Italy

Brexit: Deal or No Deal? Regulatory and Tax Implications for the Banking and Financial Services Industry – Part I

Vittorio Salvadori di Wiesenhoff[*]

Issue: Derivatives & Financial Instruments, 2019 (Volume 21), No. 4
Published online: 8 August 2019

The United Kingdom will leave the European Union (a process known as "Brexit") on 1 November 2019 at the latest, but with the possibility of leaving earlier if the Withdrawal Agreement is ratified by both parties before this date. The exact Brexit date remains, however, subject to possible change, and a "no-deal" Brexit is still a possible option. This is the first of a two-part article dealing with certain regulatory and tax implications of Brexit (with or without a deal) for the banking and financial services industry. In this first part, the author considers the consequences of the loss of passporting rights in the event of no-deal Brexit and examines the transitional provisions in both the European Union-United Kingdom Withdrawal Agreement and the emergency Brexit Decree enacted by the Italian government.

1. Introduction

The United Kingdom has decided to leave the European Union, invoking the procedure in article 50 of the Treaty on European Union (TEU).[1] In accordance with article 50, the European Union negotiated with the United Kingdom an agreement setting out the arrangements for its withdrawal. The former UK Prime Minister Theresa May and the other 27 EU Member States endorsed this withdrawal agreement in November 2018, together with a political declaration setting out the framework for the future relationship between the European Union and the United Kingdom. As at the time of writing of this article, the UK Parliament has however failed to pass the necessary legislation to ratify the withdrawal agreement.

According to article 50(3) of the TEU, all EU primary and secondary laws were to cease to apply to and in the United Kingdom from the date of entry into force of the withdrawal agreement or, failing that, 2 years after the notification, unless the European Council, in agreement with the United Kingdom, unanimously decided to extend this period.

Following a request by the UK government, on 22 March 2019 the European Council granted a first (short) extension of the period under article 50(3) of the TEU. Following a second request by the former UK Prime Minister Theresa May, the European Council agreed on 11 April 2019 to further extend this period until 31 October 2019. Unless it ratifies the withdrawal agreement by 31 October 2019 or requests a third extension, to which the European Council must agree by unanimity, the United Kingdom will be a third country as of 1 November 2019 without an agreement to ensure an orderly withdrawal (a "no-deal Brexit").

In light of the continued uncertainty with regard to the ratification by the United Kingdom and the overall domestic situation in the United Kingdom, following Mr Boris Johnson's appointment as new UK Prime Minister, the likelihood of a no-deal Brexit seems to have increased significantly. This will obviously cause considerable disruption for citizens and businesses and would have a serious negative economic impact.

2. Brexit Timeline: Events Leading to the United Kingdom's Exit from the European Union

On 29 March 2017, the United Kingdom, following the outcome of a referendum, notified the European Council of its intention to withdraw from the European Union, pursuant to article 50 of the Treaty on European Union (TEU).[2]

On 22 May 2017, the European Council authorized the Commission to open negotiations with the United Kingdom for an agreement setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the European Union. The

* **Tax partner, K&L Gates LLP, Milan. The author can be contacted at vittorio.salvadori@klgates.com .**
1. Treaty on European Union (TEU), art. 50(2): "A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union."
2. The United Kingdom notification under art. 50 TEU is available at http://data.consilium.europa.eu/doc/document/XT-20001-2017-INIT/en/pdf .

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negotiations were conducted in light of the Guidelines of 29 April,[3] 15 December 2017[4] and of 23 March 2018[5] provided by the European Council, with the overall objective of ensuring an orderly withdrawal of the United Kingdom from the European Union.

In parallel, the European Union and the remaining 27 Member States have been preparing for a possible no-deal, or "disorderly", Brexit. In November 2018, the European Commission launched a contingency action plan and the 27 Member States have also been implementing their own contingency measures which will take effect if the United Kingdom leaves the Europeans Union without a withdrawal agreement in place.

Following an intense period of negotiations, on 14 November 2018, the UK and EU negotiating teams reached an agreement, in principle, on a Withdrawal Agreement,[6] establishing the terms of the United Kingdom's departure on 30 March 2019 and providing for a transition period (also known as an "implementation period") during which EU law would continue to apply to and in the United Kingdom as if it were a Member State.[7] On 22 November 2018, a draft Political Declaration,[8] setting out the framework for the future relationship between the European Union and the United Kingdom, was also published.[9] At a special meeting of the European Council,[10] held on 25 November 2018, the EU-27 leaders endorsed the Withdrawal Agreement[11]'[12] and approved the Political Declaration.[13][14] On 11 January 2019, the European Council adopted Decision (EU) 2019/274[15] on the signing of the Withdrawal Agreement.[16]

According to article 50(3) of the TEU and the Withdrawal Agreement, the United Kingdom was due to leave the European Union as from 30 March 2019, 00:00 (CET), unless the European Council, in agreement with the United Kingdom, unanimously decided to extend this period.[17]

A first extension of the period provided for in article 50(3) of the TEU (the article 50(3) period) was politically agreed by the European Union and the United Kingdom on 21 March 2019, after the UK Parliament had rejected the approval of Withdrawal Agreement in two meaningful votes. By Decision (EU) 2019/476,[18] the European Council formalized the extension of the period until 12 April 2019 or, in the event that the House of Commons were to approve the Withdrawal Agreement by the original Brexit date of 29 March, until 22 May 2019.[19]

Given the increasing likelihood that the United Kingdom could have left the European Union without a ratified Withdrawal Agreement in place (no-deal Brexit) on 29 March (and then on 12 April 2019), several Member States (including Italy)[20] have enacted their own no-deal preparedness legislation to address the uncertainties and difficulties of a no-deal Brexit and mitigate the cliff-edge implications for the banking and financial industry (and a range of other sectors).

