

# Brexit

## Taking stock after the European Council meeting

Lord Jonathan Hill, Christiaan Smits, Emma Rachmaninov, Markus  
Benzing, Janina Heinz

26 March 2019



**Freshfields Bruckhaus Deringer**

# Agenda

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- 1) The European Council meeting of 21 March
- 2) Update on the UK political process
- 3) Update on the EU political process
- 4) EU contingency measures
- 5) UK contingency measures
- 6) German contingency measures
- 7) Contingency measures in other jurisdictions
- 8) Questions



# The European Council meeting of 21 March



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## Main outcomes

- UK Prime Minister May's request for an extension of Article 50 until 30 June
- European Council (Article 50) response
  - extension until 22 May to allow for ratification of the Withdrawal Agreement, if the UK Parliament approves the Withdrawal Agreement in a third meaningful vote this week; or
  - extension until 12 April, if the UK Parliament does not approve the Withdrawal Agreement in a third meaningful vote this week, with the expectation that the UK would "indicate a way forward before [12 April] for consideration by the European Council"
  - "there can be no opening of the Withdrawal Agreement [...] Any unilateral commitment, statement or other act should be compatible with the letter and the spirit of the Withdrawal Agreement"



## Update on the UK political process





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Senior Advisor; former European Commissioner for  
Financial Stability, Financial Services and Capital  
Markets Union



What is happening in the U.K.?



What might happen next?



# Update on the EU political process



# Response of the EU27

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- Increasingly well prepared for no deal
- Emotions in Brussels and at the Council are running high and patience is running out
- Trust in Theresa May's ability to deliver a majority in parliament is gone
- Would like to resolve the Brexit question as soon as possible, given other issues:
  - The threat of populism (European Parliament elections 24-26 May)
  - A slowing economy
  - Difficult relations with the US
  - Worries about China
  - Difficulties with Russia

# Response of the EU27

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- However:
  - The EU27 would still suffer from a hard Brexit (estimated €22 B/Y versus the UK €57 B/Y)
  - Do not want to take the blame for a no-deal scenario
  - Do realise the need for close ties to the UK geopolitically
  - Needs the UK to pay its part of the EU Budget
- Behind the scenes the Commission was already considering a delay till end 2020
- Preserving unity has served the EU27 well in the negotiations
- Will not unnecessarily plunge themselves (specifically Ireland) into a hard, damaging Brexit
- The EU27 will, in the end, likely be patient, and if necessary extend Brexit again



# EU contingency measures



# EU contingency measures

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The Commission's general stance on EU and national contingency measures

- Contingency Action Plan (November 2018) – principles for EU contingency measures
  - Focused on mitigating the most severe consequences of a “no deal” scenario
  - Temporary and limited in scope (no replication of the full benefits of EU membership)
  - Unilaterally adopted by EU, can be unilaterally revoked by EU
  - No compensation for lack of preparedness by relevant stakeholders
  - No “mini-deals”, no negotiation with the UK
  - National measures by EU27 Member States to be consistent with these principles
  - Purpose: mitigation of risks for EU and EU market participants, not for UK or UK market participants

# EU contingency measures

## EU contingency measures in the financial services sector

- Commission's conclusion in December 2018: "Only a limited number of contingency measures is necessary to safeguard financial stability in the EU27"
- Contingency measures only where market operators cannot address risks alone



# EU contingency measures

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## Specific contingency measures

- CCPs
  - Equivalence decision (EU) 2018/2031 under EMIR
  - ESMA recognition for three UK CCPs (LCH Limited, ICE Clear Europe Limited and LME Clear Limited) announced
  - Allows EU27 counterparties to clear OTC derivatives subject to the clearing obligation in these UK CCPs until 30 March 2020
- CSDs
  - Equivalence decision (EU) 2018/2030 under CSDR
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- OTC derivatives
  - Delegated Regulation (EU) 2019/397 on OTC derivatives (risk management/collateral)
  - Delegated Regulation (EU) 2019/396 on OTC derivatives (clearing obligation)
  - Allows (within limited time window of 12 months) the novation of OTC derivative contracts currently not subject to the requirement to exchange collateral (bilateral margins) and not subject to the clearing obligation without triggering either of these duties
  - In each case, novation must be for the “sole purpose of replacing a counterparty established in the United Kingdom with a counterparty established in a Member State”

