Global Financial Services Regulatory Guide - United Kingdom

7. What financial services passporting arrangements does your jurisdiction have with other jurisdiction?

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# What financial services passporting arrangements does your jurisdiction have with other jurisdiction?

The UKs departure from the EU Single Market has resulted in a loss of passporting rights for UK-based firms. The UK has prioritized regulatory autonomy over alignment in its negotiations with the EU over financial services arrangements and, instead of blanket market access mechanisms to replace passporting, it is seeking regulatory and supervisory cooperation arrangements. This means that the UK is not pursuing bespoke EU market access arrangements but will instead rely on assessments of equivalence. Equivalence is a recognition system which can be used to grant domestic market access to overseas or third-country firms in certain areas of financial services, based on the principle that the countries where those firms are based have regimes which are "equivalent" in outcome.

Equivalence decisions are unilateral decisions that are outside the terms of the UK-EU Trade and Cooperation Agreement (TCA). It is important to note that equivalence regimes do not cover the entirety of the financial services sector. For example, there is no equivalence regime for retail banking. Further, equivalence decisions may be unilaterally withdrawn. Note also that equivalence decisions are not limited to European Economic Area (EEA) jurisdictions — they may apply in respect of any jurisdiction globally that is deemed equivalent.

For incoming EEA firms accessing the UK, the UK has issued a number of decisions granting equivalence. However, for UK-based businesses accessing the EU, at the time of writing, the EU Commission has only granted equivalence on a time-limited basis for UK central securities depositories (CSDs) and for UK central counterparties (CCPs) for financial stability purposes.

The UK has put in place post-Brexit transitional measures for incoming EEA firms which previously conducted business in the UK via passporting rights. These arrangements include temporary permissions and contractual runoff regimes to enable a smooth transition to the new regulatory framework. While some individual member states have put in place limited additional measures, the EU has not established any Union-wide arrangements similar to the UK's Brexit transitional regimes. Further, in many EEA jurisdictions it is no longer possible for UK firms to service EEA retail customers from the UK.

In the absence of equivalence decisions, strategies for UK firms wishing to access European markets include:

Reviewing whether cross-border access is necessary to service EEA-based clients ̶EU law applies what is known as the “characteristic performance” test in determining whether a firm is regarded as doing business in another jurisdiction. The “characteristic performance” comprises the services that the firm is supplying to clients and for which it is being remunerated. Depending on the facts, firms might take the view that the “characteristic performance” takes place in the UK even where clients are located in an EEA country. This is on the basis that the firm is not carrying on any relevant activities in other jurisdictions. If so, no cross-border access would be needed.

Considering suitability of light touch regimes̶ Certain EEA countries have a light touch regime for third-country firms which permits them to access their markets without having a passport under a Single Market Directive (particularly in the case of wholesale/institutional business). Firms can investigate the options available to them to provide services under such light touch regimes, which can involve no more than a straightforward registration or notification procedure.

Use of reverse solicitation rules (particularly for existing customers and contacts) where permitted in individual member states̶ A firm that does not actively market its services in EEA jurisdictions might fall outside local regulations. Where a client or counterparty on its own initiative approaches the firm for the provision of services or to enter into a transaction, engaging in that business may be permissible under the relevant member state's reverse solicitation rules.

Use of National Private Placement Regimes for marketing AIFs in individual EEA member states

Using a group company located in an EEA jurisdiction to introduce business to the UK firm

Setting up delegation and/or outsourcing arrangements between an EEA-licensed firm and a UK group company to carry on performing some activities in the UK — there are, however, significant limitations to such arrangements which cannot in any event amount to little more than "letter-box entities." The European Supervisory Authorities have published guidelines on supervisory principles in this regard.

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