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3. Special meeting of the European Council (art. 50) (29 Apr. 2017) – Guidelines, available at https://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf .
4. Special meeting of the European Council (art. 50) meeting (15 Dec. 2017) – Guidelines, available at https://www.consilium.europa.eu/media/32236/15-euco-art50-guidelines-en.pdf [hereinafter Negotiation Guidelines (Dec. 2017)].
5. Special meeting of the European Council (art. 50) (23 Mar. 2018) – Guidelines, available at https://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf .
6. Draft agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, available at https://www.consilium.europa.eu/media/37099/draft_withdrawal_agreement_incl_art132.pdf .
7. *See* sec. 4.1.
8. Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom (22 Nov. 2018) [hereinafter Political Declaration], available at http://data.consilium.europa.eu/doc/document/XT-21095-2018-INIT/en/pdf .
9. As stated in the Political Declaration, the text was "agreed at the negotiators' level and agreed, in principle, at political level, subject to the endorsement of the Leaders.".
10. The conclusions adopted at the meeting are detailed in Special Meeting of the European Council (Art. 50) (25 Nov. 2018) – Conclusions, available at http://data.consilium.europa.eu/doc/document/XT-20015-2018-INIT/en/pdf [hereinafter Special Meeting Conclusions].
11. The official text of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [hereinafter Withdrawal Agreement] is available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.CI.2019.066.01.0001.01.ENG&toc=OJ:C:2019:066I:TOC .
12. According to para. 1 of the Special Meeting Conclusions, "[t]he European Council endorses the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. On this basis, the European Council invites the Commission, the European Parliament and the Council to take the necessary steps to ensure that the agreement can enter into force on 30 March 2019, so as to provide for an orderly withdrawal."
13. The official text of the Political Declaration is available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.CI.2019.066.01.0185.01.ENG&toc=OJ:C:2019:066I:TOC .
14. According to para. 2 of the Special Meeting Conclusions, "[t]he European Council approves the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom of Great Britain and Northern Ireland. The European Council restates the Union's determination to have as close as possible a partnership with the United Kingdom in the future in line with the Political Declaration. The Union's approach will continue to be defined by the overall positions and principles set out in the previously agreed European Council's guidelines. The European Council will remain permanently seized of the matter."
15. Council Decision (EU) 2019/274 of 11 January 2019 on the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, p. 1 OJ L 47 (19 Feb. 2019), available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2019:047I:FULL&from=EN [hereinafter Council Decision 2019/274].
16. The text of the Withdrawal Agreement attached to Council Decision 2019/274 was published in OJ C 66 (19 Feb.2019), p. 1.
17. Art. 50(3) TEU: "The Treaties shall cease to apply to the State in question [the UK] from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period." Art. 185(1) Withdrawal Agreement (prior to the amendments made in Apr. 2019): "This Agreement shall enter into force on 30 March 2019. In the event that, prior to that date, the depositary of this Agreement has not received the written notification of the completion of the necessary internal procedures by the Union and the United Kingdom, this Agreement shall not enter into force."
18. European Council Decision (EU) 2019/476 taken in agreement with the United Kingdom of 22 March 2019 extending the period under Article 50(3) TEU, OJ L 80I, pp. 1-2, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1556992429689&uri=CELEX:32019D0476 .
19. According to Recital (9) of the European Council Decision (EU) 2019/476: "[o]n 21 March 2019, the European Council agreed to an extension until 22 May 2019, provided the Withdrawal Agreement is approved by the House of Commons in the following week. If that is not the case, the European Council agreed to an extension until 12 April 2019 and indicated that it expected the United Kingdom to indicate a way forward before 12 April 2019 for its consideration."
20. *See* sec. 4.2.

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A third attempt to approve the Withdrawal Agreement by the UK Parliament failed on 29 March 2019, thus limiting the extension of the article 50(3) period to 12 April. By a letter of 5 April 2019, the United Kingdom submitted a request for a further extension, which was then politically agreed by the European Union and the United Kingdom on 10 April. By Decision (EU) 2019/584,[21]the European Council formalized a flexible extension of the article 50(3) period. Such an extension should last as long as necessary to allow for the ratification of the Withdrawal Agreement by both parties (but in any event, no longer than 31 October 2019). Based on the Council's decision, the UK withdrawal should now take place on the first day of the month following the completion of the ratification procedures or on 1 November 2019, whichever is the earliest (the exit day).[22]

The extension of the article 50(3) period to 31 October 2019 also implied some changes to the Withdrawal Agreement.[23]Additionally, the European Council Decision (EU) 2019/274 was amended accordingly by Decision (EU) 2019/642.[24][25]

Until the actual exit day, the United Kingdom will remain a Member State with full rights and obligations in accordance with article 50 of the TEU.

The United Kingdom will leave the European Union without a deal on 31 October 2019 unless it ratifies the Withdrawal Agreement or requests a third extension of the article 50(3) period, to which the European Council agrees by unanimity, or revokes its article 50 notification.[26]In a no-deal Brexit scenario, all EU primary and secondary law will cease to apply to the United Kingdom as from 1 November 2019, 00:00h (CET). The United Kingdom would then become a third country (i.e. a country not a Member State of the European Union) for the purposes of the EU legal framework without an agreement to ensure an orderly withdrawal, would be leaving the European single market and would no longer benefit from rights under EU law or be subject to its obligations. In these circumstances, the no-deal emergency measures enacted by the European Union and by several Member States would start to apply, thus resulting in a patchwork of different solutions and applicable regimes.

Conversely, in a "deal" Brexit scenario, the United Kingdom would leave the European Union on the first day of the month following the ratification of the Withdrawal Agreement by both parties,[27]but EU law would continue to apply to and in the United Kingdom during the transition period, as provided for by Part Four of the Withdrawal Agreement,[28]so that the United Kingdom's and EU-27's[29]access to one another's markets would continue on current terms throughout the transition period.

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21. European Council Decision (EU) 2019/584 taken in agreement with the United Kingdom of 11 April 2019 extending the period under Article 50(3) TEU, OJ L 101, pp. 1-3, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1556992494390&uri=CELEX:32019D0584 .
22. The European Council also decided that the decision to extend until 31 Oct. 2019 would cease to apply on 31 May 2019 if the United Kingdom had not held elections to the European Parliament and had not ratified the Withdrawal Agreement by 22 May 2019. As the United Kingdom had not ratified the Withdrawal Agreement by 22 May 2019, it held European elections on 23 May 2019.
23. The date of entry into force of the Withdrawal Agreement had to be adapted to reflect the period provided for in art. 50(3) TEU, as extended to 31 Oct. 2019 by the European Council in agreement with the United Kingdom. On 11 Apr. 2019, in agreement with the United Kingdom, the Withdrawal Agreement was adapted in three instances as follows:

    - in the last recital, the words "after 29 March 2019" were replaced by "from the date of entry into force of this Agreement"; and
    - the first paragraph of art. 185, dealing with the entry into force of the Withdrawal Agreement, was replaced by the following:

        > This Agreement shall enter into force on one of the following dates, whichever is the earliest:
        > (a) the day following the end of the period provided for in Article 50(3) TEU, as extended by the European Council in agreement with the United Kingdom, provided that, prior to that date, the depositary of this Agreement has received the written notifications by the Union and the United Kingdom regarding the completion of the necessary internal procedures;
        > (b) the first day of the month following the receipt by the depositary of this Agreement of the last of the written notifications referred to in point (a).
        > In the event that, prior to the end of the period provided for in Article 50(3) TEU, as extended by the European Council in agreement with the United Kingdom, the depositary of this Agreement has not received the written notifications referred to in point (a), this Agreement shall not enter into force.
24. Council Decision (EU) 2019/642 of 13 April 2019 amending Decision (EU) 2019/274 on the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, pp. 1-3 OJ L 110 (25 Apr. 2019), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019D0642#ntr2-LI2019110EN.01000101-E0002 [hereinafter Council Decision 2019/642].
25. The text of the Withdrawal Agreement attached to Council Decision 2019/274 is therefore replaced by the text of the adapted Withdrawal Agreement attached to Council Decision 2019/642. The adapted text of the Withdrawal Agreement was published in OJ C 144, p. 1 (25 Apr. 2019), available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2019:144I:FULL&from=EN .
26. In UK: ECJ, 10 Dec. 2018, Case C-621/18, Andy Wightman and Others v Secretary of State for Exiting the European Union, the European Court of Justice ruled that:

    > Article 50 TEU must be interpreted as meaning that, where a Member State has notified the European Council, in accordance with that article, of its intention to withdraw from the European Union, that article allows that Member State — for as long as a withdrawal agreement concluded between that Member State and the European Union has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in Article 50(3) TEU, possibly extended in accordance with that paragraph, has not expired — to revoke that notification unilaterally, in an unequivocal and unconditional manner, by a notice addressed to the European Council in writing, after the Member State concerned has taken the revocation decision in accordance with its constitutional requirements. The purpose of that revocation is to confirm the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State, and that revocation brings the withdrawal procedure to an end.
27. On 1 Nov. 2019 at the latest (in the case that the ratification procedures are completed in Oct.).
28. *See* sec 4.1.
29. The reference to the EU-27 should be read as also including Iceland, Liechtenstein and Norway, which are members of the European Economic Area.

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3. Brexit: Regulatory Implications for Banking and Financial Services

3.1. The EU passport regime

Currently, the EU banking and financial services sectors rely extensively on the passporting rights that are available under various EU single-market directives and allow firms to provide the services or perform the activities for which they have been authorized throughout the single market, either on a cross-border basis from their home Member State or by establishing branches across the European Economic Area where clients are located, under a common set of rules and a single authorization from their home regulator. In essence, the EU passporting rules enable firms authorized in one Member State to carry on permitted activities and provide services to clients located in the European Economic Area without needing to obtain separate authorization in the host Member State(s). The passport relies on a set of harmonized prudential requirements under EU law and on mutual recognition of licences.[30]

Whenever an institution provides its services in a Member State other than that in which it is established, the competent authority of its home Member State is mainly responsible for its supervision.

The activities that are "passportable" are set out in the relevant EU single-market directives, including:

- the Capital Requirements Directive (CRD IV),[31]for credit institutions providing banking services (such as taking deposits and lending);[32]
- MiFID II[33]/MiFIR,[34]for investment firms providing investment services and/or investment activities;[35]
- the AIFMD,[36]for alternative investment fund managers in respect of marketing or managing alternative investment funds (AIFs);
- the UCITS Directive, for management companies in respect of marketing or managing undertakings for collective investments in transferable securities (UCITS);[37]and
- the Payment Services Directive,[38]for firms providing payment services.

In the event that the United Kingdom leaves the European Union without a deal, all EU primary and secondary law will cease to apply to the United Kingdom from 1 November 2019, and the United Kingdom will become a third country, without any transition period as provided for in the Withdrawal Agreement, from that moment onwards. In this no-deal Brexit scenario, the EU-27 and UK credit and financial institutions with existing passporting permissions would therefore lose the right to conduct business freely in the United Kingdom and the EU-27 area, respectively, by virtue of EU law.[39]They would have to rely on third-country equivalence rules (when available)[40]and on the temporary no-Brexit emergency measures enacted by the European Commission and various EU-27 Member States.

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30. Many non-EU financial institutions have established regulated subsidiaries in the United Kingdom on the basis that these passporting rights would allow them to access the markets of other EEA jurisdictions. If the United Kingdom were to cease benefitting from the EU passport regimes, these non-EU financial institutions may move their UK-regulated subsidiaries to a jurisdiction within the EU-27 or establish a new regulated subsidiary within the EU-27 so that they can continue to benefit from the passporting regimes.
31. Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176/338 [hereinafter CRD IV].
32. CRD IV includes passporting provisions in arts. 35 and 39. Respectively, these articles deal with the establishment of branches and cross-border activity. In accordance with art. 35 of CRD IV, any EEA credit institution wishing to exercise the freedom to provide services by establishing "a branch within the territory of another Member State shall notify the competent authorities of its home Member State" of its intention to do so. Similarly, in accordance with art. 39 of CRD IV, any EEA credit institution "wishing to exercise the freedom to provide services" on a cross-border basis "by carrying out its activities within the territory of another Member State for the first time shall notify the competent authorities of the home Member State" of its intention to do so Indicating "the activities on the list in Annex I which it intends to carry out".
33. Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173/349 [hereinafter MiFID II].
34. Regulation (EU) 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) 648/2012, OJ L 173 [hereinafter MiFIR].
35. MiFID II includes passporting provisions in arts. 34-35. Respectively, these articles deal with cross-border activity and the establishment of branches. Based on art. 34 of MiFID II, any investment firm authorized and supervised by the competent authorities of another Member State in accordance with that Directive and in respect of credit institutions in accordance with CRD IV may freely provide investment services and/or perform investment activities, as well as ancillary services (to the extent that they are provided together with an investment service and/or activity), across the European Economic Area, provided that such services and activities are covered by its authorization. Similarly, based on art. 35 of MiFID II, any EEA investment firm and credit institution may provide investment services and/or activities, as well as ancillary services (only to the extent that they are provided together with an investment service and/or activity), across the European Economic Area in accordance with the same MiFID II and CRD IV through the right of establishment (whether by the establishment of a branch or by the use of a tied agent), provided that those services and activities are covered by the authorization granted to the investment firm or the credit institution in the home Member State. Member Statesshall not impose any additional requirements, save for those allowed under para. 8 of the same art. 35 on the organization and operation of the branch in respect of the matters covered by the Directive.
36. Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) 1060/2009 and (EU) 1095/2010, OJ L 174 [hereinafter AIFMD].
37. Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast), OJ L 302/32 (2009).
38. Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) 1093/2010, and repealing Directive 2007/64/EC, OJ L 337/35(2015).
39. The same would occur at the end of the implementation period if the United Kingdom leaves the European Union with a deal, unless differently agreed in the context of the (yet to be negotiated) UK-EU new partnership arrangements.
40. *See* sec. 3.2.

