Legal high Committee for
Financial markets of Paris

REPORT ON BREXIT, BANKING AND INVESTMENT SERVICES

Legal High Committee for Financial markets of Paris

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REPORT
"BREXIT, BANKING AND INVESTMENT SERVICES"

INTRODUCTION

The notification by the United Kingdom of its intention to withdraw from the European Union on 29 March 2017, more commonly referred to as "Brexit", led to the opening of negotiations between the 27 EU Member States on the one hand and the United Kingdom on the other hand on the conditions for this withdrawal.

This unprecedented situation in the history of the European Union led the Haut Comité Juridique de la Place financière de Paris (**HCJP**) to question the legal consequences of this withdrawal in its field of competence, both for European players established in the European Union and in the UK and for UK players.

In 2017 the HCJP conducted a preliminary analysis in two reports on the impact of the withdrawal of the UK on the accessibility of the European market[1] and on outstanding contracts[2]. The HCJP wanted to continue and deepen this work in the banking, investment services, insurance and asset management sectors.

A working group[3] was therefore invited to examine the legal consequences of Brexit on the continuation of the business relationships between European and British built before the date of Brexit and the modalities for entering into new post Brexit business relationships in banking and investment services. The review led the working group to make various recommendations.

The group's work assumed that there was no specific agreement on banking services and investment services between the European Union and the United Kingdom (including the absence of any transitional agreement) and the final exit of the United Kingdom from the European Union on 30 March 2019 (a situation more commonly known as "Hard Brexit").

The working group agreed to process banking operations (including taking repayable funds from the public, credit operations and payment banking services[4]), payment services, issuing and administering

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[1] *HCJP, Report of the Haut Comité Juridique de la Place Financière de Paris (HCJP) on the reachability of the French market by UK banking and financial institutions in a post-Brexit environment, 7 November 2017.* *https://publications.banque-france.fr/sites/default/files/rapport_10_f.pdf*

[2] *HCJP, Progress Report on the impact of Brexit on banking and financial contracts and on the stability of continental players' funding, 29 September 2017.* *https://publications.banque-france.fr/sites/default/files/rapport_12_f.pdf*

[3] *See composition of the working group in the annex.*

[4] *Article L. 311-1 of the MFC.*

electronic money, as well as major investment services[5]. Such operations, which may only be exercised by certain regulated entities[6], shall be subject to a criminally-sanctioned monopoly[7].

Asset management activities, including portfolio management, have been studied by another dedicated working group of the HCJP and are therefore not addressed in this report.

Some of these issues have already been analysed internally by the institutions authorised in France as part of the continuity plans they provided to their regulators/supervisors. During the work of the HCJP, representatives of professional associations were heard and their interventions fed into the deliberations of the working group.

After having examined the legal regime for the loss of the European passport (**1**), the task force questioned the fate of the contracts being executed at Brexit time between UK entities and their French clients (**2**) and on the conditions for the provision of post-Brexit banking and financial services (**3**) before formulating its recommendations (**4**).

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[5] *Article L. 321-1 of the Monetary and Financial Code (MFC) lists in particular the following investment services:*
- receipt and transmission of orders on behalf of third parties;
- execution of orders on behalf of third parties;
- own-account trading;
- portfolio management on behalf of third parties;
- investment advice.
The definition of these services is contained in Article D. 321-1 of the MFC.
Services of underwriting, secured investment, unsecured investment, the operation of a multilateral trading and trading system for a trading system will not be treated in the context of this report.

[6] *Credit institutions for the receipt of funds from the public and payment banking services, credit institutions and credit operations financing companies; payment service providers, i.e. in addition to credit institutions, payment institutions, electronic money institutions and account information service providers for payment services; issuers of electronic money, i.e. electronic money institutions and credit institutions for issuing and administering of electronic money, investment firms, portfolio management companies and credit institutions which have received an authorisation to provide investment services for the provision of investment services.*

[7] *Banking monopoly (Article L. 511-5 of the MFC), monopoly of payment services (Article L. 521-2 of the MFC), monopoly of issuing and administering of electronic money (Article L. 525-3 of the MFC), financial monopoly (Article L. 531-10 of the MFC).*

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SUMMARY

With a view to furthering the preliminary work of the HCJP on Brexit, this report focuses on the legal consequences of Brexit on banking activities (banking operations, payment services, issuing and administering of electronic money) and investment services (excluding services of underwriting, investment - guaranteed and unsecured - and operating a multilateral trading facility (MTF) or an organised trading facility (OTF)). The report assumes the effective exit of the United Kingdom from the European Union on 30 March 2019 without specific agreement on banking and financial services.

At that time, British institutions will no longer be able to use the “European passport”, i.e. to provide banking and financial services directly from the United Kingdom into the territory of the European Economic Area and/or to open a branch in one of the European Economic Area States by using a simplified procedure without breaching the requirement for authorisation and the relative banking and financial monopolies. This major consequence of Brexit summarised as the “loss of the European passport” raises questions about two main issues.

The first issue relates to the fate of outstanding contracts at the date of Brexit, i.e. contracts underwritten before the date of Brexit but continuing after the date of Brexit. If the validity of these contracts, appreciated at the time of their conclusion before the date of Brexit, is not questioned, their execution occurring after the date of Brexit may raise difficulties. Indeed, the loss of the European passport is generally not provided for in the European legislation and the French legislation organising extinctive management of certain activities in the event of a withdrawal of authorisation does not apply in the case of Brexit. Since they do not involve the provision of the characteristic performance of a regulated service after the date of Brexit, contracts concluded before the date of Brexit by UK institutions located in the United Kingdom with clients located in France will not see their continuity challenged. This principle was then applied to the various types of banking and financial contracts (financing contract, derivative contracts, repo, securities lending, accounts and payment services). This study suggests that there would be no uncertainty about post-Brexit continuity for most of these contracts.

The second issue focuses on the legal situation of the parties after the date of Brexit and the existing mechanisms for the provision of direct services by UK institutions which have become “third country” institutions without a subsidiary in the European Economic Area. In banking matters, the European legislation does not provide for an equivalence regime applicable to third-country firms. However, the path of outsourcing, despite the European framework, remains a possibility. In the area of investment services, in addition to the possibilities opened up by outsourcing, European legislation provides for a specific regime applicable to third-country firms offering more or less simplified access to markets in Member States and to the European market according to the corresponding category of clients (professional clients, professional clients on option, eligible counterparties, retail clients) and the third country recognition of equivalence (or absence of recognition)with the European framework. These simplified modalities may include the possibility

for UK institutions to provide services to professional clients in the territory of the European Economic Area directly from the United Kingdom, subject to an equivalence decision relating to the United Kingdom by the European Commission[8].

These analyses led the HCJP to make recommendations. In order to promote continuity of services, the HCJP recommends establishing clear and simple criteria for determining where the post-Brexit restructuring of an outstanding transaction results in the provision of the characteristic performance of an investment service. In some sufficiently delineated and determined assumptions (e. g. a plan to restructure corporate debts in a collective process), a discussion of a text would be usefully conducted to ensure the continuity of contracts for the purpose of consumer protection. The HCJP recommends adopting measures on the management of extinguishing contracts, as well as existing regimes for the withdrawal of authorisation, for outstanding contracts whose prosecution would involve the post-Brexit supply of regulated services and which would not have been transferred to an entity authorised in the territory of the European Economic Area.

With the aim of encouraging transfers of business to location in the European Union, the HCJP recommends facilitating the replication of initial outline agreement concluded between a UK group and a European client to the new contractual relationship established between the same European client and the European group entity. In this context, it recommends facilitating the transfer of current derivatives transactions at the date of Brexit by allowing the transfer of transactions not subject to clearing or collateralisation requirements and pre-trade transparency obligations to an entity located in the European Union that does not result in the application of these obligations to such transactions.

Finally, the HCJP recommends continuing the effort towards convergence in European legislation and the application of the legislation.

[8] *In addition, for retail clients, MIFID 2 allows branches of third-country firms to apply for authorisation.*

I- Analysis of the legal regime for the loss of the European passport

1.1 - Reminder of the European passport

In accordance with the European legislation applicable in the sectoral areas examined, namely CRD IV, PSD 2, MDE 2 and MIFID 2[9], an institution authorised in a Member State of the European Union or party to the Agreement on the European Economic Area (**the "EEA"**) to provide it banking, payment or electronic money services or investment services may also provide some or all of these services in one or more other Member States, without being required to obtain the obligation to authorisation to the competent authority of the host Member state concerned. This is known as the European passport. The passport shall be based on the principle of mutual recognition of authorisations between competent authorities of the Member States.

It is on the basis of the European passport that UK authorised institutions ("UK institutions") provide banking, payment and electronic money services and investment services in France. When speaking of British institutions, it is factual to understand:

- institutions established in the United Kingdom;
- subsidiaries of third-country institutions (the United States, Switzerland, Japan, etc.), established and authorised in the United Kingdom and serving as the point of entry into the Single Market[10]; and
- subsidiaries of institutions of other EU Member States (e.g. France, Germany, Spain, etc.) in which corporate and investment banking activities (CIB)[11] are often grouped with a logic of penetration into the European market from a single point of access.

By contrast, the English branch of an institution authorised in another Member State such as France is in a symmetrically reversed situation: the French institution benefited from the passport to establish its branch in the United Kingdom. The continuation of such a branch's regulated activities in the UK after the date of Brexit will be subject to the national provisions of the United Kingdom[12].

Finally, the case of the English branch of a non-European institution must be reserved. Although authorised in the United Kingdom, such a branch does not benefit from the passport. Its activity is

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[9] *Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 ("**CRD IV**"), Directive No 2015/2366 of the European Parliament and of the Council of 25 November 2015 ("**PSD 2**"), Directive No 2009/1111113 0/EC of the European Parliament and of the Council of 16 September 2009 ("**DME 2**") and Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 ("**MIF 2 Directive**"), as amended.*

[10] *Marcin Szczepanski, European Parliamentary Research Service, Understanding Equivalency and the single passport in financial services, third-country access to the single market, February 2017.*

[11] *Still commonly called wholesale banking.*

[12] *Reuters, Bank of England reassures companies on Brexit transition deal, 28 March 2018.*

confined into British borders.

