

# I.A. Régulation européenne

## BREXIT: WHAT IMPACT ON THE FINANCIAL SERVICES SECTOR?



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The financial services sector has received particular attention after the decision of the UK to leave EU. It is one of the most crucial issues at stake in the negotiations that started on 19 June. This is, however, not surprising, as the UK and the EU-27 financial services industries are highly interconnected, with wider implications for both UK and EU economies.

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The City of London is the leading global financial centre.<sup>(1)</sup> However, 23% of the UK financial services revenues (banking, asset management, insurance, reinsurance and infrastructure revenues) are related to the EU;<sup>(2)</sup> in some areas of derivatives trading business, essential for risk management, the City hosts over 70%

of EU trading activity. But the EU is similarly dependent on the UK. 35% of the wholesale financial activities of the EU takes place in London:<sup>(3)</sup> European corporations benefit from the deepness of the UK capital markets to raise finance and large European institutions and investors also turn to wholesale banks to manage their cash and hedge foreign exchange and interest rate risks.<sup>(4)</sup> Accordingly, every disruption of this interconnectedness, may entail adverse consequences not only for the UK economy but also for the access of the EU to capital markets finance.

But when may this disruption occur? Undoubtedly, in the event of the worst-case scenario of a “hard” Brexit, which means no passport for UK financial actors anymore (I). And how such a disruption may be prevented? Undeniably, if alternative paths to enter into the EU single market are envisaged (II).

### I. The risk of losing the passport

The financial services sector is one of the most highly regulated sectors, given its implications for investors, other market participants, financial stability and the economy as a whole. Generally speaking, jurisdictions usually impose on foreign providers of financial services, who want to access their markets, their own domestic rules, and place them under their own supervision, even if these providers have already been regulated and supervised in their home State. On the contrary, in the EU, pursuant to current single market rules, financial market actors may offer cross-border services, without having to comply with the regulatory and supervisory framework of the host Member States. Regulation and supervision of the home Member State – the State in which they have been registered – generally suffice for operating financial activities across the EU.

This facility is due to the passport mechanism: financial market actors whose services are approved by the competent authority of their Home Member State obtain a “passport” that allows them to offer

1. See The Global Financial Centres Index 20 (September 2016), [www.longfinance.net/images/gfci/20/GFCI20\\_26Sep2016.pdf](http://www.longfinance.net/images/gfci/20/GFCI20_26Sep2016.pdf).  
2. European Parliament, “Brexit: the Unlighted Kingdom and EU financial services”, [www.europarl.europa.eu/RegData/etudes/BRIE/2016/587384/IPOL\\_BRI\(2016\)587384\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/587384/IPOL_BRI(2016)587384_EN.pdf).

3. The CityUK, “UK: The Europe’s Financial Centre” (August 2016), [www.thecityuk.com/assets/2016/Reports-PDF/The-UK-Europes-financial-centre.pdf](http://www.thecityuk.com/assets/2016/Reports-PDF/The-UK-Europes-financial-centre.pdf).  
4. European Parliament, “Brexit: the Unlighted Kingdom and EU financial services”, [www.europarl.europa.eu/RegData/etudes/BRIE/2016/587384/IPOL\\_BRI\(2016\)587384\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/587384/IPOL_BRI(2016)587384_EN.pdf).

their services to other Member States without being subject to additional regulatory requirements. This passport mechanism is based upon the principle of mutual recognition. As the rules applying to financial services are harmonised across the EU and the supervisory practices converge under the auspices of the three European Supervisory Authorities, the host regulators of each Member State accept financial operators registered in other Member States. For example, regarding banking activities, article 17 CRD IV<sup>(5)</sup> provides that “host Member States shall not require authorisation or endowment capital for branches of credit institutions authorised in other Member States”. Banks can therefore establish branches or provide services in other Members States, under the sole condition of notification of their home authorisation to the host competent authorities. As to the supervisory regime, article 49.1 CRD IV provides that “the prudential supervision of an institution (...) shall be the responsibility of the home Member State”, albeit the host supervisor retains a number of competences, in particular as regards liquidity supervision and the protection of depositors or investors.

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Recent evidence suggests that the UK financial services sector will lose the passport when the UK leaves the EU. Prime Minister May stated in her 17 January 2017 speech on the UK’s negotiating objectives<sup>(6)</sup> that the UK is to leave the single market and she reaffirmed this position in the letter triggering Article 50, which was sent on 29 March 2017 to European Council President Tusk.<sup>(7)</sup> One must, however, not rule out that an agreement will be reached on the retention of the passport mechanism for a transitional period of time, but the way to it is far from easy, as consensus should be found

5. Directive 2013/36/UE du Parlement européen et du Conseil du 26 juin 2013 concernant l'accès à l'activité des établissements de crédit et la surveillance prudentielle des établissements de crédit et des entreprises d'investissement, modifiant la directive 2002/87/CE et abrogeant les directives 2006/48/CE et 2006/49/CE.
6. [www.telegraph.co.uk/news/2017/01/17/theresa-mays-brexit-speech-full/](http://www.telegraph.co.uk/news/2017/01/17/theresa-mays-brexit-speech-full/).
7. [www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50](http://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50).

on complex issues as the continuing application of the EU rules and the judicial control exercised by the European Court of Justice.

