BREAK – IMPLICATIONS FOR THE FINANCIAL SERVICES INDUSTRY

Prof. Dr. Dirk A. Zetzsche, LL.M. (Toronto)
ADA Chair in Financial Law/ Inclusive Finance
OVERVIEW

§ 1 – Setting the stage
§ 2 – Access from 3rd country via Equivalence
§ 3 – EU Subsidiary
§ 4 – Bilateral Market Access
§ 5 – Passive Use of Freedom to Provide Services
§ 6 – Conclusions
1.1. **BREXIT SCENARIOS**

- UK as EEA member (but: freedom of movement !)
- Bilateral Treaties (example: EU - Switzerland), but delay in negotiations
- Third Country / Equivalence (Example: USA)
1.2. **Scope of EU Financial Services Law**

- Territoriality doctrine => seat/ headquarter (financial regulation)
- Market doctrine => market (sales, market regulation: prospectus etc.)
- Effects doctrine => negative impact on EU (systemic risk, market abuse)
1.3. Benefits of EU / EEA Membership

- EU’s Single Market
- 1 license - 31 countries – 510 million consumers
- Pro competition: channel intermediation to most productive venue
- Towards Development of Financial Centres
1.4. **Downsides of EU Membership**

- Mandatory law and coordination of supervision and enforcement
- Necessary evil of Single Market: Mitigate risk shifting
1.4. **Downsides of EU / EEA Membership**

- Not all mandatory financial law is necessary or efficient => some political, some overly detailed, some outright silly, all costly.
- Examples:
  - Diversity Rules for Board Composition
  - 40 L1-L3 statements on MiFID II/MiFIR (+1000pp.)
  - Regulation of bank directors’ remuneration under CRD IV
  - Asset stripping rules for AIFMs
1.5. Ways into the EU Single Market

- Access from 3rd country via Equivalence
- EU Subsidiary
- Bilateral Market Access
- Passive Use of Freedom to Provide Services
§ 2 Access from 3rd country via Equivalence

- US « substituted compliance » (for derivative clearing)
- Scope: where worldwide risk spreading mitigates EU’s systemic risks => PD, AIFMD, MiFID, CCP/EMIR, CRA, CSDR, Re-Insurance Undertakings

- Equivalent rules and regulations
- Equivalent enforcement
- Equivalent social factors: AML/CFT Rules + Tax Transparency
- Equivalent market access: Reciprocity
§ 2 Access from 3\textsuperscript{rd} country via Equivalence

- **Up:**
  - home rules + regulators
  - Low costs

- **Downs**
  - Equivalence statement under political influence
  - Limitations on clients/customers/investors: professionals only
  - Limited scope
    - MiFID license insufficient for full-service investment banks, re-insurance for insurance undertakings, AIFMD for UCITS ManCos
§ 3 EU Subsidiary

- Scope: all financial law
- Requires minimum substance in EU
- Ups
  - All EU financial services passports
- Downs
  - Double costs
  - Double processes

US, Asian intermediaries: Why not move EU Hub into EU and forget London?
§ 4 Bilateral Market Acess

- Scope: MiFID and others
- Requires friendly market access regime in MS
- Upsides
  - Some MS have liberal approach
  - Some discretion of national regulator
- Downsides
  - Varies across Member States
  - No Single License – feasible for large MS only
  - Policial uncertainty
§ 5 PASSIVE USE OF FREEDOM TO PROVIDE SERVICES

- Scope: all financial services
- Requires clients to request services on their own initiative
- Upsides:
  - Details not harmonized => liberal approach eg by BaFin re professional investors
- Downsides:
  - Details not harmonized => subject to change, MS’ approach varies
  - Need to contact new clients outside of the EU
  - Compliance in day-to-day business difficult; violations likely
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§ 6 CONCLUSIONS

1. **Based on equivalence** UK firms will have some market access. Experience with recognition of third-country equivalence is scarce. Political criteria could impact equivalence assessment. Equivalence decisions are not reviewable in court.

2. **Bilateral access** under MiFID is an option only in some EU Member States. **No passport exists** for third country IMs in banking and primary insurance business.

3. Many UK IMs it will try to establish a **functionally independent, but minimally equipped EU subsidiary** taking advantage of the equivalence-based facilitation of capitalization and supervision. Minimum substance (prohibition of letter-boxes) deserves special attention.

4. **Reverse solicitation** if not amended could support the business with institutional clients from London with few restrictions. But: Regulatory approach not harmonized, regulatory uncertainty exists.
Thanks!

Prof. Dr. Dirk Zetzsche, LL.M.
ADA Chair in Financial Law / Inclusive Finance
University of Luxembourg
Dirk.Zetzsche@uni.lu

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