The passport may be exercised in two different ways:

- freedom to provide services **freedom to provide services** through which the institution provides its services without permanent presence in the host Member state from its headquarters in the country of origin[13];
- the right of establishment whereby the institution creates a branch in the host Member state through which it will provide its services[14].

Both types of passports are not exclusive and can be used cumulatively, which is generally the case in practice, including for the provision of the same services. In practice, for example, the banking sector shows that European institutions, primarily British ones, mainly use the free service passport to provide services in France (in 2016 there were 76 branches of UK institutions[15] opened in France against 2,550 freedom to provide services returns from UK institutions), as illustrated by the maps below.[16]

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[13] *Article 39 of CRD IV, 8 of PSD 2 (also applicable to electronic money institutions by reference of Article 3(1) of DME 2) and 34 of MIFID 2.*

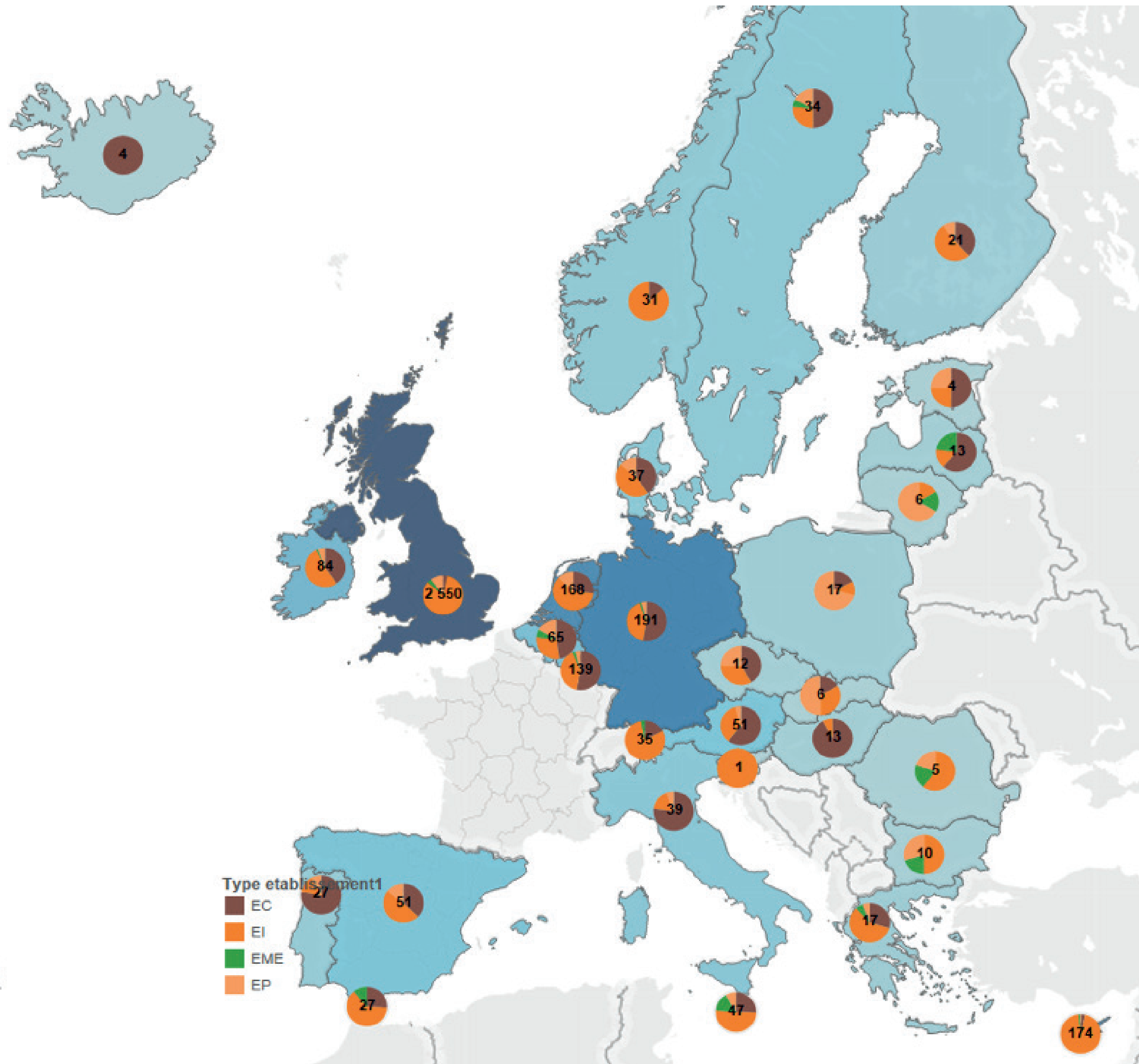
[14] *Articles 35 of CRD IV, 28 of PSD 2 and 35 of MIFID 2. The free establishment can also be implemented by using an agent established in the host country to provide payment services or investment services, or to an electronic money distributor established in the host country.*

[15] *Credit institutions, investment firms and payment undertakings combined.*

[16] *ACPR, French banking and insurance market figures 2016, pp. 23 and s. https://acpr.banque-france.fr/sites/default/files/medias/documents/rapport_chiffres_2016_assemble_20171002.pdf). By comparison, French institutions have opened 23 branches in the United Kingdom and 131 of them are active in freedom to provide services.*

Table 1
Number of branches of credit institutions, investment firms and payment institutions opened in France

Table 2
Number of notifications in application of freedom to provide services by European institutions identified in France



The exercise of the passport does not formally require authorisation from the competent authority of the home or host Member state. The passport is a right whose exercise is subject to a notification by the institution to the competent authority of the home Member State for transmission, if applicable, to that of the host Member state. For the exercise of the passport of freedom of establishment only, the home authority may refuse to transmit notification to the host authority[17] or to register the branch[18].

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[17] *Article 35(3) of CRD IV and Article 35(3), (5) and (7) of MIFID 2.*

[18] *Article 28(2) of the PSD2.*

1.2 - Absence of rules governing the loss of the European passport

The European legislation does not provide for the assumption of the passport withdrawal by the competent authority (whether the home authority or the host Member state) or, more generally, its loss for any other reason, e.g. not having commenced the activities that are subject to it in the host Member state upon expiry of a certain period or in the event of termination of business, contrary to the conditions for authorisation[19].

There are two exceptions to this.

First, in the field of banking services, financial institutions[20] may have their passports withdrawn if they no longer comply with the conditions for granting them: "*If a financial institution as referred to in the first subparagraph of paragraph 1 ceases to fulfil any of the conditions imposed, the competent authorities of the home Member State shall notify the competent authorities of the host Member State and the activities carried out by that financial institution in the host Member State shall become subject to the law of the Member State*[21]". However, nothing in the Directive[22] specifies the fate of outstanding contracts.

Second, it may also be mentioned that there exists a procedure for the host Member state authority to temporarily prohibit a provider from providing services in that country in the event of a breach[23]. As an illustration, the Autorité des marchés financiers ("**AMF**") implemented this procedure under the MIFID[24] in 2016 against certain Cypriot providers providing investment services on foreign exchange market[25]. It should be noted that the provisions in question only cover new transactions and not earlier transactions whose continuation cannot be suspended or prohibited.

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[19] The authorisation may indeed be withdrawn by the authority if the institution has not used it within the 12-month period (Article 18 (a) of CRD IV, Article 13(1) (a) of the e-money Directive, Article 8 of the MIFID 2).

[20] This means, in particular, that institutions which are not authorised as credit institutions, however, provide certain other banking services than the receipt of deposits. See the definition in Article L. 511-21 4 ° of the MFC under French law.

[21] Article 34(2) of CRD IV.

[22] Or in its transposition law in France.

[23] In banking matters, Article 44 of CRD IV. For payment services and electronic money, Article 30 of PSD 2 relates only to the adoption of precautionary measures by the host country authority without expressly providing for the prohibition of new operations as Article 44 of CRD IV abovementioned.

[24] Article 62 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 ("MIF Directive"), as set out in Article 86 of MIFID 2.

[25] According to the AMF's communiqué (http://www.amf-france.org/Actualites/Communiques-de-presse/AMF/annee-2016?docId=workspace%3A%2F%2FSpacesStore%2Ff35a247e-e20d-42c3-8b3d-b354794a2a70), the decision to ban, as a precaution by the College of the AMF, covers, in France: (i) a prohibition on seeking or entering into new clients; (ii) the prohibition on continuing relations with existing clients, except in the context of extinctive management of accounts (winding up of positions and withdrawal of funds).

Therefore, apart from these assumptions, the passport is not lost autonomously. The loss of the passport will result from the withdrawal of authorisation by the home Member State competent authority, which will determine the date on which the withdrawal takes effect and which will inform the host Member state competent authority in order to take appropriate measures to prevent the relevant institution from initiating further transactions within its territory and to safeguard client interests[26]. In contrast, transactions validly incurred prior to the effective date of the withdrawal may be completed until terminated.

In France, for example[27], the withdrawal of authorisation in the banking sector is subject to specific provisions, which can be summarised as follows:

- the loss of authorisation necessarily results from a decision taken by the ECB (for credit institutions falling within the scope of CRD IV) or by the Autorité de contrôle prudentiel et de résolution ("**ACPR**") (concerning credit institutions not covered by CRD IV[28], financing companies, payment institutions, electronic money institutions and, finally, investment firms)[29];

- the ECB, or the ACPR, as applicable, determines the date on which the withdrawal takes effect (which cannot fall beyond the maturity of a period fixed by the authority)[30]. It should be noted that during this period of notice or transition, the authorisation shall remain in force.

Interestingly, notwithstanding the effect of withdrawal of the authorisation, the continuation of the outstanding contracts is generally allowed in extinctive management. For example, in the field of banking services, Article L. 511-16 of the MFC provides that "*Repayable funds received from the*

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[26] Article 45 of CRD IV.

[27] These provisions apply only to institutions that have been granted authorisation by the ACPR or, as applicable, by the ECB. Withdrawal of the authorisation issued to UK institutions fall under equivalent provisions provided for under English law.

[28] This applies in particular to branches of third-country institutions that have received authorisation as a credit institution (Article L. 511-10 I of the MFC).