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Conversely, if the United Kingdom leaves the European Union with a ratified Withdrawal Agreement in place, EU law (including the EU passport) will continue to apply to and in the United Kingdom throughout the transition period.

3.2. Third countries in EU financial regulation

Equivalence is a mechanism provided by some (but not all) EU single-market directives through which third-country firms (i.e. financial institutions located outside the European Economic Area) may be allowed to provide diverse financial services and activities across the single market if and to the extent that their home country's regulatory regime is deemed to be equivalent to EU standards[41]and certain other conditions are satisfied (a so-called "equivalence regime"). The conditions to be fulfilled may vary depending on the nature of the service provider, the service itself and the potential customers of the service.

Many recent financial services directives and regulations include third-country equivalence provisions, which stipulate cases in which the European Union may consider foreign regulatory and supervisory frameworks as equivalent (and under which criteria and to what extent this can occur).

Equivalence, however, is not available with respect to the provision of all services or the servicing of all client types, and quite often, it concerns more technical matters, without significantly altering third-country access terms. In addition, the availability of the equivalence regime generally requires an assessment and a positive decision by the European Commission.

Equivalence, if available and granted, "offers in most cases a much more piecemeal access to the single market than passport rights. Only in some instances can access under equivalence be considered 'passport-like'".[42]In many instances, equivalence provisions simply do not exist or are mainly technical and narrow in scope (such as under CRD IV) and, as such, do not provide passport-like rights of access. In these circumstances, third-country firms are not subject to EU provisions, but only to the national regimes in place, thus creating a fragmented regulatory environment.

3.3. MiFID investment services and activities

MiFIR[43]allows third-country firms to provide investment services to and perform investment activities with eligible counterparties (ECPs) and per se professional clients throughout the European Union, on the condition (inter alia) that an equivalence decision is adopted by the European Commission and that the relevant firms are registered in the register of third-country firms kept by the European Securities and Markets Authority (ESMA).[44]'[45]Member States shall not impose any additional requirements on third-country firms that are registered in the ESMA register in respect of matters covered by MiFIR or MiFIR II and shall not treat third-country firms more favourably than EU firms.

The equivalence decision to be adopted by the European Commission for this purpose aims at assessing that the legal and supervisory arrangements of the specific third country ensure that firms authorized in that third country comply with legally binding prudential and business conduct requirements that have equivalent effect to the MiFIR, MiFID II and CRD IV requirements (and relevant implementing measures).[46][47]It must also confirm reciprocity of treatment for EU firms under the third country's legal regime.

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41. The European Commission describes equivalence as follows: "[I]n certain cases the EU may recognise that a foreign legal, regulatory or supervisory regime is … equivalent to the corresponding EU regime." *See Recognition of non-EU financial frameworks (equivalence decisions)* , available at https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/recognition-non-eu-financial-frameworks-equivalence-decisions_en).
42. European Parliament, Understanding equivalence and the single passport in financial services: Third-country access to the single market (2017), available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599267/EPRS_BRI(2017)599267_EN.pdf .
43. Based on recital (41) MiFIR:

    The provision of services by third-country firms in the Union is subject to national regimes and requirements. Those regimes are highly differentiated and the firms authorised in accordance with them do not enjoy the freedom to provide services and the right of establishment in Member States other than the one where they are established. It is appropriate to introduce a common regulatory framework at Union level. The regime should harmonise the existing fragmented framework, ensure certainty and uniform treatment of third-country firms accessing the Union, ensure that an assessment of effective equivalence has been carried out by the Commission in relation to the prudential and business conduct framework of third countries, and should provide for a comparable level of protection to clients in the Union receiving services by third-country firms.
44. Arts. 46-49 MiFIR. According to art. 46(1) MiFIR:

    A third-country firm may provide investment services or perform investment activities with or without any ancillary services to eligible counterparties and to professional clients within the meaning of Section I of Annex II to Directive 2014/65/EU [MiFID II] established throughout the Union without the establishment of a branch where it is registered in the register of third-country firms kept by ESMA in accordance with Article 47.

    Based on art. 46(2) MiFIR:

    ESMA shall register a third-country firm that has applied for the provision of investment services or performance of activities throughout the Union in accordance with paragraph 1 only where the following conditions are met: (a) the Commission has adopted a decision in accordance with Article 47(1); (b) the firm is authorised in the jurisdiction where its head office is established to provide the investment services or activities to be provided in the Union and it is subject to effective supervision and enforcement ensuring a full compliance with the requirements applicable in that third country; (c) cooperation arrangements have been established pursuant to Article 47(2).

    For the purposes of being registered in the ESMA register, a third-country firm shall, according to art. 47(3) MiFIR, submit an application to ESMA after the adoption by the Commission of the decision referred to in art. 47 MiFIR, determining that the legal and supervisory framework of the third country in which the third-country firm is authorized is equivalent to the requirements described in art. 47(1).
45. As clarified by ESMA, under the MiFIR third-country regime, third-country firms registered by ESMA are not required to comply with any MiFID II/MiFIR organizational or conduct-of-business rules when interacting with eligible counterparties and per se professional clients established or situated in the European Union and are not subject to the direct supervision and enforcement by ESMA or any national competent authority in the European Union.
46. Recital (41) MiFIR:

    The equivalence assessment should be outcome-based; it should assess to what extent the respective third-country regulatory and supervisory framework achieves similar and adequate regulatory effects and to what extent it meets the same objectives as Union law. When initiating those equivalence assessments, the Commission should be able to prioritise among third-country jurisdictions taking into account the materiality of the equivalence finding to Union firms and clients, the existence of supervisory and cooperation agreements between the third country and the Member States, the existence of an effective equivalent system for the

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In the absence of an equivalence decision from the Commission, or when such decision is no longer in effect, Member States may allow third-country firms to provide investment services and activities to ECPs and per se professional clients in their territories in accordance with the applicable national regime.[48]

While the MiFIR regime for the provision of investment services to ECPs and per se professional clients by third-country firms is subject to a pan-European framework that requires at least, inter alia, the registration in the ESMA register and the adoption of an equivalence decision and cooperation arrangements between ESMA and the relevant third-country competent authority, the MiFID II regime on the provision of investment services to retail clients is fragmented across the European Union. Indeed, MiFID II merely empowers Member States to require the establishment of a branch for third-country firms intending to provide investment services to and perform investment activities with retail clients (and professional clients on request) in their territories and provides, when Member States opt for such a solution, for a minimum common regulatory framework with respect to the requirements applicable to those branches.[49]This option, which, as said, is discretionary and left to national legislation, does not lead to any passport for the provision of services by third-country firms to retail clients, which remains based on national regimes.