The most reasonable scenario however is that the UK exit from the EU single market will deprive UK financial actors from the passport benefit, as the UK will be considered “a third, non-EU country”. This will clearly raise the risk of disruption of the aforementioned UK and EU financial services industry interconnectedness.

The question therefore arises as to whether any alternative exists in order to prevent this disruption and permit the access to the EU single market.

## II. The alternative paths into the EU single market

Undoubtedly, UK firms may use the passport mechanism, if they set-up subsidiaries in the EU-27 and conduct their business through these subsidiaries. There are some indications that EU financial centres (i.e. Paris, Frankfurt) compete for attracting UK-based business. Still, this strategy is not without costs. For example, according to the Boston Consulting Group,<sup>(8)</sup> establishing subsidiaries in the EU-27 would increase global costs by 3% to 8% for investment banks, depending on their current operational model. Conversely, European banks operating in the UK through branches would also face higher costs. Needless to say, subsidiaries will be subject not only to EU regulation, but also to domestic rules, mainly tax and labour law, which might be considered as a serious obstacle for firms currently based in the UK.

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Another alternative would be to grant UK firms “an equivalence regime”, which would provide them access to the EU-27 markets. This is not a new solution as this regime has already been set-up for third countries accessing EU markets. The equivalence regime is built on the premise that where a third country’s financial regulation rules are “equivalent” to those of the EU, access to the EU financial market is allowed, without the third country actor being subject to EU law.

8. [http://image-src.bcg.com/BCG\\_COM/BCG-Impact-of-Brexit-on-Capital-Markets-July-2016\\_tcm9-38972.pdf](http://image-src.bcg.com/BCG_COM/BCG-Impact-of-Brexit-on-Capital-Markets-July-2016_tcm9-38972.pdf).

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The current equivalence regime is, nonetheless, incoherent and suffers from structural deficiencies. It has not been established to cover global access to the financial markets, but is largely fragmented, depending on the type of actors and services. For example, the CRD IV does not include any provision for third-country access to EU markets, which means third-country banks must first acquire supervisory authorisation before conducting business in the EU.<sup>(9)</sup> In the same vein, in the area of investment collective schemes, an equivalence regime is not always provided by EU law. If, for example, the Alternative Investment Funds Managers Directive (AIFM)<sup>(10)</sup> grants cross-border rights to non-EU firms, providing that equivalence is recognised by the Commission and the firm is authorised by the European Securities and Markets Authority (ESMA)<sup>(11)</sup>, such equivalence rights do not exist under the Undertakings for Collective Investment in Transferable Securities Directive (UCITS):<sup>(12)</sup> a UCITS fund must be domiciled in the EU and managed by a EU company.

Moreover, even when it is provided by EU legislation, the equivalence regime still does not offer legal certainty. The equivalence criteria are set out in EU law, which can be easily amended. In addition, the equivalence decision is adopted by the European Commission on a discretionary basis, even though it is preceded by a non-binding opinion from the compe-

9. European Parliament, “Third-country equivalence in EU banking legislation” (12 July 2017), [www.europarl.europa.eu/RegData/etudes/BRIE/2016/587369/IPOL\\_BRI\(2016\)587369\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/587369/IPOL_BRI(2016)587369_EN.pdf).

10. 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) No. 1060/2009 and (EU) No. 1095/2010.

11. Art. 35 and art. 37 to 41 of AIFMD.

12. Directive 2009/65/CE du Parlement européen et du Conseil du 13 juillet 2009 portant coordination des dispositions législatives, réglementaires et administratives concernant certains organismes de placement collectif en valeurs mobilières (OPCVM).

tent European Supervisory Authority. Finally, it can be easily withdrawn. If for example, equivalence between UK and EU-27 standards is initially decided, but then the UK legislator decides not to follow the European rules considering them as rigid and inefficient and to apply different supervisory practices, equivalence may be withdrawn with all the costs that such a withdrawal may entail. One could however argue that the history of financial services regulation shows that it is the EU that builds upon the UK standards and not the opposite. But it is uncertain how EU regulatory policy will evolve after Brexit and which countries will play a leading role in the design of the EU regulatory framework.