[29] Articles L. 511-15 and L. 511-15-1 (Banking Services), Article L. 522-11 I (Payment Services), Article L. 526-15 MFC (electronic money), Article L. 532-1 (Investment Services, as last amended from Order of 22 June 2017) of the MFC.

[30] This period shall not exceed:

- two years for credit institutions (Article 30 of the Ministerial Order of 4 December 2017 on authorisation, changes in conditions and withdrawal of authorisation of credit institutions), the financing companies (Article 27 of the Ministerial Order of 4 December 2017 on authorisation, changes in situation, withdrawal of authorisation and delisting of financing companies and reporting obligations of certain financial institutions) and investment firms (Article 27 of the Ministerial Order of 4 December 2017 on authorisation, changes in situation, withdrawal of authorisation and delisting of investment firms and assimilated institutions);

- 15 months for payment institutions (Article 23 of the Ministerial Order of 29 October 2009 on the prudential regulation of payment institutions) and electronic money institutions (Article 29 of the Ministerial Order of 2 May 2013 on the prudential regulation of electronic money institutions).

public[...] shall be redeemed by the credit institution or finance company on their due dates or, where the due date falls after the expiry of the period referred to in the III of Article L. 511-15 or in the third subparagraph of Article L. 511-15-1, on the date determined by the Authority[...]" and, in the case of banking, payment and electronic money services, that "Operations[…] which the institution[…] has entered into or committed to conclude before the decision to withdraw authorisation [,] may be concluded."[31]

However, these provisions are not applicable in the Brexit context. Indeed, the passport will be lost by UK institutions because of the effects of the exit of the United Kingdom from the EEA, while no decision to withdraw the authorisation from the UK regulator would be taken in any case.

By analogy, however, it would be possible to use it to establish a regime of extinctive management of outstanding contracts whose continuation would involve the post-Brexit supply of regulated services and which would not have been transferred to an entity authorised in the EEA.

II - The fate of outstanding contracts at Brexit time between institutions located in the United Kingdom and their French clients

2.1 - Change in regulatory framework for contracts concluded by an institution in the United Kingdom to a French client

2.1.1 - Persons and situations concerned

The contracts concluded between an institution located in the United Kingdom and a French client prior to the date of Brexit fall within the framework of European legislation (directives and regulations in particular). As a result of Brexit, it will lose, at least in part, its effectiveness.

Regulations, which are directly applicable, will cease to apply in the United Kingdom. The references to European regulations contained in the contracts did not lapse solely because of Brexit. This solution is based on the principle of the autonomy of will, which is the basic principle of conflicts-of-law rules.

[31] *Articles L. 511-15 III and L. 511-16 of MFC (banking operations); in an equivalent manner: Articles L. 522-11 II (Payment Services) and L. 526-17 (electronic money) of the same code.*

By contrast, UK legislation transposing European directives will remain in force and unchanged at the date of Brexit. This means that the English provisions transposing the provisions relating to passport of the European directives will remain in force on Brexit day. However, until further amendments are made, these provisions will no longer be eligible for application from the date of Brexit.

Brexit raises questions about individuals and specific situations involved in this change in regulatory framework.

At the date of Brexit, British institutions with legal personality will automatically lose the benefit of the European passport and will no longer be able to pursue their activities within the territories of the EEA States from the date of Brexit. However, two situations should be considered in this context:

- the continuation of the activity with the conclusion of new business with European clients after the date of Brexit, when it characterises the provision of regulated services; and

- the continuation of contracts validly concluded with European clients prior to the date of Brexit where the provider benefited from the passport.

If the first situation raise no question (the loss of the passport automatically prohibits the UK provider from entering into new contracts, once their conclusion is involved in the provision of a regulated service), this is not the case for the second situation where it will be necessary to distinguish whether the continuation of the contract involves the provision of a regulated service.

In addition, there may be another question regarding European activities pursued by the London branch of a European institution. European authorities, in particular the ECB, have already expressed their views on this subject through opinions and consider that the London branch of a European institution should not be able to provide its services within the European Union territory[32].

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[32] *ECB, FAQ, Relocating in the euro area, (https://www.bankingsupervision.europa.eu/banking/relocating/html/index.en.html),: "Question: «Can I continue to provide services to clients in the EU from a branch in London post Brexit?» Response: «The ECB and the national supervisors believe that the purpose of branches in third countries is to meet local needs. The ECB and national supervisors do not expect that branches in third countries perform critical functions for the credit institution itself or provide services back to clients based in the EU. Banks should clarify the role of branches in third countries and the UK in their Brexit plans. This means providing detailed information on the branch's activities, organizational structure and geographical distribution of clients, as well as on the persons responsible for managing the branch and any proposed arrangements for dual hatting involving other group entities.»"*

2.1.2 - Principle of validity of contracts concluded before Brexit

The validity of a contract shall be appreciated at the time of its conclusion. The contractor must therefore have the ability to conclude the contract at the time he concludes it. Thus, at the time the UK entity contracted with the European client, it had the capacity and the authorisation to do so. Contracts concluded before the date of Brexit shall remain valid. This principle of validity of contracts concluded before the date of Brexit was recently recalled by the ACPR[33].

If the current contracts at the date of Brexit remain valid, then the question of continuing their post-Brexit execution with respect to the banking and financial monopolies will arise.

2.2 - Distinguishing criteria and general principles

2.2.1 - Criterion for performing the characteristic service

The outstanding contracts shall be contracts that have been concluded before the date of Brexit but have subsequent effects, the realisation of such effects permitting the execution of such contracts. The question of continuity of contracts arises when their execution is carried out within the territory of one of the Member States of the European Union. This is particularly important in France because of criminally-sanctioned prohibitions in banking monopolies, the provision of payment services, electronic money and investment services. It cannot be ignored because of criminal sanctions related to the violation of these prohibitions.

The question of contract continuity arises differently depending on the characteristics of contracts. The main distinction leads to oppose certain forms of contracts involving immediate performance and contracts involving deferred or sequential performance.

Contracts with immediate performance do not give rise to problems. This is the case when their execution and their conclusion, which are assumed performed before the date of Brexit, are contemporary.

This is different in the case of a contract concluded prior to the date of Brexit and executed later. Contracts involving deferred or sequential performance shall be distinguished between two main situations depending on the time of execution of the characteristic performance of the service concerned.

[33] *ACPR, Measures to face the effects of BREXIT, June 2018.*

The first situation is the one in which the characteristic performance was previously performed at the date of Brexit. This is the case in respect of a loan contract conclude before the date of Brexit and in respect of which the remittance of funds occurs after the date of Brexit, as the characteristic provision of the loan transaction consist of the promise to make funds available[34].

The second situation is the one where the execution of the characteristic performance takes place or continues after the date of Brexit. As part of an export supplying credit transaction, several credit operations are provided: the pre-financing credit may occur before the Brexit date, while the seller's credit mobilisation credit on the buyer, which can materialise with an overdraft and discount, could be concluded after the date of Brexit.

Similarly, in the case of an account agreement, the bank shall provide the deposit receipt service on an ongoing basis until the close of the account and the return of remaining funds to the client.

As regards the provision of investment advice, the obligation to advise and issue recommendations will extend over the life of the investment product or portfolio concerned.

2.2.2 - General principles on contracts continuity

2.2.2.1 - Transitional law

New legislation shall apply immediately to current legal situations. This principle is clearly applicable to the status of providers of banking and financial services. By contrast, outstanding contracts remain subject to previous legislations[35]. This is the survival of the previous legislation, which is traditionally justified by the respect of contractual freedom and the expectations of the parties[36], such expectations warranting protection in the name of legal certainty.

However, legal certainty may be assigned to the public interest. According to the case-law of the Conseil constitutionnel: "*le législateur ne saurait porter aux contrats légalement conclus une atteinte qui ne soit justifiée par un motif d'intérêt général suffisant sans méconnaître les exigences résultant des articles 4 et 16 de la Déclaration de 1789 […]*[37]." At first sight, one might therefore consider that

[34] *HCJP, Progress Report Impact of Brexit on banking and financial contracts and the stability of continental players' funding, 29 September 2017.*

[35] *S. Gaudemet, Application of law over time: the Judge and Article 2, fasc. 20, Civil Litigation, Variant. No. 41 and s.*

[36] *T. Bonneau, The Court of Cassation and enforcement over time, pref. Mr Gobert, PUF 1990, No. 111.*

[37] *Cons. const. n° 2009-592 DC du 19 novembre 2009.*

a legal provision applicable to outstanding contracts to draw the consequences of Brexit would be regarded by the Conseil constitutionnel as "sufficient general interest".

2.2.2.2 - European Principles

The Court of Justice of the European Union recognises the notion of legal certainty as a general principle of European Union law[38]. In particular, this implies that the law of the European Union is clear and predictable to litigants, as this principle opposes the retroactivity of Community acts. However, it does not object to the immediate application of European acts to current situations.

Nor does it object to the principle of legitimate confidence which is presented as a corollary to the principle of legal certainty[39] or as a principle deducted from it. However, the principle of legitimate confidence prohibits European institutions from amending suddenly regulation without preventing interested economic agents or subject to effective transitional measures[40].

2.2.2.3 - Freedom to choose the law applicable to the contract

The Parties may freely choose the law applicable to contracts they concluded. This law, which may differ from the Law of their authorisation, does not change merely because their situation has changed.

These solutions can be affected by the recognition of mandatory rules. The mandatory rules to be taken into account may themselves differ if the law of one of the parties has changed in the course of the performance of the contracts. However, this change does not *ipso facto* lapse from references to EU law in the contract.

This right becomes only the contractually chosen law of the parties and must remain applicable provided that its application does not lead to inconsistent settlement of the contract.

2.3 - Application to different types of banking and financial contracts

This analysis, the conclusions of which are set out in Annex 1, was conducted in a predominantly legal and regulatory prism, although institutions agree that continuity of contracts may create

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[38] *J. Molinier, General Principles, European Directory of Law, Dalloz, Specc. No. 102 and s.*

[39] *Ibid n° 84.*

[40] *Ibid. 86.*

operational problems in a post-Brexit environment.

This analysis assumes that a service is provided to a client located in France by British institution acting from its head office or from its French branch, as well as the British branch of a bank having its head office in France. Although the provision of certain services to UK clients may require an authorisation in the UK, the purpose of this analysis is to focus on events that question continuity of contracts and not to address passport or authorisation issues. This analysis does not take into account the location of investment services that were addressed in a previous HCJP report[41].