A third-country firm established in a country of which the legal and supervisory framework has been recognized by the Commission to be effectively equivalent in accordance with article 47(1) of MiFIR and is authorized based on article 39 of MiFID II[50]can provide the services and activities covered under the authorization to eligible counterparties and professional clients without the establishment of new branches.[51]

4. The Transition Periods under the Withdrawal Agreement and the Italian Brexit Decree

4.1. The Withdrawal Agreement

Part Four of the Withdrawal Agreement sets out the scope of a period of continuity (referred to as the "implementation period" or "transition period"), running from the date of entry into force of the Withdrawal Agreement until 31 December 2020,[52]as well as how it will function. The implementation period may be extended once, with both parties' mutual consent, for 1 or 2 years.[53]

The transition period is meant to bridge the period between the date of the United Kingdom's exit from the European Union and the entry into force of the new, yet to be negotiated, UK-EU partnership arrangements.[54]'[55]

The Withdrawal Agreement provides that during this period, the United Kingdom will no longer be a member of the European Union, but will be treated as such under EU law (with the exception of participation in the EU institutions and governance structures). Save for a few exceptions, the entire EU *acquis* (i.e. the existing rules under EU law) will continue to apply to and in the United Kingdom as if it were a

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recognition of investment firms authorised under foreign regimes as well as the interest and willingness of the third country to engage in the equivalence assessment process. The Commission should monitor any significant changes to the regulatory and supervisory framework of the third country and review the equivalence decisions where appropriate.

47. According to art. 47(1) MiFIR:

The Commission may adopt a decision … in relation to a third country stating that the legal and supervisory arrangements of that third country ensure that firms authorised in that third country comply with legally binding prudential and business conduct requirements which have equivalent effect to the requirements set out in this Regulation, in Directive 2013/36/EU [CRD IV] and in Directive 2014/65/EU [MiFID II] and in the implementing measures adopted under this Regulation and under those Directives and that the legal framework of that third country provides for an effective equivalent system for the recognition of investment firms authorised under third-country legal regimes. The prudential and business conduct framework of a third country may be considered to have equivalent effect where that framework fulfils all the following conditions: (a) firms providing investment services and activities in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis; (b) firms providing investment services and activities in that third country are subject to sufficient capital requirements and appropriate requirements applicable to shareholders and members of their management body; (c) firms providing investment services and activities are subject to adequate organisational requirements in the area of internal control functions; (d) firms providing investment services and activities are subject to appropriate conduct of business rules; (e) it ensures market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation.

48. Recital (41) MiFIR: "Where a decision cannot be made determining effective equivalence, the provision of services by third-country firms in the Union remains subject to national regimes." Art. 46(4) MiFIR: "Member States may allow third-country firms to provide investment services or perform investment activities together with ancillary services to eligible counterparties and professional clients within the meaning of Section I of Annex II to Directive 2014/65/EU in their territories in accordance with national regimes in the absence of the Commission decision in accordance with Article 47(1) or where such decision is no longer in effect. "
49. Arts. 39-43 MiFID II.
50. Meaning that it has established a branch in a Member State to provide investment services or perform investment activities with or without any ancillary services to retail clients or to professional clients.
51. Art. 47(3) MiFIR.
52. Art. 126 Withdrawal Agreement: "There shall be a transition or implementation period, which shall start on the date of entry into force of this Agreement and end on 31 December 2020."
53. Art. 132 Withdrawal Agreement.
54. European Commission, Fact Sheet, *Brexit Negotiations: What is in the Withdrawal Agreement* (14 Nov. 2018), available at http://europa.eu/rapid/press-release_MEMO-18-6422_en.htm [hereinafter European Commission Fact Sheet] explains that the continued application of EU law during the transition period "will give time to national administrations and businesses to prepare for the new relationship" and "also provide the EU and the UK with time to negotiate the future relationship".
55. UK: Her Majesty's Government, *Explainer for the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union* (14 Nov. 2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756376/14_November_Explainer_for_the_agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Unio 1_.p states that this will be of mutual benefit, "giving an important bridge to our future relationship, and giving citizens and businesses in both the UK and the EU the time and confidence they need to plan for the UK's future relationship with the EU".

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Member State, and references to Member States in EU law will be understood as including the United Kingdom.[56]'[57]As the European Commission Fact Sheet explains:

> This means that the UK will continue to participate in the EU Customs Union and the Single Market (with all four freedoms) and all Union policies. Any changes to the Union acquis will automatically apply to and in the UK. The direct effect and primacy of Union law will be preserved. All existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures will apply, including the competence of the Court of Justice of the European Union.

In essence, during the transition period, the United Kingdom and EU-27 would continue to have access to one another's markets on current terms, giving businesses certainty.

At the end of the implementation period, the current application of common rules would come to an end, as would the existing arrangements under which EU law applies to the United Kingdom.

4.2. The Brexit Decree

4.2.1. Introduction

On 24 January 2019, the Italian Ministry of Economics and Finance announced that the government was preparing emergency decree-laws to ensure the continuity of markets and businesses in the context of a no-deal Brexit. The press release[58]stated:

> The […] measures are aimed at ensuring the financial stability, the integrity, and the operational continuity of both markets and intermediaries, and at protecting depositors, investors, and customers in general, through the introduction of an appropriate transitional period during which such entities can continue to operate, similarly to the transitional period planned in the event of an agreement between the United Kingdom and the EU.
>
> During the transitional period provided [for] by the measures mentioned above, banking, financial and insurance intermediaries (including those active in the business of providing supplementary pensions) will be able to continue to operate according to existing laws and regulations. Such a scenario is envisioned for both [UK] firms carrying out activity in Italy and Italian firms carrying out activity in the United Kingdom. The protection of those intermediaries' depositors and investors will also be guaranteed on a continuous basis throughout the aforementioned transitional period.
>
> The provisions will be differentiated according to the nature of the intermediaries involved, taking into account the applicable European and national laws and regulations.
>
> The decree-law will identify the obligations and procedural steps that the various types of intermediaries have to comply with – based on applicable sector legislation – in order to continue to operate beyond the defined transitional period, with the aim of ensuring stable and certain parameters to allow each intermediary to adapt to the new institutional and operational framework.
>
> Similar provisions will be included in the part of the decree-law concerning trading venues and intermediaries' access to those venues. In this case, too, the provisions for the transitional period – the period [during which] intermediaries can continue their current activity according to the European sector legislation – apply to both [UK] companies managing trading platforms operating in Italy and Italian companies managing trading platforms operating in the UK.
>
> With reference to the investments of pension funds in UCITS and AIFs established under the laws of the United Kingdom […], the decree-law will provide for the possibility to continue to hold such instruments during the transitional period.
>
> The exceptional measures to be implemented through the decree-law are exclusively aimed at avoiding discontinuity in the exercise of activities subject to regulatory licensing and restrictions at a national level, in accordance with the relevant EU-harmonized regulations.