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The Brexit negotiations are therefore likely to lead to a special EU/UK market access arrangement for financial services, probably in a Free Trade Agreement.<sup>(13)</sup> The design of a special agreement should circumvent various obstacles.<sup>(14)</sup> It seems for example reasonable that the EU and the UK should agree on a common set of regulatory principles. Perhaps, international financial standards could serve as a guide for the drafting of these principles. But the path to be followed should also contemplate the hypothesis that one of the signatory parties deviates from these principles. In this regard, a special organ should be appointed that would be responsible for enforcement issues. Finally, supervi-

13. See Prime Minister’s Letter to Donald Tusk Triggering Article 50, 29 March 2017, [www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50](http://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50).

14. For an in-depth analysis of these obstacles as well as the Brexit context see N. MOLONEY, “Brexit, the EU and its Investment Banker: Rethinking ‘Equivalence’ for the EU Capital Market”, LSE Law, Society and Economy Working Papers 5/2017.

sion of cross-border actors is a crucial issue. Will the principle of home supervision still apply? This would imply that EU-27 supervisory authorities rely on the supervision exercised by their UK analogues. But given the current divergences on the supervisory practices, with the UK exercising more pro-active supervision and imposing less sanctions than other EU countries, this may not be the solution to expect. Perhaps a shared supervision scenario is more plausible.

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There is no doubt that Brexit will spark major change. One thing, however, should not change: the financial sectors in the UK and the EU should remain closely connected, and regulators as well as supervisors of negotiating parties should not engage into a race to the bottom, which would eventually undermine the so-desired financial markets stability.

## I.B. Régulation comparée

### LA RESPONSABILITÉ CIVILE SUR LES MARCHÉS FINANCIERS<sup>(1)</sup>



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Un constat s'impose d'emblée : la responsabilité civile occupe une place assez faible sur les marchés financiers. En effet, le particularisme des marchés financiers rejailit sur la responsabilité civile et en freine la mise en œuvre. Cette affirmation doit toutefois être précisée quant à son champ d'application.

Deux domaines sont en fait à distinguer. La responsabilité des prestataires financiers envers leurs clients est fréquemment mise en œuvre et donne lieu à une jurisprudence assez abondante, notamment dans le cadre de leurs obligations d'information, de mise en garde et de conseil. Au contraire, la responsabilité civile résultant des manquements susceptibles d'être commis par tout intervenant sur les marchés dans le cadre de l'information du public et des abus de marché (manipulation du cours de bourse et opération d'initié) reste notablement peu développée.

À l'examen, le particularisme des marchés financiers ne se manifeste dans toute sa plénitude que pour ce second type de faits générateurs, et ce dès lors qu'ils sont commis sur les marchés que l'on peut qualifier de « boursiers ». Ces marchés constituent en effet des marchés organisés au sein desquels a lieu une confron-

tation multilatérale des ordres de bourse qui aboutit à l'établissement d'un cours de bourse et à la conclusion des transactions audit cours de bourse entre des contreparties anonymes. L'information défectueuse du public et les abus de marché entraînent alors une atteinte générale au bon fonctionnement du marché pouvant affecter l'ensemble des investisseurs, tandis que la faute commise par un prestataire financier ne lèse qu'un investisseur déterminé, susceptible généralement d'obtenir réparation par le recours à la technique de la perte de chance. Plus précisément encore, c'est le marché secondaire – c'est-à-dire le marché d'échange du titre après son émission – qui est concerné au premier chef, les introductions en bourse sur le marché primaire ou les offres publiques d'acquisition ne présentant qu'un intérêt moindre.

La dimension essentiellement individuelle de la responsabilité civile s'oppose alors frontalement à la logique collective, et plus précisément multilatérale, des marchés boursiers. En effet, déjà bien mal armée face aux dommages de masse classiques, la responsabilité civile se révèle profondément inadaptée lorsque ceux-ci se produisent dans le cadre d'échanges très éloignés de ceux auxquels elle est habituée : des échanges anonymes, réalisés à un prix fixé par le marché, sur le fondement d'informations provenant de tiers (notamment de l'émetteur), et sur des marchés liquides, instables et mettant l'investisseur en situation constante d'arbitrage. Le préjudice s'en trouve diffus, incertain, délicat à évaluer et le lien de causalité difficile à établir.

Au résultat, c'est donc un choix de politique juridique qui est en jeu : faut-il favoriser la réparation des préjudices subis par les intervenants sur les marchés en cas de manquement à l'information du public, de manipulations de cours ou d'opérations d'initié ? Il s'agit ainsi de confronter le domaine spécifique des marchés financiers au droit commun français de la responsabilité civile délictuelle dans le but de déterminer s'il

1. Cet article constitue un résumé synthétique de notre thèse intitulée *La responsabilité civile sur les marchés financiers* et soutenue sous la direction du professeur Hervé Synvet le 31 mars 2016 à l'Université Panthéon-Assas (Paris II). Elle est en cours de publication à la Bibliothèque de droit privé (LGDJ).