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ECB / ESMA / EBA

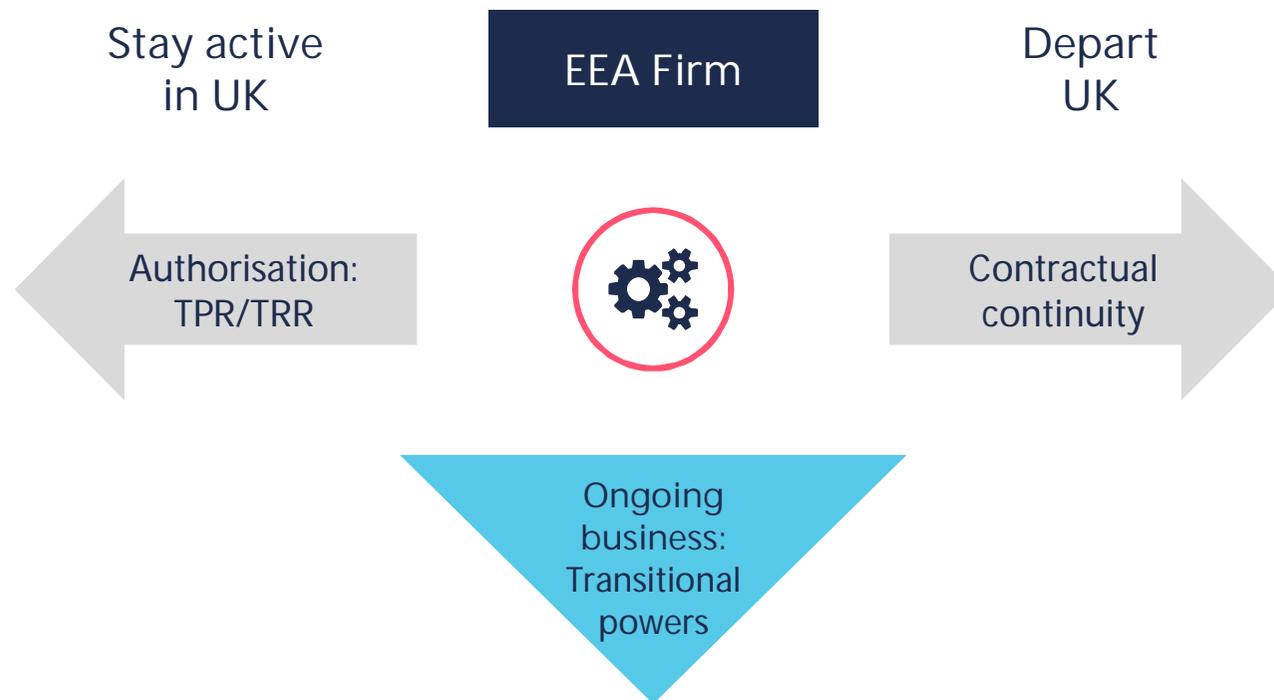
- Main points
  - Limitations on using “empty shells” in the EU27 and on reverse solicitation for UK institutions
  - Risk management for EU27 institutions interacting with UK institutions and clients
  - Stress that substance to identify and manage material risks locally in the EU is required
- Examples
  - EBA Opinions on Brexit (2017) and Brexit Preparedness (2018)
  - ECB supervisory expectations on booking models (2018)
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# UK contingency measures



# Outline of the UK hard Brexit framework





# German contingency measures



# German contingency measures

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## „Brexit-Steuerbegleitgesetz“

Legislation authorising the Federal Financial Supervisory Authority (BaFin) to grant a transitional period for passported services under CRD, MiFID and PSD\* - to give time to reorganise business

- Existing business & closely related new business, e.g.
  - Typical follow-up business such as prolongations
  - Draw-downs under revolving credit facilities or existing credit lines
  - Life-cycle events in derivatives
- Decision by BaFin
  - Whether and for how long to grant the transitional period (up to 21 months after a Brexit date)
  - Scope of the transitional passport right
  - Form of granting a transitional passport right (upon request or by general order)

\*Transitional period also available for UK markets in financial instruments providing DEA to German participants.



# Contingency measures in other Member States



# Member state contingency measures

Country	Measures
France	<ul style="list-style-type: none"><li>• Ordinance of 6 February 2019 providing for measures relating to the banking, financial and insurance markets</li><li>• No transition period for services passported under CRD 4 or MiFID 2</li><li>• Rules enabling performance of ongoing contracts such as derivatives where these cannot be transferred. Addresses settlement finality and references continued access of French entities to UK interbank and settlement systems and continuity of ISDA master agreements</li></ul>
Ireland	<p>Investment firms</p> <ul style="list-style-type: none"><li>• Intend to use the existing national 'Safe Harbour' regime, which allows investment services to be provided by a third country firm to eligible counterparties and professionals</li></ul> <p>Insurers</p> <ul style="list-style-type: none"><li>• Draft legislation with respect to insurance (life and non-life) contracts, ensuring continuity for Irish policyholders through a temporary run off facility for up to three years after the date of the withdrawal of the UK from the EU</li><li>• Temporary run-off regime, which, subject to a number of conditions, will enable UK insurance undertakings and intermediaries to continue to fulfil contractual obligations to Irish customers (including paying out on claims and accepting premiums).</li></ul>