The French banking industry has analysed the topic of continuity of business contracts . Three types of contracts were studied and analysed:

a) financing contracts;

b) derivative contracts, repurchase agreements and securities lending;

c) payment account and payment services and bank and payment services intermediaries.

In most cases, the analysis suggests that outstanding contracts (i.e. those concluded before the date of the effective exit of the United Kingdom from the European Union) can continue to be executed after the date of the effective exit of the United Kingdom from the European Union. However, some situations do not allow for this continuity. This is true when the characteristic performance is executed after the date of Brexit or when the contract is substantially modified post-Brexit, leading post-Brexit to the provision of a new service.

This analysis confirms the outcome of the HCJP's previous report[43] on the impact of Brexit on ongoing banking and financial operations with the monopoly on the provision of investment services and the banking monopoly.

2.3.1 - Financing contracts

Brexit does not, in itself, imply a risk of discontinuity of financing contracts involving borrowers located in France where it can be analysed that the parties have been irrevocably committed before

[41] *HCJP, Report of the Haut Comité Juridique de la Place Financière de Paris (HCJP) on the reachability of the French market by UK banking and financial institutions in a post-Brexit environment, 7 November 2017.*

[42] *A summary table of the conclusions is also attached to this report.*

[43] *HCJP, Progress Report Impact of Brexit on banking and financial contracts and the stability of continental players' funding, 29 September 2017.*

the date of Brexit. The loan agreement is a consensual agreement and the remittance of the funds is the performance of the contract. Thus, the remittance of funds post Brexit (loan with agreed maturity, *revolving loan*…) should be covered by the pre-Brexit contract execution promise. The same holds true for collateral issued at the request of French clients before the date of Brexit and whose payment takes place post Brexit.

By contrast, the risk of discontinuity of contracts could exist for credit contracts with a number of preconditions, some of which are not fulfilled before the date of Brexit. Indeed, in this case, the contract is considered to be formed but not executed on the date of Brexit. If certain conditions not met by Brexit could challenge the continuity of contracts, this would not be the case for those conditions that are not at the sole discretion of the bank, to the extent that the bank is committed and is required to perform the contract previously concluded. The same applies to the "*uncommitted facilities*" for which the failure of the parties, in particular by lender, would not allow the contract to continue.

Finally, some events that substantially change post-Brexit the characteristics of the previously concluded contract could also challenge the continuity of contracts. This should be the case for an increase in the amount of the facility, which is typically analysed in a new loan made available to the borrower by the lender, at least where the lender's terms and limits were not provided for in the original contract. The addition of a new borrower in France would call the same conclusion as the availability of funds to this new borrower would characterise the existence of a new loan.

As regards credit by signature, the term "*extend or pay*", which, if included in the contract from inception and provides an alternative to clearly developed payments, allows the beneficiary of a guarantee to apply either for a payment or an extension thereof, even if it occurs post Brexit.

2.3.2 - Derivatives contracts, repurchase agreements and securities lending

The approach to study the continuity of derivative contracts, repurchase agreements and securities lending is to analyse all events that may occur during the life of transactions that were concluded before Brexit's occurrence. These "*life cycle events*" can either be provided for by the terms of the trade confirmation or arise at the sole request of the co-contractor[44]. In such cases Brexit does not entail, in itself, a risk of discontinuity of these contracts where the contract was validly entered into by the parties before the date of Brexit.

[44] *If the client seeks a new provision of investment services, this new provision will have to be performed in compliance with the regulation and within the framework of the monopoly exceptions provided by European or national legislation.*

Certain events are considered not to jeopardise the continuity of the contract since they fall under the pure execution of the contract. This is the case for the exercise of an option (or *swaption*) and *payment and settlement* flows on the dates provided in the original contract. Other objective events, whether or not planned in the contract, can lead to a nominal reduction (*unwind*) or portfolio compression and hence to risk exposure. They should therefore not be a new service provision and should challenge the continuity of the contract.

On the other hand, the rolling of a position, the extension of maturity or the increase in the nominal amount could be considered as substantial changes leading to the provision of a new investment service.

2.3.3 - Payment accounts and payment services and banking and payment service intermediaries

In the field of payment accounts and payment services, services may be provided by two broad types of providers subject, at least partially, to different sectoral rules:

• credit institutions, which conclude deposit-account opening conventions (or, in a common term, bank account) with their clients. In doing so, these institutions provide several types of regulated services[45]: (i) the receipt of repayable funds from the public which characterises the execution of banking operations; (ii) payment services, including issuing payment instruments (typically a payment card) and execution of payment transactions (transfers, debit flows, etc.) associated with the operation of the account, such services being governed by PSD 2[46]; and (iii) payment banking services, in connection with the issuance and management of non-dematerialised payment instruments (typically crossed checks), which constitute banking operations within the banking monopoly; and

• payment institutions, which provide payment services, in our hypothesis, associated with a payment account[47], and electronic money institutions, which can, as payment service providers, also provide such services[48].

In the case of accounts opened to clients located in France (non-resident accounts) and the activity of "*correspondent banking*", according to the geographical location criteria for the execution of the characteristic performance, the services performed by the entity located in the United Kingdom should not fall within the geographical scope of banking and provision of payment services

[45] Beyond the following list, it can be added the granting of credit, for example in the form of overdrafts or revolving loans associated with the use of the payment card (which becomes a payment and credit card). The analysis of the situation of bank loans after Brexit is discussed above.
[46] See the list of payment services in Article L. 314-1 II of the MFC.
[47] Article L. 314-1 (1) of the MFC.
[48] Article L. 521-1 I of the MFC.

monopolies. Therefore, the continuity of execution of the account opening contract after the date of Brexit (for example, the receipt and execution of payment orders from the client or the receipt of payments on the account) should not arise[49].

With regard to the opening and functioning of a payment account by a payment institution (or e-money by an electronic money institution), it seems that, in the absence of jurisprudence, the above analysis should be transposed[50].

Some of the account life events (in the case of an account opened before the date of Brexit or after the date of Brexit, under the conditions specified above) have also been analysed and do not raise issue regarding the continuity of the contract to the extent that they fall under the pure execution of the account. These include the sending of account statements from the United Kingdom to France or the receipt and execution of payment orders from the client, or receipt of payments on the account.

With respect to accounts opened on behalf of French clients in the books of branches in the United Kingdom of French banks, and subject to the location of the accounts, the same principles could apply[51].

With regard to post-Brexit account transfers in respect of the execution of a *cash sweeps* agreement between cash pool members, it would be possible to consider that these transfers do not pose a contract continuity problem whenever the accounts are located outside France. This mandate shall be evidenced by the signature of the cash centralisation contract. With regard to the addition of new members to cash pool, the same logic as described in the previous paragraphs on opening accounts to clients located in France could probably apply.

Finally, intermediaries in banking and payment services, with the exception of credit and mortgage credit intermediaries, are not regulated at the European level, so it is appropriate to analyse the topic under each local regulation and on a case-by-case basis.

2.3.4 - Investment service contracts

Investment services contracts were not analysed in the context of this study (see, however, Section 2.3.2).

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[49] *However, this conclusion should be nuanced for the opening of new accounts after Brexit. The application of the geographical location criteria alone is not sufficient to prevent the application of banking monopolies and the provision of payment services in the presence of canvassing or commercial solicitation by the bank in France. A distinction should therefore be made between a commercial solicitation situation and a request directly from the client. In the event that the client's request for account is received, Brexit should not challenge the possibility to open and maintain a non-resident account locally if it is in the field of licensing regulations. Conversely, the analysis may differ in the event of a commercial solicitation from the UK Bank and lead to the offer or supply of a banking service in France.*

[50] *HCJP, Report of the Haut Comité Juridique de la Place Financière de Paris (HCJP) on the reachability of the French market by UK banking and financial institutions in a post-Brexit environment, 7 November 2017.*

[51] *The same logic applies to centralising cash accounts.*

III-The conditions for the provision of post-Brexit banking and financial services

3.1 - Establishment of a subsidiary or branch in the European Union

3.1.1 - In banking matters

In principle, only institutions authorised in France, or authorised in a State party to the EEA Agreement and benefiting from the European passport, may provide banking services[52] as a habitual occupation in France. Banking legislation does not provide for an equivalence regime applicable to third-country entities providing banking services from a branch established in France[53].

In order to pursue post-Brexit activities currently carried out in France as a branch or directly from the United Kingdom under the freedom to provide services, a British institution shall have established either a credit institution (in the form of a subsidiary or branch, in each case authorised by the banking supervisor), a payment institution or an electronic money institution in France, or exercised a European passport from an entity of its group established in another Member State. UK institutions could thus continue to provide banking services in France without discontinuity.

As of September 2016 the ACPR and the AMF have, to this end, put in place accelerated and simplified authorisation procedures for the recovery of existing activities and already supervised by the competent authority of the United Kingdom. The establishment of UK institutions as entities authorised in France could be combined with the establishment of outsourcing schemes through which a number of benefits by these authorised entities would be outsourced to another authorised group entity located either within the European Union or outside the European Union, for example in the United Kingdom.

3.1.2 - In investment services

As regards investment services, the principle set out in the above section 3.1.1 is equally valid. Thus, in order to pursue post-Brexit activities currently carried out in France as a branch or directly from the United Kingdom under the freedom to provide services,

[52] *The concept of "financial services" in this report refers in a generic way to the provision of banking activities in the definition of credit institutions and all activities, including investment services, payment services, and issuing and managing electronic money as referred to in Annex 1 of the CRD IV, authorised to these institutions as well as activities open to payment institutions and electronic money institutions.*

[53] *See Section 3.2.2.*

a British institution shall have either an entity authorised by the French authorities or a European passport from an entity of its group established in another Member State. UK institutions could thus continue to provide financial services in France without discontinuity.

In addition, a regime specific to "third country firms" was introduced by MIFID 2 and MIFIR[54].

3.1.2.1 - Retail clients and business clients on option

In order for a third-country firm to provide investment services or activities or offer ancillary services to clients (both professionals on option[55] and non-professional), the MIFID 2 allows Member States to require a third-country firm to establish a branch in that Member State. The branch shall be authorised by the host Member State under the conditions laid down in MIFID 2.