Considering the UK government's failure to secure the required ratification of the Withdrawal Agreement by Parliament and the increasing likelihood that the United Kingdom could have left the European Union on 29 March 2019 without an agreed withdrawal deal or

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56. The Negotiation Guidelines (Dec. 2017) adopted by the European Council stated that the transition period would cover the whole of the EU *acquis* , while the United Kingdom "as a third country [would] no longer participate in or nominate or elect members of the EU institutions, nor participate in the decision-making of the Union bodies, offices and agencies". These principles were reflected in transition provisions contained in the draft Withdrawal Agreement published in March 2018 and in the agreed text published in November 2018.
57. Art. 127(1) Withdrawal Agreement: "Unless otherwise provided in the [Withdrawal] Agreement, Union law shall be applicable to and in the United Kingdom during the transition period." Art. 127(3) Withdrawal Agreement (which deals with the effects of the application of EU law): "During the transition period, the Union law applicable pursuant to [Article 127(1)] shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States, and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the Union." Art. 127(6) Withdrawal Agreement: "Unless otherwise provided in this [Withdrawal] Agreement, during the transition period, any reference to Member States in the Union law applicable pursuant to [Article 127(1)], including as implemented and applied by Member States, shall be understood as including the United Kingdom." Art. 131 Withdrawal Agreement (which deals with the ongoing jurisdiction of the EU authorities, such as ESMA): "During the transition period, the institutions, bodies, offices and agencies of the Union shall have the powers conferred upon them by Union law in relation to the United Kingdom and to natural and legal persons residing or established in the United Kingdom. In particular, the Court of Justice of the European Union shall have jurisdiction as provided for in the Treaties."
58. IT: Ministry of Economy and Finance, Press release, *BREXIT: Italy has drafted transitional measures to ensure the continuity of both markets and intermediaries in the event of no deal* (24 Jan. 2019), available at http://www.mef.gov.it/ufficio-stampa/comunicati/2019/documenti/comunicato_0015en.pdf .

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implementation period, on 25 March, the Italian government enacted the Brexit Decree[59]to mitigate the cliff-edge effect of a no-deal Brexit on UK and Italian financial institutions with existing passporting permissions, which would have lost the right to conduct business freely in one another's markets by virtue of EU law.

The decree was published in the Italian Official Gazette on 25 March 2019 and came into force on 26 March. The parliament converted the Brexit Decree, with amendments, into Law on 20 May 2019.

4.2.2. The temporary permissions regime and the temporary run-off regime

4.2.2.1. General

The Brexit Decree sets out different transition rules for the banking and financial sector, which vary depending on (i) the nature of the business carried out; (ii) whether the services and activities are being performed on the basis of the freedom to provide services (cross-border) or the freedom of establishment (branch); and (iii) the types of clients that are being served, having due regard to the applicable European and national laws and regulations.[60]

More in detail, two complementary regimes are established for UK firms that carry out passported activities in Italy immediately before exit day, namely (i) a temporary permissions regime (TPR); and (ii) a temporary run-off regime (TROR).

These regimes will only become operational if there is a no-deal Brexit and will apply to UK banks, electronic money and payment services firms, MiFID investment firms, fund managers and undertakings for collective investment (altogether referred to as "UK firms" or "UK institutions").[61]

The key difference between the two regimes is that the TPR covers both existing and new businesses, while the TROR permits only the run-off of existing business.

Following the enactment of the Brexit Decree, Consob[62]and the Bank of Italy[63]issued implementing measures, detailing the TPR and TROR requirements and formalities.

A special temporary permissions regime is also envisaged for UK and Italian market operators/investment firms operating a trading venue.

4.2.2.2. The TPR

UK institutions with a passport will generally need to opt in to the TPR if they wish to take advantage of it. If they do not opt in, the TROR will apply to them automatically. Certain regulated services and activities, however, are not eligible for the TPR and automatically fall under the TROR.

The TPR allows eligible UK institutions to continue carrying out their current passported services and activities in Italy for a limited period after exit day,[64]while seeking full Italian authorization in the case that they intend to continue to operate in Italy. Firms will need to notify the appropriate Italian regulator (the Bank of Italy or Consob) that they wish to use the TPR. Notifications (TPR notices) shall be sent no later than 3 days prior to the actual exit day.[65]The scope of the permission under the TPR will generally reflect the scope of a firm's passporting permission pre-Brexit, and it will allow UK firms to enter into new contracts with Italian businesses (except for deposit-taking activities carried out on a cross-border basis).

The following UK firms may enter the TPR:

- banks providing banking/financial services or MiFID investment services and activities,[66]subject to the following limitations in the case that they operate on a cross-border basis:

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59. IT: Law Decree No. 22, 25 Mar. 2019, converted into law by IT: Law No. 41, 20 May 2019 [hereinafter Brexit Decree].
60. Based on the current regulatory framework, which does not provide for a completely EU-harmonized third-country regime, banks and investment firms from third countries may be allowed to operate in Italy (with or without the establishment of a branch), provided that they become so authorized by the Bank of Italy or Consob. Conversely, third-country e-money services firms need to establish a local branch, while third-country payment services firms and fund managers can only operate in Italy by means of setting up a full-fledged and licensed subsidiary under Italian law (or EU law, in another Member State). Finally, Italian and third-country trading venues need to submit an application to the competent Italian regulator to operate in one another's markets.
61. The article focuses on the provisions of the Brexit Decree that are relevant for UK banking and financial institutions that carry out regulated activities in Italy. The Brexit Decree also includes provisions concerning insurance undertakings and intermediaries, which are not addressed herein.
62. Consob Communication n. 7 of 26 Mar. 2019: No-deal Brexit – Requirements for intermediaries who provide investment services and activities, with or without ancillary services, resulting from the adoption of Decree Law no. 22 of March 25, 2019 laying down the transitional regime, available at http://www.consob.it/web/consob-and-its-activities/bullettin/documenti/english/resolutions/c20190326_7.htm . On 1 Aug. 2019, Consob published amendments to said Communication n. 7 of 26 Mar. 2019 to reflect the amendments to the Brexit Decree upon its conversion into law by the Parliament (*see* Consob Press Release, available at http://www.consob.it/documents/46180/46181/Press_release_20190801.pdf/17872e3e-73ed-4253-b3b8-9f3e79459389). The updated text of the Consob Communication is attached to the press release.
63. Bank of Italy Communication of 27 Mar. 2019: Brexit – Fulfillment of the requirements for UK financial institutions under Decree Law 25 March 2019, n. 22, available at https://www.bancaditalia.it/compiti/stabilita-finanziaria/informazioni-brexit/brexit-fulfillment/index.html .
64. The provisions of the Brexit Decree make reference to the actual exit day in the event of a no-deal Brexit.
65. UK banks/investment firms that are entitled to participate in auctions of Italian government bonds are not required to submit the temporary permissions regime (TPR) notice (except for deposit-taking activities).
66. Different from the operation of a multilateral trading facility (MTF) or an organized trading facility (OTF), to which a different temporary regime applies (*see* sec. 4.2.3.).