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Italy	<ul style="list-style-type: none"> <li>• Legislation to allow for contract continuity announced. Includes 21 month period of reciprocal access for firms and trading venues. Operation according to existing laws and regulations</li> <li>• Settlement Finality issue addressed through law</li> </ul>
Luxembourg	<ul style="list-style-type: none"> <li>• Draft legislation on financial sector measures if a hard Brexit</li> <li>• Gives CSSF power to continue to apply (up to 21 months) EU passporting provisions for the freedom to provide services or the establishment in favour of UK-based institutions</li> <li>• The regime is only available for (i) contracts concluded before 29 March 2019 and (ii) for contracts concluded thereafter where they have a close link to contracts concluded before exit</li> </ul>
The Netherlands	<ul style="list-style-type: none"> <li>• UK investment firms providing investment services in the Netherlands to, or trading on own account with, Dutch eligible counterparties or per se professional clients will be temporarily exempted from having to obtain a license in the Netherlands until 1 January 2021</li> <li>• Prior notification to the Dutch Authority for the Financial Markets</li> <li>• Legislative amendments adopted to give settlement finality protection to third country systems</li> </ul>
Spain	<ul style="list-style-type: none"> <li>• Royal Decree-Law published: provisions to ensure that existing contracts for the provision of financial services entered into before 30 March 2019 will remain in force and contract management can be carried out</li> <li>• Temporary extension of licence for nine months for the purposes of (i) termination or assignment of contracts to an authorised entity or (ii) application for a new Spanish licence</li> </ul>



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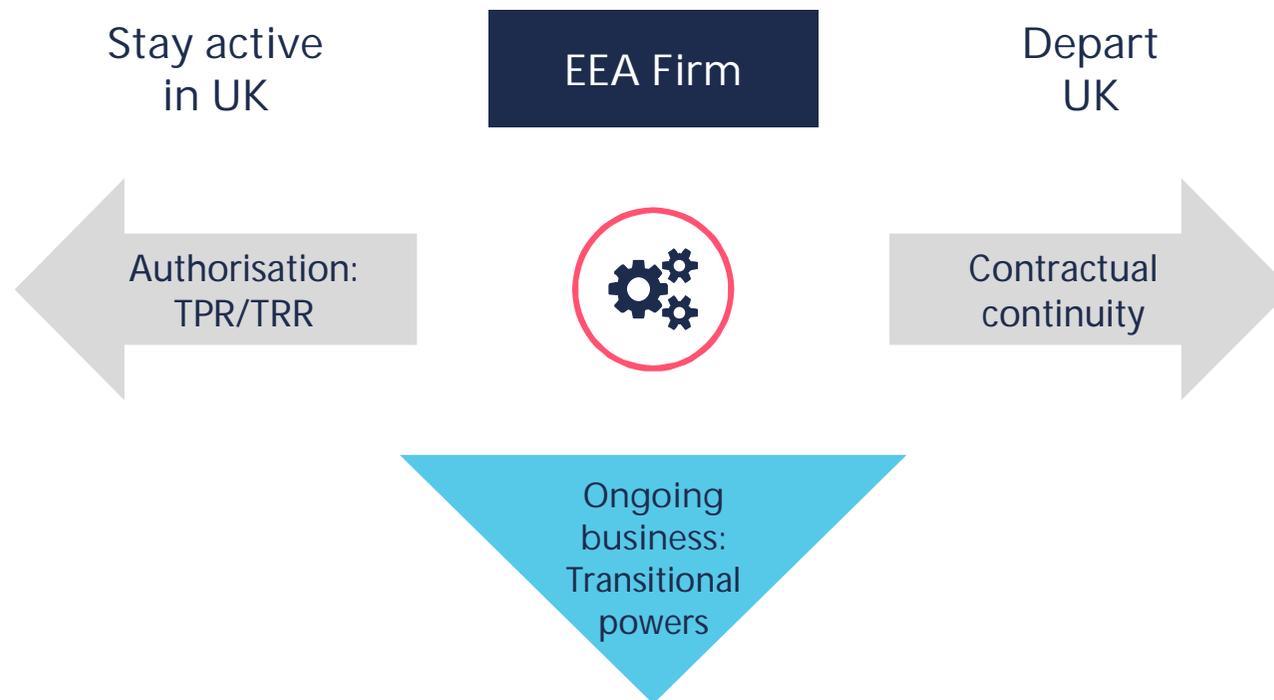
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