Among these conditions, MIFID 2[56] lays down requirements for:

[54] *Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (**MIFIR**).*

[55] *Clients that can be treated as professional clients upon request from Section II of Annex II.*

[56] *Article 39 of MIFID 2: 1. A Member State may require that a third-country firm intending to provide investment services or perform investment activities with or without ancillary services to retail clients or to professional clients within the meaning of Section II of Annex II in its territory establish a branch in that Member State.*

2. Where a Member State requires that a third-country firm intending to provide investment services or to perform investment activities with or without any ancillary services in its territory establish a branch, the branch shall acquire a prior authorisation by the competent authorities of that Member State in accordance with the following conditions:

(a) the provision of services for which the third-country firm requests authorisation is subject to authorisation and supervision in the third country where the firm is established and the requesting firm is properly authorised, whereby the competent authority pays due regard to any FATF recommendations in the context of anti-money laundering and countering the financing of terrorism;

(b) cooperation arrangements, that include provisions regulating the exchange of information for the purpose of preserving the integrity of the market and protecting investors, are in place between the competent authorities in the Member State where the branch is to be established and competent supervisory authorities of the third country where the firm is established;

(c) sufficient initial capital is at free disposal of the branch;

(d) one or more persons are appointed to be responsible for the management of the branch and they all comply with the requirement laid down in Article 9(1);

(e) the third country where the third-country firm is established has signed an agreement with the Member State where the branch is to be established, which fully comply with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including, if any, multilateral tax agreements;

(f) the firm belongs to an investor-compensation scheme authorised or recognised in accordance with Directive 97/9/EC.

3. The third-country firm referred to in paragraph 1 shall submit its application to the competent authority of the Member State where it intends to establish a branch.

i) the third-country firm: In particular, it must be authorised and subject in the third country to an authorisation complying with the FATF's obligations to combat money laundering and special supervision. It shall also belong to an investor compensation scheme authorised or recognised in accordance with Directive 97/9/EC.

ii) the branch of the third-country firm: In particular, it must have sufficient initial capital, at free disposal of the branch and must comprise a management body composed of several persons that meet the requirements of Article 9(1) of MIFID 2.

iii) cooperation between the third-country and the Member State: MIFID 2 requires in particular the existence of cooperation mechanisms for the exchange of information to protect investors and a tax convention in accordance with Article 26 of the OECD model.

3.1.2.2 - Professional clients other than on option and eligible counterparties

Article 39 of MIFID 2 does not cover eligible counterparties and professional clients (other than on option). MIFIR provides for the direct provision of investment services (without a subsidiary or branch) to these clients, the prior adoption by the Commission of an equivalence decision with regard to the third country (see sections 3.2.3.2 and 3.2.3.3 below). If the Commission does not adopt an equivalence decision with regard to that third country or if the Commission's decision recognizing equivalence is no longer in force, the draft law on growth and transformation of enterprises (**"Projet de loi relatif à la croissance et la transformation des entreprises"**)[57], using the option provided for in Article 46(4) of MIFIR, proposes to introduce into French law the requirement to establish a branch authorised in France to provide investment services to professional clients or eligible counterparties in France.

Furthermore, obtaining the authorisation of a branch of a third-country firm in the European Union may be an interesting solution in providing investment services to eligible counterparties and professional clients (other than on option) located in the European Union, as such authorisation will subsequently enable the branch to provide investment services and activities covered by its authorisation in other EU Member States, provided that the legal framework and supervisory arrangements of the third country are recognised as equivalent[58]. In this respect, we can talk of "third-

[57] Article 23 of the draft PACTE.

[58] Article 47 (3) of MIFIR: "A third-country firm established in a country whose legal and supervisory framework has been recognised to be effectively equivalent in accordance with paragraph 1 and is authorised in accordance with Article 39 of Directive 2014/65/EU shall be able to provide the services and activities covered under the authorisation to eligible counterparties and professional clients within the meaning of Section I of Annex II to Directive 2014/65/EU in other Member States of the Union without the establishment of new branches. For that purpose, it shall comply with the information requirements for the cross-border provision of services and activities in Article 34 of Directive 2014/65/EU.

The branch shall remain subject to the supervision of the Member State where the branch is established in accordance with Article 39 of Directive 2014/65/EU. However, and without prejudice to the obligations to cooperate laid down in Directive 2014/65/EU, the competent authority of the Member State where the branch is established and the competent authority of the host Member State may establish proportionate cooperation agreements in order to ensure that the branch of the third-country firm providing investment services within the Union delivers the appropriate level of investor protection."

country passport". The branch shall remain subject to the supervision of the Member State in which the branch has been "authorised" in accordance with the conditions mentioned above. The authorities of that Member State and of the Member State in which the service is provided may establish cooperation arrangements to ensure an appropriate level of investor protection.

3.2 - Current arrangements making it possible, directly or indirectly, to provide services from the United Kingdom

3.2.1 - Outsourcing

3.2.1.1 - European rulebook

Outsourcing is subject to a general limit on the substance to be retained within the supervised delegating undertaking. The main risk resulting from outsourcing is that its size is such that the supervised undertaking becomes "a letter-box" - to use the terminology used in the MIFID 2, UCITS Directive[59] and AIFM Directive[60] - which would be likely to challenge the conditions for its authorisation.

The concept of substance is based on a set of minimum requirements shared by all sectoral directives: it means maintaining a *minimum* effective management functions within the supervised undertaking (the head office of a supervised undertaking shall be located in the same Member State as its registered office) and a control capacity of outsourced tasks.

Beyond this baseline, and with the notable exception of the AIFM Directive[61], the different sectoral legislation does not define quantitative criteria to balance the respective importance of outsourced activities and intern activities to characterise the acceptable level of outsourcing.

Following an analysis of the various sectoral rulebooks, the task force did not identify provisions

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[59] *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) as amended (**UCITS Directive**).*

[60] *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 1060/2009 095/2010 as amended ("**AIFM Directive**").*

[61] *According to Article 82 of Delegated Regulation (EU) No 231/2013 supplementing the AIFM Directive, national authorities are invited, in particular, to take into account, when assessing the size of the delegated delegations, the amount of assets that are delegated to the total amount of assets under management, geographical allocation and investment sector, the configuration of the delegates, their business area and their social structure, and whether the delegation is conferred on an entity belonging to the same group as the AIFM.*

that exclude certain services or activities from the scope of activities that could be externalised[62]. The main limits restricting the ability of a supervised institution to use outsourcing are related to the extent of outsourcing that is assessed broadly in all the activities of these institutions and its ability to control outsourced activities, hence the risk they take in doing so[63].

In the absence of harmonised criteria allowing for a consistent assessment within the different Member States, the notion of substance is widely at the discretion of each national authority.

3.2.1.2 - French framework

The French framework for outsourcing is defined in the Ministerial Order of 3 November 2014 on the internal control of enterprises in the banking, payment services and investment services sectors subject to supervision by the Autorité de contrôle prudentiel et de résolution (**the "Ministerial Order"**).

Articles 10 and 231 of the Ministerial Order distinguish, within "critical or important tasks", different categories of services which, as the case may be, may or may not be outsourced to authorised persons[64]. However, national legislation does not contain specific restrictions which would prohibit *a priori* the outsourcing of certain tasks, functions or services, subject to the respect of general requirements which take into account, *inter alia*, the governance and supervision of the supervised institution and the requirement to have adequate human and material resources.

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[62] Recital 18 of Directive 2006/73/EC implementing the MIFID 1 specifies in this respect that "competent authorities should not make the authorisation to provide investment services or activities subject to a general prohibition on the outsourcing of one or more critical or important functions or investment services or activities." This clarification is reflected in recital 43 of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing MIFID 2.

[63] See the 2006 CEBS guidelines on outsourcing (being revised by the EBA) and, on the particular issue of the use of cloud service providers, the 2018 EBA recommendations that also cover the topic.

[64] Article 10 (r) of the Order: "Provision of services or any other crucial or significant operational tasks: - banking operations within the meaning of Article L. 311-1 of the Monetary and Financial Code, issuing and administering of electronic money within the meaning of Article L. 315-1 of the same code, payment services within the meaning of Article L. 314-1 of the same code and investment services within the meaning of Article L. 321-1 of the same code for which the supervised institution was authorised; - related transactions as mentioned in paragraphs 1, 2, 3.7 and 8 of Article L. 311-2, 1, 2, 5 and 6 of Article L. 321-2 and Articles L. 522-2 and L. 526-2 of the Monetary and Financial Code; - services directly involved in the implementation of transactions or services mentioned in the first two dashes; - or any service provision when an defect or failure in its performance would materially impair the continuing compliance of the supervised institution with the conditions and obligations of its authorisation and those linked to its activity, its financial performance or its business and service continuity".

Article 231 of the Order: "Supervised institutions shall ensure that any service which substantively contributes to a decision committing the undertaking vis-à-vis its clients to conclude a transaction referred to in the first three indents of Article 10 of this Order is outsourced only to persons approved or authorised to carry on such activities in accordance with the prevailing standards in their country."

As with European directives, the Ministerial Order also does not define quantitative criteria to balance the respective importance of outsourced activities and internal activities to characterise the acceptable level of outsourcing.

The internal organisation - including outsourcing - of each institution is subject to their own responsibility under the supervision of the competent authorities.

3.2.1.3 - The position of regulators

In response to Brexit and to the plans to relocate activities within the European Union by UK financial institutions, European regulators have recently made a number of clarifications on the extent of outsourcing in order, in particular, to harmonise the assessment of these agreements at the European level.

