

# Brexit Means Brexit: No Agreement on Financial Services Equivalence

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## Summary

- Both the unsettled Financial Services regulation and the Northern Ireland border issues have revealed that neither the European Union nor the United Kingdom appears interested in improving relations with the other following Brexit.
- With the March 31 deadline now passed, the EU has not found any additional UK financial regulations equivalent to their EU counterparts. An MOU governing UK/EU cooperation on financial services regulation announced in late March is merely a technical measure for the two sides to communicate, not an agreement on the substance.
- UK-based firms looking to offer or sell financial products in the EU will be required to contract with an EU-based operator or create a genuine EU operation with substance.
- EU financial firms with business in the UK have the reverse problem – they will no longer be able to operate freely in the UK from the EU.
- Firms operating in both the UK and EU will need to navigate a costly and complex process to set up operations in the other jurisdiction.

## Brexit means Brexit.

The slogan “Brexit means Brexit” was coined by the hapless and short-serving UK Prime Minister Theresa May a few years ago. The phrase was designed to cut-off disputes and debate (including within her own party) on the course of the UK’s impending exit from the EU. According to May, the UK needed no more uncertainty. The voters had approved the Brexit, and she was going to deliver it without further discussion.

Following several years of negotiations and political posturing, the UK under Prime Minister Boris Johnson followed May’s course and left the EU at the end of 2020. Throughout the negotiations, two issues in particular proved the most complicated: First was the border between Ireland and Northern Ireland, and second was the treatment and recognition of regulations in the Financial Services industry. The Ireland border issue was agreed upon (but has since been re-opened), while the Financial Services industry was left to be solved later and apparently remains unresolved.

## Financial Services

UK financial firms will not retain the ability to offer services and products into the EU pursuant to the EU Passport after March 31. Firms operating from the UK across the English Channel that have not yet done so will be required to open operations in the EU and re-structure their cross-border business.

In our previous alert, "[Brexit and Financial Services](#)," we explained that the treatment of the Financial Services sector was left undecided at the end of 2020 and was largely unaddressed within the EU-UK bilateral agreement. It was agreed that the EU would continue to analyze UK financial regulations to determine which were "equivalent" to those in the EU by the end of March 2021, similar to how it handles financial regulations from any other "third country." For any areas of equivalence, UK firms could continue to operate in the EU pursuant to a "passport."

Many have hoped that the EU and the UK would approach this analysis working in a productive and technical manner and would set the stage for some level of positive collaboration between the UK and the EU in financial services. However, the EU has continued to question the equivalence of UK rules that are effectively identical to the EU Rules, while the UK has already stated that it intends to change its rules as it sees fit.

As the March 31 deadline approached, there were a number of negative press statements from both sides with no indication of a successful outcome. The attitudes of both sides seem to be hardening rather than improving. Brexit does seem to mean a full and true break from the EU. The UK has left the EU and has no intention of conforming to EU rules it does not like, while the EU will not make concessions that might assist the UK.

The EU has reiterated its fears that the UK will loosen financial regulations to encourage growth in financial services in London at the expense of Europe while permitting increased risks. The UK has insinuated that the EU will withhold any equivalence decision merely for political or economic reasons.

Unfortunately, as of March 31, the EU will not grant equivalence across most financial sectors. Without equivalence, relevant UK banking, trading and processing operations will be forced to relocate into the EU, and UK financial institutions will have to create substantive operations within the EU in order to operate their European business.

Many of the largest UK-based banks and financial firms have already created such EU entities and opened substantive offices in the EU – primarily in Dublin, Luxembourg, Amsterdam, and Frankfurt. Smaller firms had been either hoping for a positive outcome or contracting with local firms to front their European operations. Such half-way measures now seem unlikely to be effective.

Therefore, UK-based firms looking to offer or sell financial products in the EU are now required to contract with an EU-based operator or create a genuine EU operation with substance. Either alternative will be costly for smaller firms and add complexity and extra layers of process to European business. Some EU countries still allow for more creative and less punitive solutions, and we expect to see an increased focus on such measures. Nonetheless, many smaller firms may simply avoid European business, at least for a while.

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At the same time, EU financial firms with business in the UK have the reverse problem – they can no longer operate freely in the UK from the EU. Therefore, these firms have been opening offices – primarily in London – for their UK business. Some reports say over a thousand such firms have opened already. Opening and operating a business in the UK requires legal, tax, HR, and other advice and norms are developing for the simplest ways to do this. For the London economy, although there are a large number of these in-bound openings, each is likely to be small and even together will not replace the large operations displaced out of London to the EU.

On March 26, while no equivalence determinations had been made, the UK and the EU agreed on a Memorandum of Understanding to establish a Joint U.K.-EU Financial Regulatory Forum, which will serve as a platform to facilitate dialogue on financial services issues between them. While having such a cooperation mechanism is useful, announcing it without agreeing the scope of equivalence would appear to indicate that no substantive agreement will be forthcoming.

To further complicate the process, it was reported that the Bank of England is now requiring UK banks to seek its consent before shifting staff to the EU.

### **Ireland Border**

The Northern Ireland border issue is going even worse. In early March, the European Commission sued the UK for violating the Brexit Agreement by extending the Northern Ireland transition arrangements until October 2021. The UK claims the extension is permitted and merely part of the process to implement the Agreement.

Soon after Johnson triumphantly signed the Brexit Agreement, the UK figured out that this Irish border problem could not be implemented as agreed. Johnson's first idea was to announce that the UK would intentionally breach the Agreement it had just signed (i.e., violate international law to which it is subject). For this, the French have directly referred to Prime Minister Johnson as a serial liar. That earlier dispute was resolved when the UK backed-down, only to result in the current suit, which brings considerable damage to the UK's international reputation as a law-abiding country and leaves Northern Ireland no closer to a solution.

Both the Financial Services and Northern Ireland border issues have revealed that neither the EU nor the UK appears interested in improving or smoothing relations with the other following Brexit. In fact, the UK seems intent on being a difficult and aggressive negotiator, while the EU seems to want to fully exclude the UK following its departure. Recent disputes over the Oxford-AstraZeneca COVID vaccine have further exacerbated these positions.

Brexit apparently did mean Brexit.

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