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(1) for deposit-taking activities, the TPR only allows servicing of existing relationships as of exit day (entering into new contracts or renewing, even tacitly, existing ones is not allowed); and

(2) MiFID investment services and activities can only be provided to MiFID eligible counterparties, per se professional clients and, solely to manage life-cycle events of "over-the-counter" (OTC) non-cleared derivatives that were in place as of exit day, regions, independent provinces (Trento and Bolzano) and public entities;

- investment firms providing MiFID investment services and activities, subject to the same limitation in (2) above in the case that they operate on a cross-border basis; and
- e-money services firms operating in Italy through a branch.

The "short" TPR period is 6 months from exit day. UK firms that wish to continue to operate in Italy after the end of the short TPR period can seek full Italian authorization. To do so, they shall submit an application, in compliance with the provisions of the Italian Finance Code[67]or the Italian Banking Code[68](as the case may be), before the end of the short TPR period to apply for an Italian licence or establish an Italian-regulated entity, to which the business would then be transferred. If an application is submitted, the TPR period will be extended to 18 months as from exit day (the long TPR period).[69]If no application is submitted, the TPR will come to an end, and the Italian-regulated business will have to be run-off within a 6-month TROR period.

4.2.2.3. The TROR

By contrast, the TROR is designed to allow UK firms to conduct an orderly exit from the Italian market by running off regulated business. The TROR will apply automatically to UK firms that either do not or cannot enter the TPR or do not file an application through the TPR route (thus leaving the regime at the end of the short TPR period) to run off. The TROR allows UK institutions to fulfil Italian contracts entered into before exit day or before exiting the TPR, but, unlike the TPR, it does not allow the carrying out of regulated activities in relation to new contracts (except when necessary to service OTC non-cleared derivatives). UK firms falling within the scope of the regime shall cease to operate on the actual exit day and are expected to run off their Italian business within the subsequent 6 months (in the case that they cannot or do not enter the TPR), or within 5 months from the end of the short TPR period (in the case that they do not submit an application before then).

The TROR automatically applies to the following UK institutions:

- banks and investment firms providing MiFID investment services/activities on a cross-border basis to retail or "opted up" professional clients;
- e-money services firms operating on a cross-border basis or by means of a network of agents;
- payment services firms, fund managers and undertakings for collective investment;[70]
- UK firms eligible for the TPR that fail to make the TPR notice (when required); and
- UK firms that enter the TPR but fail to submit the application (in which case the TROR would start to apply from the end of the short TPR period).

UK institutions ceasing their business in Italy must inform clients, counterparties and authorities, within 15 days starting from the actual exit day,[71]of measures and actions taken to ensure an orderly cessation of business.[72]

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67. IT: Legislative Decree No. 58, 24 Feb. 1998 [hereinafter Italian Finance Code].
68. IT: Legislative Decree No. 385, 1 Sept. 1993 [hereinafter Italian Banking Code].
69. For UK banks/investment firms providing MiFID investment services/activities on a cross-border basis (to clients other than retail or "opted up" professional clients (i.e. clients that have elected to be treated as professional clients)), the TPR period is arguably the earlier of 18 or 6 months as from exit day (depending on whether or not the application is filed) and the date on which a decision is taken by the European Commission pursuant to art. 47(1) MiFIR. As stated in sec. 2.3., based on art. 47(1) MiFIR, the Commission may adopt a decision in relation to a third country (including, therefore, the United Kingdom, as from exit day) stating that the legal and supervisory arrangements of that third country ensure that firms authorized in that third country comply with legally binding prudential and business conduct requirements that have equivalent effect to those applicable to EU firms and that the legal framework of that third country provides for an effective equivalent system for the recognition of investment firms authorized under third-country legal regimes. If the Commission takes such an equivalence decision in relation to the United Kingdom post-Brexit, UK firms would be allowed to provide investment services and activities to MiFID-eligible counterparties and per se professional clients in EU Member States without being required to establish local branches. In this respect, the wording of the Brexit Decree and the guidelines published by Consob are not particularly clear. A reasonable interpretation is that, in the case that an equivalence decision is taken with regard to the United Kingdom before the expiration of the TPR period, the MiFIR regime will apply, and UK banks and investment firms will be allowed to provide investment services and activities in Italy on a cross-border basis (also beyond the expiration of the TPR period).
70. Reference is to undertakings for collective investment (UCIs) that are established in the United Kingdom, regardless of whether they are managed by a UK or EEA fund manager.
71. Based on the original wording of the Brexit Decree, these communications were due within 15 days from the entry into force of the Brexit Decree. The deadline has been amended upon conversion of the Brexit Decree into law.
72. According to Consob, for UK banks and investment firms that enter the TPR but fail to submit the application within the end of the short TPR period (thus exiting the TPR and entering the temporary run-off regime (TROR)), the deadline for informing clients, counterparties and authorities is 15 days from the end of the short TPR period.

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4.2.3. The temporary permissions regime for market operators/investment firms operating a trading venue

EEA market operators/investment firms (altogether referred to as trading venue operators) that operate a regulated market, a multilateral trading facility or an organized trading facility[73]currently rely on MiFID II passport rights to enable members based in other EEA countries access to their markets. If the United Kingdom leaves the European Union without a deal and without entering an implementation period, those passport rights will no longer apply.