In response, the ECB recalled, in Q&As published on 11 April 2017[65] the obligation for each credit institution authorised within the euro area to have local and independent capacity to execute transactions with a diversified number of counterparties. The ECB, which was expected to decide on *back-to-back* arrangements for financial transactions booking, has estimated that:

"Notwithstanding any temporary arrangements that they may agree on a case-by-case basis with the supervisor, the ECB and the national supervisors expect banks to have sufficient capabilities in place (including local infrastructure, staff and risk management functions) to manage all material risks locally. With specific reference to the "back-to-back booking model", the ECB and the national supervisors would expect (also after possible transitional arrangements on a case-by-case basis) that a part of all risks is managed locally. For market risk, this might mean eventually establishing permanent local trading capabilities and local risk committees, as well as trading and hedging risks with diversified counterparties. The specific requirements will depend, among other things, on the structure of the booking model, as well as on the underlying contractual relations and internal arrangements. (…) Banks in the euro area should be capable of managing all material risks potentially affecting them independently and at the local level, and should have control over the balance sheet and all exposures. They should be in a position to respond directly and independently to potential enquiries by the ECB or national supervisors on all activities affecting the bank and provide information swiftly. The governance and risk management mechanisms should be commensurate with the nature, scale and complexity of the business and fully comply with European legislation. Establishing an "empty shell" company would not be acceptable.»

[65] *ECB, Procedures for the relocation of banks to the euro area in the context of Brexit, (https://www.bankingsupervision.europa.eu/banking/relocating/html/index.en.html)*
ECB, Brexit: an ECB supervision perspective, 15 November 2017: "Banks do not only need to be well-capitalised and have the liquidity and funding. They are the need to have substance. In other words, there may be empty shells or letter box banks."

The EBA recently reaffirmed that financial institutions should not outsource activities so that they become "empty shell"[66]. This position has been recalled by national regulators[67].

The ESMA, on the other hand, published on 31 May 2017 a general opinion[68] that, with regard to requests for relocations in the European Union of firms authorised in the United Kingdom, lays down nine principles to ensure convergence of the competent authorities in the examination of authorisation files.

In particular, the Opinion contains a principle on substance (*Principle Six*), providing that certain key activities and functions for the functioning of the entity (such as management functions) must be located on the ground of the European Union and cannot be outsourced outside the European Union. The ESMA also considers that, under certain circumstances, specific to the relevant business area, certain important activities or functions cannot be outsourced without jeopardising the entity's activity and the possibility for the supervisor to exercise effective control over the entity. These include key managerial functions, head of activities, internal control, compliance, risk control and IT systems control infrastructures.

In this context, the ESMA has established a Coordination Network between the competent national authorities (*Oversight Coordination Network*) on relocation requests, which still retain their authorisation powers.

In an opinion of 12 October 2017[69], the EBA clarified that competent authorities should ensure that outsourcing is not used with intent to empty a company from its substance and to create a company for the sole purpose of benefiting from European passports.

In the MIFID 2 areas, the ESMA published sectoral opinions (investment services in particular) providing the general advice abovementioned on the proportions and conditions to be fulfilled in the context of outsourcing[70].

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[66] *"Financial institutions should not outsource activities to such an extent that they operate as 'empty shell' companies, and all institutions should have the substance to identify the capability to manage the risks they generate from the first day after the withdrawal of the UK, as the EBA made clear in its Opinion on Brexit of 12 October 2017", EBA, Opinion of the European Banking. Authority on preparations for the United Kingdom from the European Union, EBA/Op/2018/05, 25 June 2018.*

[67] *See "Insurance in a troubled world", speech by François VILLEROY DE GALHAU, October 27, 2017.*

[68] *ESMA, Opinion, General principles to support supervisory convergence in the context of the United Kingdom, ESMA 42-110-433, 31 May 2017.*

[69] *EBA, Opinion of the European Banking Authority on related to the departure of the United Kingdom from the European Union, EBA/Op/2017/12, 12 October 2017.*

[70] *ESMA, Opinion to support supervisory convergence in the area of investment firms in the context of the United Kingdom withdrawing from the European Union, 13/07/2017, ESMA35-43-762; ESMA, Opinion to support supervisory convergence in the area of secondary markets in the context of the United Kingdom withdrawing from the European Union, ESMA70-154-270, 13 July 2017; ESMA, Opinion to support supervisory convergence in the area of investment management in the context of the United Kingdom withdrawing from the European Union, ESMA 34-45-344, 13 July 2017.*

In addition, in a "*Notice to Stakeholders*" on the impact of Brexit on markets in financial instruments of 8 February[71], the European Commission highlighted the risk of creating a "letter-box" through the use of outsourcing schemes and/or the use of non-European branches to provide services to European clients.

The European Commission takes over the views of the ESMA and the ECB that the use of non-European branches should be based on objective reasons related to services provided in non-European jurisdictions where they are established and should not result in a situation where non-European branches perform important functions on behalf of their European institutions or provide services in the European Union.

In particular, the ECB considered in these questions, which were published on 11 April 2017, that:

"The ECB and the national supervisors believe that the purpose of branches in third countries is to meet local needs. The ECB and national supervisors do not expect that branches in third countries perform critical functions for the credit institution itself or provide services back to customers based in the EU."

Although Brexit has highlighted the issue of outsourcing, the nature and proportions of outsourcing are topics addressed in particular as part of an authorisation or modification of the programme of operations, as specific items address this topic.

3.2.2 - Absence of equivalence regime for third country firms in banking matters

Unlike recent European legislation such as the AIFM Directive, MIFID 2/MIFIR, EMIR or the Credit Rating Agency Regulation , the relevant sectoral banking directives do not provide for any equivalence regime for non-European institutions with regard to access to regulated

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[71] *European Commission, Notice to stakeholders - Withdrawal of the United Kingdom and EU rules in the field of markets in financial instruments, 8 February 2018; European Commission Notice to stakeholders – Withdrawal of the United Kingdom and EU rules in the field of banking and payment services, 8 February 2018; European Commission, Notice to stakeholders – Withdrawal of the United Kingdom and EU rules in the field of post-trade financial services, 8 February 2018.*

[72] *Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 (**EMIR**). See Article 25(6) on third-country clearing houses and Article 75 on non-European trade repositories.*

[73] *Regulation (EU) No 1060/2009, as amended by Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 ("**CRA Regulation**"). See Article 5(6).*

[74] *CRD IV and, by extension, PSD2 and DME2. See the European Commission's table of equivalence schemes (https://ec.europa.eu/info/sites/info/files/file_import/equivalence-table_en.pdf). See also, European Parliament, Briefing "Third-country equivalence in EU banking legislation", PE 587.369, 7 March 2017.*

activities[75]. Therefore, in the absence of any derogations or exemptions provided by national legislation[76], it will not be possible for UK institutions to pursue their activities in France after the date of Brexit from the UK (freedom to provide services) or from a branch located in France (freedom of establishment).

3.2.3 - Arrangements for investment services

3.2.3.1 - Reverse sollicitation

If a professional or a non-professional[77] client in the European Union requests on its own initiative the provision of an investment service or an investment activity by a third country firm, the latter may provide the requested service without having established a branch in accordance with the requirements of MIFID 2 or be registered in the third-country corporate register kept by the ESMA in accordance with MIFIR. Such services should not be considered to be provided within the territory of the European Union[78].

By contrast, any trade solicitation[79] of the third-country firm (in the form of advertising or promotion) vis-à-vis clients or potential clients in the European Union cannot be analysed as a measure that has been made solely by the client. The client's initiative will have to be assessed in concreto without taking into account any clauses or reservations indicating, for example, that the third-country firm is deemed to act solely on the initiative of the client.

The third country firm shall not be entitled to market new categories of investment products or services to such clients and shall be limited to the supply of the service requested by the client. In particular, the ESMA clarified the criteria for determining when a third-country firm markets a new

*[75] Of course, CRD IV provides for certain equivalence rules but is limited to prudential matters (e.g. Article 107(4) of Regulation (EU) No 575-2013 of the European Parliament and of the Council of 26 June 2013 ("**CRR**") concerning the prudential treatment of exposures to exposures to credit institutions in some third countries, such as Australia, China, etc.; or Article 142 of the same regulation on large exposures). To be complete, it may also be noted that DME2 (Article 8(3)) allows the European Union to conclude agreements with third countries to agree on the same treatment throughout the EU. To date, such agreements have not been concluded.*

[76] For example, in France, exceptions to the banking monopoly (e.g. the new authorisation given to foreign entities and institutions of foreign law to acquire bank claims under certain conditions introduced by Law Sapin II in Article L. 511-6 (4) of the MFC) enable persons not to seek a banking authorisation by the ACPR.

[77] Article 42 of MIFID 2 and Article 46(5) of MIFIR.

[78] Recital 111 of MIFID 2 and Recital 43 of MIFIR.

[79] Including any advertising, brochure, press release, etc.: "As for the means of such solicitations, ESMA is of the view that every communication means used such as press releases, advertising on internet, brochures, phone calls or face-to-face meetings should be considered to determine if the client or potential client has been subject to any solicitation, promotion or advertising in the Union on the firm's investment services or activities or on financial instruments." ESMA, Questions and Answers On MIFID II and MIFIR investor protection and open topics, ESMA 35-43-349, 25 May 2018.

product category. In particular, it recommends considering the type of instrument offered, whether complex or non-complex instruments within the meaning of MIFID 2 and the risk of the product[80].

<u>3.2.3.2 - Direct services to non-option professional clients and eligible counterparties</u>

For eligible counterparties and professional clients (other than on option) only[81], MIFIR[82] allows third-country firms to provide investment services or activities without establishing branches if they are registered in the register of third-country firms kept by the ESMA.

The conditions for registration in the register kept by the ESMA are laid down in MIFIR : the third country in which the undertaking originates will have to benefit from an equivalence decision[83] granted by the European Commission, which implies in particular that firms providing investment services in that third country are authorised in that third country and are subject to effective supervision and enforcement on an ongoing basis and that cooperation arrangements have been established between ESMA and the competent authority of third countries[84].

The objective of the European Commission's equivalence decision is to certify that the legal and supervisory arrangements of the third country ensure compliance, by the undertakings authorised in the third country, with prudential and business requirements and have an equivalent effect to the requirements laid down in European legislation.

The third-country firm registered in the ESMA register cannot be subject to additional requirements by the Member States or be accorded more favourable treatment than European enterprises[85].

The proposal for a regulation of the European Parliament and of the Council on prudential requirements for investment firms and amending in particular MIFIR[86] (**"Proposal of amendment to MIFIR "**) provides that where the services provided and the activities carried out by third-country firms in the European Union following the adoption of the equivalence decision are likely to be of systemic importance for the European Union, prudential and conduct of business requirements legally binding can only be considered having an equivalent effect after a detailed and granular

[80] ESMA, Questions and Answers On MIFID II and MIFIR investor protection and intermediaries topics, ESMA 35-43-349, 25 May 2018, question 2 of Chapter 13.

