportunity to take control of the Brexit process in Parliament in an attempt to break the current deadlock by holding a series of “indicative votes”.

Current scenario

On 27 March 2019, the House of Commons debated and voted on a series of “indicate votes” (*i.e.* a series of votes designed to test the will of the House of Commons to reach a majority on certain options). These votes could provide a way out of the current political stalemate. A second round of voting should take place next Monday, 1st of April 2019, to find a single preference.

In the worst case scenario, if the UK leaves the EU without a deal (the so-called hard Brexit), the UK will become a “third country”, with the consequent discontinuation of bilateral relations with the EU.

If the UK becomes a third country to all intents and purposes under EU law, EEA financial services firms and investment funds, it will no longer be able to be passported into the UK and viceversa.

In this climate of uncertainty and precariousness, both the United Kingdom and Italy, each within the scope of its own autonomy, have drafted transitional measures to ensure the continuity of markets and intermediaries in the event of hard Brexit.

UK temporary provisions

In preparation for a Brexit scenario, the British Government has enacted the so-called “Temporary Permissions Regime” (the “**TPR**”) which enables inbound passported financial services firms to continue their activities in the UK within the scope of their current permissions while seeking full UK authorisation and allows investment funds with a passport to continue marketing in the UK while seeking UK recognition.

If the UK leaves the EU on 11 April 2019 (as replaced to the original 29 March 2019 deadline as a result of the Extension), the TPR would come into force immediately the day after and, probably, it will be in place for a maximum of three years. In this time-frame firms and investment funds will be required to obtain respectively the authorisation or recognition in the UK.

The TPR concerns the following firms and funds:

- firms which have passports in place under Schedule 3 of Financial Services and Markets Act 2000 (FSMA), including firms with top-up permission;
- treaty firms under Schedule 4 of FSMA, including firms with top-up permission;
- electronic money, payment institutions and registered account information service providers who are exercising their passporting rights under the Electronic Money Directive (EMD) or the Payment Services Directive (PSD2);
- UCITS schemes;
- Alternative Investment Funds (including EuVECAs, EuSEFs, ELTIFs and AIFs authorised as MMFs) managed by EEA domiciled firms.

According to the TPR, firms will need to notify the FCA that they wish to use the TPR via the FCA Connect system by the end of 28 March 2019 (extended to 11 April 2019 following the Extension). Once the notification window will be closed, firms that have not submitted the notification will not be able to use the TPR. Before the notification, firms should register for the FCA Connect system and should check their passport on the FS Register and let the FCA know as soon as possible, through their national competent authority, of any changes. Following this procedure, firms will be deemed to have permission under Part 4A of the Financial Services and Markets Act 2000 (FSMA) on a temporary basis. The scope of the permission will reflect the scope of a firm's passporting permission pre-Brexit.

With regard to the investment funds, fund managers will also need to notify the FCA in relation to which among their funds they want to continue to market in the UK via the FCA Connect system by the end of 28 March 2019 (extended to 11 April 2019 following the Extension). Fund managers should submit their notification with a full list of the funds they wish to continue marketing in the UK after exit day. Fund managers that do not submit a notification within the given time-frame will be unable to continue marketing the relevant funds in the UK. Before notification, fund managers should register for the FCA Connect system and should check which funds they are actively marketing in the UK and let the FCA know as soon as possible, through their national competent authority, of any changes.

If fund managers have passports other than for the purposes of marketing funds in the UK (for example, a MiFID passport), they should also submit a firm temporary permission notification form, if appropriate.

The British Government also has published draft legislation for the Financial Services Contracts Regime (the “FSCR”). In case of hard Brexit, this will enable firms who do not enter the TPR to wind down their UK business in an orderly manner. The FSCR will automatically apply to EEA passporting firms that do not notify the FCA that they wish to use the TPR, but have pre-existing contracts in the UK which would entail the need of a permission to be performed.

Italian temporary provisions

As far as the Italian market is concerned, the Italian Government, in close consultation with the regulatory authorities and after continued discussions with trade associations, has adopted the law decree (*decreto legge*) no. 22 of 25 March 2019 (“**Italian Decree**”) (to be then converted into law by the Parliament within 60 days from its enactment) which contains the transitional measures that will be effective in the event of hard Brexit.

The measures are aimed at ensuring financial stability, integrity, and the operational continuity of both markets and intermediaries, as well as to protecting depositors, investors, and customers in general, through the introduction of a transitional period during which such entities can continue to operate in case of a hard Brexit, similarly to the transitional period planned in the event of an agreement between UK and the EU.

During this transitional period, which would run from the date of the UK withdrawal to the end of the eighteenth month thereafter, banking, financial and insurance intermediaries will be able to continue to operate according to existing laws and regulations. Such scenario envisages for both British firms carrying out activities in Italy and Italian firms carrying out activities in the UK. The protection of intermediaries' depositors and investors will also be granted.

The Italian Decree has been positively welcomed by the financial industry as it is intended to solve many issues that would have otherwise arisen in case of hard Brexit. However, the same Italian Decree left some issues unsolved.

The greyest area concerns the UK insurers with their registered office in the UK that operate in Italy in favour of Italian customers. The Italian Decree provides that, in order for them to continue their coverage of the Italian market, it would not be sufficient to just open a branch in Italy. In this regard, the Italian Decree sets out that the UK insurers would be allowed to keep managing their existing agreements for a 18-month period, provided that they file a motion to IVASS (the Italian insurance authority) in order to guarantee "the proper performance of said agreements" within 90 days. Should an insurer be unable to meet this requirement, it can apply to IVASS for an extension.

The Italian Decree appears to be more clean-cut in relation to banks. UK banks with an Italian branch would be allowed to continue to carry out their activity during the 18-month period following hard Brexit, following an *ad hoc* communication to be delivered to the Bank of Italy (*Banca d'Italia*).

On the other hand, UK banks with no branch established in Italy, and who collect deposits from Italian customers from UK, can continue to work with already established customers but they cannot open new positions.

With regard to the so-called "tailor-made" derivatives (derivative contracts that banks stipulate with companies or local Authorities), the Italian Decree makes some distinctions. UK banks without a branch in Italy can continue to provide these services to institutional client (including local Authorities), but not to small businesses. On the other hand, UK banks with a branch in Italy can continue to provide these services also in favour of small businesses.

The Italian Decree is silent regarding the sort of existing derivative contracts. According to most reliable interpretation, it appears that they would survive until their final terms, but the topic appears to be arguable.

The Italian Decree casts the same doubts highlighted in relation to insurers with regard to UK investment funds collecting money from Italian investors. According to the Italian Decree, they would have six months to cease such activity. However, the Italian Decree is silent on the sort of existing clients. The most reliable interpretation is that UK investment funds should not be allowed to acquire new clients, but they could keep existing ones. However, also such topic is arguable.

Finally, in relation to UK indexes and banks managing Mtf or Otf, the Italian Decree sets out a quite complex approval process to be adhered to.

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