The Brexit Decree establishes a special temporary permissions regime for UK and Italian trading venue operators. The length of this regime is 18 months from the actual exit day. During this period:

- Italian trading venue operators may continue to carry out their activities in the United Kingdom, enabling UK members or participants, as of exit day, to retain access to their markets, on the condition that an application is filed with Consob or the Bank of Italy based on articles 26, 29 or 70 of the Italian Finance Code[74](to extend the operations to the United Kingdom) and that UK and EU-applicable regulations are complied with;[75]and
- UK trading venue operators may continue to carry out their activities in Italy, enabling Italian members or participants, as of exit day, to retain access to their markets, on the condition that an application is filed with Consob or the Bank of Italy based on articles 26, 29 or 70 of the Italian Finance Code (to extend the operations to Italy) and that EU-applicable regulations are complied with.

4.2.4. Provisions concerning outstanding loans granted by UK passported lenders

Under the standard “illegality clause”, typically contained in English law facility agreements, if it becomes unlawful for a lender to perform any of its obligations under the loan agreement or to fund, issue or maintain its participation in any utilization under the facility, that lender is entitled to cancel its commitment or, as the case may be, require the prepayment of the loan. A UK lender willing to leave the Italian market might consider invoking illegality to cancel its commitment or request a mandatory loan prepayment.

In this respect, the Brexit Decree includes provisions concerning outstanding loans granted by UK passported lenders to Italian borrowers, stating that the timing and the terms of payment of both interest and principal in respect of these loans shall remain unchanged, also when a lender ceases its activities under the TROR.

It is debatable whether such provision effectively deals with all issues that may arise under the illegality clause. An assessment on a case-by-case basis of the language actually utilized in the relevant provisions of the facility agreement is needed. On the one hand, the events captured by the standard clause seem wider than the scope of the Brexit Decree provision. On the other hand, the clause is frequently negotiated in a variety of formats, which can restrict or enlarge its perimeter.

In any event, it also has to be noted that facility agreements often contain “mitigation” clauses, which require the lender to carry out all reasonable steps to mitigate any circumstances that arise and would result in any amount becoming payable or cancelled pursuant to the illegality clause. In this respect, it is debatable whether such mitigation obligation of the lenders also includes delivering the TPR notice (when required).

4.2.5. The transitional tax regime

4.2.5.1. General

The Brexit Decree establishes a transitional tax regime (TTR), lasting 18 months from the actual exit day. During that period:

- Italian tax rules that rely on the UK membership of the European Union (including those connected to EU directives) shall continue to apply; and
- VAT and customs duty provisions deriving from the implementation of EU directives and regulations shall continue to apply mutatis mutandis.

The Italian Minister of Economy and Finance is required to enact implementing regulations for the TTR, which shall not imply any new or additional charges for the public budget.[76]

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73. MiFID II/MiFIR establish three types of multilateral trading venues: regulated markets, MTFs and OTFs. While regulated markets are operated by a market operator, MTFs and OTFs may be operated by investment firms or market operators.
74. IT: Legislative Decree 58 of 24 Feb. 1998 [hereinafter Italian Finance Code].
75. On 21 Mar. 2019, Borsa Italiana published a notice (*see* https://www.borsaitaliana.it/borsaitaliana/regolamenti/avvisi/avviso5672.pdf), stating that it had filed an application with Consob pursuant to art. 70 of the Italian Finance Code and that, as a consequence, it can continue to allow existing participants incorporated in the United Kingdom to access its markets during the transition period. The notice also states that “nothing further is required of UK existing participants for their participation in the Borsa Italiana markets”.
76. These regulations have not been enacted so far.

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4.2.5.2. The Italian tax regime applicable to medium to long-term loans granted by qualifying foreign lenders

According to Italian domestic rules, interest and other proceeds derived from medium to long-term loans granted to Italian enterprises[77] by certain qualifying foreign lenders operating on a cross-border basis may be exempt from withholding tax in Italy. The exemption applies on the condition that the relevant loan is granted in compliance with the provisions of the Italian Banking Code (i.e. the lender must be allowed to lend in Italy).

Qualifying lenders include, among others, passported credit institutions established in EU Member States and foreign institutional investors under article 6(1)(b) of Decree 239/96,[78] even if not liable to tax, that are subject to forms of supervision in their state of formation (e.g. EU AIFs that have been authorized by the Bank of Italy to lend in Italy).

In the event of a no-deal Brexit, credit institutions established in the United Kingdom will become third-country entities as from exit day. However, based on the TPR and TTR rules, UK credit institutions that enter the TPR will remain qualifying lenders. As a consequence, interest derived from new loans granted in the TPR period by these credit institutions should remain eligible for the withholding tax relief.[79] These loans should also fall within the scope of application of the optional 0.25% substitute tax regime under article 15 of Decree 601/73[80] (which replaces all transfer taxes otherwise applicable to the facility agreement and the security package).

On the contrary, UK AIFs cannot enter the TPR and automatically fall under the TROR. This means that, even when a UK AIF was authorized by the Bank of Italy to directly lend in Italy, that authorization would no longer be in place as from exit day. The TROR does not allow a UK AIF to grant new loans in Italy.[81]

4.2.5.3. The Italian withholding tax relief for dividends, interest and royalties

During the TTR period:

- the withholding tax relief available in respect of Italian-source dividends, interest and royalties based on the domestic rules implementing the Parent-Subsidiary Directive[82] and the Interest and Royalties Directive[83] will remain available to UK resident recipients, on the same terms as currently apply; and
- dividends paid to UK resident corporations and entities subject to UK corporation tax should remain eligible for the reduced 1.2% withholding tax rate, on the same terms as currently apply.

77. The Italian tax authorities recently clarified, in IT: Ruling 98 of 5 Apr. 2019 (available at https://www.agenziaentrate.gov.it/wps/file/nsilib/nsi/normativa+e+prassi/risposte+agli+interpelli/interpelli/archivio+interpelli/interpelli+2019/aprile+2019+interpelli/interpello+98+2019/Risposta+n.+98_2019.pdf), that Italian UCIs are not eligible borrowers for the purposes of the withholding tax relief, as they do not qualify as enterprises for tax purposes.
78. IT: Legislative Decree 239 of 1 Apr. 1996 [hereinafter Decree 239/96].
79. *See* sec. 4.2.2.2.
80. IT: Presidential Decree 601 of 29 Sept. 1973 [hereinafter Decree 601/73].
81. *See* sec. 4.2.2.3.
82. Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (recast) , OJ L 345 (2011), Primary Sources IBFD. Under this Directive, associated companies in different EU Member States do not have to deduct tax on certain payments of dividends.
83. Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States , OJ L 157 (2003), Primary Sources IBFD. This Directive allows EU companies to make certain interest and royalty payments to associated companies and permanent establishments within the European Union without needing to deduct tax from them.

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