[81] Category of clients considered as professionals in Section I of Annex II to MIFID 2.

[82] Article 46(1) of MIFIR.

[83] Article 47(1) of MIFIR.

[84] Article 47(2) of MIFIR.

[85] Article 46(3) of MIFIR.

assessment. To this end, the European Commission shall also assess and take into account supervisory convergence between the third country concerned and the European Union. The proposal of Amendment to the MIFIR also provides that third-country firms should annually communicate to the ESMA information on the scale and extent of services provided and activities carried out in the European Union.

3.2.3.3 - National regimes

In the absence of an equivalence decision of the European Commission or if the equivalence decision is no longer in force, the MIFIR allows Member States to provide that their competent authorities shall grant authorisation, in accordance with their national law, to third-country firms to offer investment services or to carry out investment activities and offer ancillary services to eligible counterparties and professional clients other than on options on their territory without having to place branches or to be registered in the ESMA register[87]. The third-country firm authorised in this framework cannot offer services to a client located in another country of the European Union than in which it was authorised.

Moreover, there is a transitional regime for situations where third-country firms are already authorised under national provisions and where an equivalence decision of the European Commission for the third country concerned arises. In this case, undertakings in that third country may continue to provide services and carry out their activities in the European Union for three years in accordance with the national schemes under which they were authorised[88].

This option was exercised by many Member States in the European Union, most notably the United Kingdom under the "*overseas exemption*". Under the aegis of MIFID 1, the United Kingdom introduced derogations to enable third-country firms to provide investment services within its territory without the obligation to be established and thus to comply with MIFID 1 rules. This option has been restored within the third-country regime of MIFID 2. The "*overseas exemption*" allows persons not authorised as investment firms outside the EEA to provide clients located in the United Kingdom with certain investment services provided that they meet the following cumulative

[86] Proposal for a regulation of the European Parliament and of the Council on prudential requirements for investment firms and amending Regulations (EU) No 575/2013, (EU) No 600/2014 and (EU) No 1093/2010, 2017/0359 (COD), COM (2017) 790 final.

[87] Article 46(4) of the MIFIR.

[88] Article 54(1) of the MiFIR

conditions: (i) not to have an institution in the United Kingdom (or as a branch), (ii) to provide only certain regulated services[89] (which correspond to certain investment services within the meaning of MIFID 2, such as reception-transmission of orders or trading on own account), and (iii) to provide the service with the participation or through a person authorised or exempted in the United Kingdom following a “legitimate approach”[90].

Comparable regimes exist in particular in Belgium, Germany, Ireland, the Netherlands, Luxembourg, Norway and Sweden.

Unlike some other EU States, France, in the context of the PACTE bill, intends to require the third-country firm to establish a branch authorised in France to provide investment services to professional clients and eligible counterparties in France.

IV- Recommendations of the Working Group

4.1 - Promote continuity of services

From the effective withdrawal of the United Kingdom from the European Union, a UK institution or its European branch will no longer be able post-Brexit to provide services to European clients, without violating the monopoly of the provision of services.

This situation may be problematic in restructuring assumptions and collective procedures. For example, a British institution granted a loan to a company established in the European Union prior to Brexit. This company is experiencing difficulties, so that a debt restructuring plan including a new remittance of funds from lenders would be negotiated post Brexit. Thus, the amount of initial credit granted by the UK institution should be increased. The latter could not undertake this new remittance that was not initially foreseen in the loan agreement without violating the banking monopoly in this example.

Except for specific cases or post-Brexit substantial changes leading to the provision of a new regulated service , the general principle of the task force study seems to be the continuity of contracts that are

[89] The benefit of the exemption shall be subject to varying conditions, depending on the service provided.

[90] Much broader notion than passive marketing of reverse solicitation.

[91] See Section 2.3 of this report. This could include credit agreements concluded before Brexit, whose a number of preconditions are not fulfilled before Brexit, increasing the amount of the facility, adding a new borrower, adding a position, etc.

being executed at the time of Brexit.

The Working Group shall make the following recommendations:

- In order to clarify in which circumstances the restructuration of an outstanding transaction (derivative, securities lending, repo), whose characteristic performance has already been performed, may conduct to the qualification of the provision of a new investment service, it appears desirable to determine clear and simple criteria of qualification. Industry associations could usefully propose technical criteria which could then be endorsed by supervisory authorities.

- In some sufficiently defined and determined assumptions, such as a debt restructuring plan of a firm experiencing difficulties under a collective procedure, a reflection on a text would be usefully conducted to ensure continuity in the interest of client protection.

- In the interests of legal certainty, it would be desirable to introduce at least under French law and at best in European law[92] a regime, inspired by the existing regime for the withdrawal of authorisation, the extinctive management of activities carried out under certain contracts between European branches of UK institutions or of UK institutions under the freedom to provide services and their French or European clients and that would not have been transferred to an entity authorised in the EEA. This regime would lead the provider to fulfil its commitments made by carrying out strictly necessary operations to settle existing situations in the best interests of clients.

4.2 - Encourage transfers to location in the European Union

It should be distinguished from the situation of French institutions which, in most cases, have branches in the United Kingdom and institutions organised in other way[93] (and which are authorised in the United Kingdom). For the former, it will not be necessary to encourage transfers, for legal reasons only, since the contract usually provides that the client enters into the business with the entity established in the European Union or its branch.

For the latter, it is in the Union's and the clients' interest to promote transfers of contractual relationships between an institution or a UK subsidiary for the benefit of an entity located in the European Union with a view to protecting the interest of European clients.

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[92] *A further study should be carried out on the feasibility of this solution in European law.*

[93] *Entities covered in the section 1.1 of this report.*

4.2.1 - Facilitating replication of market framework contracts

In order to ensure the continuity of contractual relationships between European clients and the groups serving them from the United Kingdom, apart from the case of institutions established in London branches where the continuity of contracts remains predominantly possible (see above), a large number of contracts will have to be established between those clients and their new providers based in the European Union.

Recent examples of *repapering* related to MIFID 2 or EMIR have demonstrated the operational difficulty of this type of exercise not only for institutions but also for their clients.

In financial matters, there are many areas where the relations between the Parties are governed by two levels of contractual formalisations: the master agreement and the confirmations relating to each transaction concluded under this master agreement. This is the case for derivatives, repo and securities lending transactions.

The purpose of the master agreement is to define the general legal framework for future relations between the Parties concerning a type of transaction, and each confirmation subsequently introduces the agreement of the Parties on the conclusion of a transaction and the specific economic and legal terms of the Agreement.

This is why it may be in the common interest of all players to allow a simplified way of replication of certain existing contractual relationships, namely master agreements.

Replication of an agreement means using the terms of an existing agreement (the **"Replicated Agreement"**), and thus already negotiated between a client and a banking group, in order to establish a new contract (the **"Second Agreement"**) between that client and another company in that banking group.

The Replicated Agreement and the related transactions remain unchanged and continue to produce all their effects.

It could be envisaged that a text would allow replication to be deemed accepted by the client where the following conditions are met:

- i) the two investment service providers belong to the same group;
- ii) the credit quality of the new investment service provider is similar to that of the UK provider;
- iii) the new provider has notified the client in writing with a notice of sixty days, the proposal to

replicate the existing master agreement and any necessary amendments to it, in particular with regard to the different notification addresses and contact details, the possible domicile (*process agent*) or the applicable law (and jurisdictional competence) to this new Agreement; and

iv) the client did not challenge the terms of the new agreement and entered into a first transaction, after the prior notice mentioned above, within the scope of this new agreement with the new investment service provider.

The client will also have to be informed if the modification of the master agreement is likely to have adverse consequences in terms of client protection.

Thanks to the process proposed above, the conclusion of the Second Agreement is thus facilitated. This replication of a master agreement would not be confined to the existing Agreement or related transactions.

4.2.2 - Facilitate the transfer of outstanding transactions under market master agreements

The replication or transfer of transactions documented by commodity master agreements concluded before the date of Brexit between a UK entity and an entity established in the European Union may result, as a result of the change in contracting party, in the application of the clearing obligation or collateralisation obligation under the EMIR.

Indeed, the clearing obligation[94] applies to certain types of derivative contracts concluded or novated (i) on the date on which the clearing obligation takes effect or after that date[95] or (ii) between the date of notification of the authorisation of the CCP and the date on which the clearing obligation takes effect, if the residual maturity of the contract is higher than to the minimum residual maturity set out in the delegated regulations, known as *frontloading period*.

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[94] *Article 4 of the EMIR.*

[95] *These dates shall be staggered according to the type of counterparties and the type of product. See in particular Commission Delegated Regulation (EU) 2015/2205 of 6 August 2015 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council by regulatory technical standards with regard to the clearing obligation, Delegated Regulation (EU) 2016/592 the Commission of 1 March 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council by regulatory technical standards on the clearing obligation, Commission Delegated Regulation (EU) 2016/1178 of 10 June 2016 supplementing Regulation (EU) No 6 48/2012 of the European Parliament and of the Council by regulatory technical standards the clearing obligation, Delegated Regulation (EU) 2017/751 of the Commission of 16 March 2017 amending Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 with respect to the time limit compliance with clearing obligations granted to certain counterparties trading OTC derivatives.*

The collateralisation requirement[96] is also subject to an entry into force overtime according to the type of margin (initial margin or variation margin) and the volume of non-cleared derivatives of counterparties that occurs at the earliest on 4 February 2017.

All outstanding transactions between an entity established in the European Union and a credit institution or an investment firm established in the United Kingdom concluded before those dates are not subject to the obligations to clear and collateralise.

In the Brexit context, a number of UK traders want to transfer books of transactions to the European Union. This trend should be encouraged and facilitated. The only technique to implement this transfer of transactions is novation, i.e. a tripartite contract between the entity established in the European Union and the British entity, both parties to the original contract, and the European entity that will replace the UK entity in the contract.

The ESMA's Q&A[97] clarifies, about the clearing obligation, that a novation is characterised by the change of counterparty in a transaction. This analysis seems to be transposable to collateralisation obligation. In this case, novation would therefore create a new transaction between European entities that would be immediately subject to clearing or collateralisation obligations. It would be desirable to clarify the criteria for determining that a transaction is "novated".

It would be unfair to submit the client to clearing or collateralisation obligations only by reason of this novation, but also to the pre-trade transparency obligations of MIFID 2. Furthermore, it is also in the Union's interest to allow these transfers of books. It would be possible to agree at EMIR 2 level on arrangements for operators to make novation on a constant regulatory basis, i.e. novated transactions retain their legal regime before novation. The only reservation to this rule is that grandfathering can benefit to "novice" transactions only as a result of the change of counterparty to a European entity and that it is limited over time. As soon as the parties agree on any other changes under the operation, this grandfathering would not apply and the new transaction that would result from these other changes would be subject to clearing and collateralisation requirements. In order to ensure the proper use of this measure, it would be desirable that a reporting to the regulator be made.

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[96] *Article 11(3) of the EMIR Regulation and Delegated Regulation (EU) 2016/2251 of 4 October 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories by regulatory technical standards on risk mitigation techniques for OTC derivative contracts not cleared by a CCP.*

[97] *"Article 4(1)(b) of EMIR requires to clear the OTC derivative contracts (pertaining to a class of OTC derivatives that has been declared subject to the clearing obligation) that are entered into or novated either on or after the date from which the clearing obligation takes effect or during the frontloading period detailed in Article 4(1)(b)(ii) and under certain conditions. What type of trade novations are covered in this article?" "All types of trade novations are covered i.e. each time a counterparty (being a CCP or counterparty) steps into the trade and become a new counterparty to the trade." ESMA , Questions and Answers Implementation of the Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR), OTC question 20.*

4.3 - Continue the convergence effort in European legislation and the application of the legislation

The working group invites the Authorities to start reflecting on the framing of the arrangements[98] organised by the current legislation enabling the provision of investment services by an entity which has its head office in a third country to European clients or enabling the outsourcing of the provision of banking and financial services by an entity located in the European Union to an entity established in a third country. Indeed, these mechanisms deserve further clarification. Therefore, better harmonisation[99] of the approaches of national authorities would be desirable and could, in particular, be achieved by strengthening the powers of each of the European Supervisory Authorities in the interpretation and implementation of European legislation.

[98] Reverse solicitation, provision of direct services by third-country firms to professional clients other than on option and eligible counterparties subject to the obtaining of an equivalence decision.

[99] See in this sense in particular the letter from ESMA to the European Commission, MiFID II / MiFIR third country regimes, provision of investment services and activities at the exclusive initiative of the client and outsourcing of functions to third country entities, 26 September 2018.

CONCLUSION

This report presents two main legal issues related to Brexit: on the one hand, the continuity of contracts concluded at the time of Brexit and the conditions for the provision of post-Brexit banking and financial services.

Regarding the continuity of contracts, the HCJP considers that the majority of banking and financial contracts do not raise problems. The contracts for which continuity is threatened are those whose post-Brexit execution results in the provision of banking and investment services. For these contracts, the HCJP issued recommendations to ensure continuity until the contract was finalised in the best interests of clients.

If the parties to the contract want the contract to be continued with an entity established in the European Union, the HCJP recommends facilitating the transfer of the contractual relationships and transactions related to that entity.

The analysis of the conditions for the conclusion of the new post-Brexit contractual relationships led the HCJP to recommend further convergence efforts in the field of European legislation and the application of the legislation.

LIST OF ANNEXES

Composition of the working group

Annex 1 Business continuity study

COMPOSITION OF THE WORKING GROUP

COMPOSITION OF THE WORKING GROUP
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ANNEX 1

Study on the continuity of contracts

ANNEX 1
« STUDY ON THE CONTINUITY OF CONTRACTS »

Financing contract (1/2):

Overall assumption (for any type of contract discussed below): service provided from a UK branch of a bank whose head office is in France.

As a reminder, the "wholesale lending" is not regulated in the United Kingdom, so the opposite analysis would not cause problems, as in the applicable regulation.

Type of contract	Cases	Continuity of contracts	Arguments
"Revolver" and term credit	Already signed and already drawn fully before Brexit	✓	Before Brexit therefore no subject. Only a payment obligation for the borrower remains.
	Already signed but not fully drawn before Brexit (this covers both partially drawn term loans and revolver loans).	✓	"Consensual" approach to the contract and irrevocable commitment of the bank **(1).** Post Brexit remittance could be considered to be a mere execution of the contract.
"Committed" credit agreement with commitment option by signature * (*) the location criterion should be that of the payer.	Issuance of collateral before Brexit with a payment date after Brexit	✓	See arguments **(1).** The payment of the post Brexit guarantee is the sole execution of the contract.
	Line of credit with obligation to issue post Brexit a guarantee that extends beyond the date of Brexit	✓	See arguments **(1).** The issuance of the post Brexit guarantee could be considered as a mere execution of the contract.
Documentary credit	With a payment date after Brexit	✓	See arguments **(1).** The payment of the post Brexit guarantee is the sole execution of the contract.
	Line of credit with obligation to issue post Brexit a documentary credit that extends beyond the date of Brexit	✓	See arguments **(1).** The issuance of the post Brexit guarantee could be considered as a mere execution of the contract.

Type of contract	Cases	Continuity of contracts	Arguments
Syndicated credit agreement with a number of preconditions	All preconditions are met before Brexit	✓	See arguments **(1).**
	Certain preconditions are not met at Brexit time	✗	As the conditions have not been fulfilled, the execution of the contract has not started, it may not allow the continuity of the contract.
Uncommitted facilities		✗	There is no commitment of the parties therefore the contract cannot continue: it must stop by respecting the required advance notice or have an authorisation.

Financing contract (2/2):

Life cycle event (Brexit)	Continuity of contracts	Arguments
Extend or pay (issuance of a guarantee with a post Brexit maturity, where the amount of the guarantee is renewed)	✓	Where the provision "Extend or Pay" is specifically organised within the guarantee, it is part of the guarantee and credit by signature, see arguments **(1)**.
Increase in amount of facility	✗	Substantial modification of the contract and therefore cannot continue **(2).**
Maturity extension	✗	See arguments **(2).**
Addition of new French borrower	✗	See arguments **(2).** A contractual development limiting the possibility of adding new borrowers should be considered.

Other topics discussed:

1. LMA contract:

The question of the location of the agent for the facility is asked. Institutions would like the institution to have no impact and the agent may be considered as transparent. LMA under English law indicates that the location of the agent of the facility can be changed but proposes no choice contrary to the United Kingdom. We should think about "must be in the United Kingdom".

2. Article 55 of the Directive (BRRD):

Some institutions recall the general context on Article 55 and the market work for a "smart"/ proportionate application on the contracts that provide recapitalisation capabilities. The integration of the article into the contracts should therefore be integrated into this framework, taking into account the terms of the French transposition Act (Ratification Law Sapin 2).

3. Reference path:

Approach the ACPR, after further analysis by the working group, to defend a parallel with the situations of cessation and withdrawal of the authorisation with a view to obtaining confirmation of the analysis and treatment applied in these situations.

Derivatives, repo and securities lending

This analysis is based on ISDA's "*life cycle events*".

Life cycle event (Brexit)	Continuity of contracts	Arguments
Payment & Settlement	✓	"Consensual" approach to the contract and irrevocable commitment of the bank. **(1)** The remittance is the sole execution of the contract and does not involve the provision of an investment service.
Exercise of an option (or swaption)	✓	See arguments **(1).** The option exercise is already provided for in the contract.
Additional collateral transfer	✓	See arguments **(1).** This is a simple request for additional collateral.
Unwind	✓	See arguments **(1).** This is a nominal reduction, so there is no service provision This operation can result in partial termination or the conclusion of a reverse transaction (in the second case, the processing of this operation from Paris would avoid any problem of location of the operation). It is indicated by an institution that it is necessary to identify/link transactions
Portfolio compression	✓	See arguments (**1**). It is a regulatory obligation (EMIR) that involves replacing a number of contracts with a transaction whose market risk is identical to the risk resulting from all compressed contracts: the operation is "neutral".
Corporate share	✓	See arguments **(1).** This clause often leads to divisions of nominal shares/decreases.
Increase in the nominal value	✗	This event modifies a substantial feature of the contract, involves the conclusion of a new transaction and therefore the provision of a new investment service **(2)**.
Roll of position	✗	See arguments **(2).** This event extends the maturity of the operation and typically involves payment of an amount
Novation	✗	See arguments **(2).** This event leads to trading between the parties (on the price of novation or the increase in the nominal amount).
Renegotiation Economic change	To widen	Depending on the type of modification, institutions (a) indicate that an analysis could be conducted against ISDA's *life cycle events* in clearing (as events generating a clearing obligation could lead to an investment service) and (ii) consider that the degree of materiality of

		the economic change needs to be assessed (only material events could affect the continuity of the contract.)

Article 55 of BRRD is also mentioned (see Financing Contract).

Payment accounts and services and IOBSP

Assumption: if a bank in the form of a branch is located in the United Kingdom, it has taken a step to remain authorised post Brexit.

Type of contract	Cases	Continuity of contracts	Comments
Non-resident account and Correspondent Banking	Without commercial solicitation (no service offering outside the country of authorisation)	✓	The service should be considered locally (example in France). Brexit should not question the possibility to open and maintain locally a non-resident account whose opening is requested by the client **(3)**.
	With commercial solicitation (service offering outside of the country of authorisation)	✗	The potential impact of Brexit and business continuity or business continuity issues. The particular case of canvassing is to widen.
IOBSP		✓ (if local authorisation)	Unregulated activity at European level excluding consumer credit and housing loans. Point to be analysed under each national regulation.
Depository account of payment institutions in cross-border situations		✓ (if local authorisation)	If the institution is no longer authorised and does not obtain local authorisation →cessation of the contract. There is no break of continuity if the payment institution has a local authorisation (to compensate for the loss of the European passport).

Account life (post Brexit)	Continuity of contracts	Arguments
Statement of account	✓	The statement of account or operations is the pure execution of the contract and is not a banking operation.
Payment order (creditor transaction, debtor transaction)	✓	Continuity of contracts (see **(3)**).