“Some reflections concerning the potential effect of Brexit on the relations between prudential authorities in Europe”

This Briefing aims to set out in further detail a number of relevant considerations relating to Brexit and the potential impact on cross-border relationships between prudential authorities.

Summary: 1. Introduction. 2. The importance of cross-border relationships between prudential authorities. 3. Potential impact of Brexit.

1. Introduction

On 23 June 2016 a referendum on EU membership was held in the United Kingdom in which a majority of those voting – 52% – voted for the UK to leave the European Union. This is commonly known as “Brexit” (being a contraction of ‘British’ + ‘exit’). While the referendum is not legally binding, the Government has stated that the procedure for the UK to leave the EU that is set out in Article 50 of the Treaty on European Union (“Article 50”) will be triggered in due course and result in Brexit.

Upon an Article 50 notice being submitted, Brexit would take place at the latest two years thereafter, unless extended by the European Council acting unanimously. During such two years it is envisaged by Article 50 itself that the UK and the EU would undertake the negotiation of a “withdrawal agreement”. The withdrawal agreement would be likely to contain transitional arrangements as well as provide for the UK’s long-term future relations with the EU.

Regarding timing for the Article 50 notification, Theresa May has stated that Article 50 will be invoked no later than the end of March 2017.

Any withdrawal agreement between the UK and the EU would have to be agreed by a ‘qualified majority’ of the European Council – being 72% of members and 65% of population – and a simple majority of the European Parliament. If the withdrawal agreement is “mixed”, i.e. involves national as well as EU competences, it would also have to be separately ratified by each member state.

The conclusion of a withdrawal agreement between the UK and the EU as contemplated by Article 50 would be likely to seek to mitigate any negative consequences of Brexit for businesses. However, it is important for businesses to undertake contingency and scenario planning in order to be fully prepared for a range of potential economic and legal outcomes.

This Briefing aims to set out in further detail a number of relevant considerations relating to cross-border relationships between prudential authorities.

2. The importance of cross-border relationships between prudential authorities

The Italian Commissione Nazionale per le Società e la Borsa - otherwise known as CONSOB - is the Italian authority for prudential regulation of the financial markets.

In the context of ever-increasing interactions in financial markets in which financial operators participate, transparency and information-sharing are of fundamental importance, underpinning the stable functioning of the financial markets themselves.

In order to ensure and promote transparency, it is necessary for EU member states’ and third countries’ prudential authorities – including...
CONSOB and the Bank of Italy (as regards the areas of its competence) – to cooperate in relation to the exchange of information.

It is in this context, and in order to promote the efficient functioning of the financial system, that CONSOB has entered into a number of agreements for collaborating and exchanging information with other prudential authorities, both within the EU and without, in CONSOB’s own words “in order to ensure mutual assistance for the elimination of unlawful market behavior and to ensure market participants maintain proper standards of transparency with the market, investors and prudential authorities” (CONSOB website).

These agreements arise from work undertaken, and following increasing encouragement, by the European Union in the wake of the 2008 financial crisis.

We have therefore seen increasing integration of Community prudential activity, which began with the work undertaken by the CESR – the Committee of European Securities Regulators.

Further, following the work of the de Larosière group, the European Commission led the calls for the creation, in the words of the EU Regulation 1095/2010 of the European Parliament and Council of 24 November 2010 establishing the European Securities and Markets Authority (ESMA), of “a European system of financial supervision and a European systemic risk board” in order to prevent further financial crises. (The Commission indeed envisaged the establishment of a number of European prudential authorities, among them ESMA.)

One of ESMA’s roles, in promoting further integration of European legislation, is to set out certain principles which national authorities should adhere to on a “comply or explain” basis (i.e., in the absence of full compliance with the principles, an explanation must be provided), so as to facilitate contacts between and bring closer together the operations of national authorities. Further ESMA must also cooperate with the prudential authorities of third countries in certain areas in order to strengthen global financial compliance.

Relations between ESMA and the prudential authorities of the various member States are in turn regulated by cooperation and information-exchange agreements, analogous to cooperation agreements that exist between prudential authorities within each member State of the European Union.

With respect to the relations between UK and Italian prudential authorities there are various Memoranda of Understanding, including: between the UK Financial Conduct Authority (FCA, previously the Financial Services Authority) and CONSOB in relation to cooperation, consultation and exchange of information relating to the London Stock Exchange plc and Borsa Italiana S.p.A.; between the FCA (originally with the FSA), Banca d’Italia and CONSOB in relation to cooperation concerning prudential regulation of market infrastructure operators; and between the UK Treasury, FCA (originally it was with the UK Securities and Investments Board) and the Italian Treasury in relation to investor protection and promotion of the stability of the equity, futures and options markets. These Memoranda of Understanding are generally long-standing agreements that have survived numerous changes in the regulatory landscape (including the various iterations of regulatory authorities in the UK).

3. Potential impact of Brexit

Upon Brexit, the UK will become a third country as regards the EU, and this may require the agreements between the UK FSA and CONSOB, Banca d’Italia, the Italian Treasury and ESMA to be reviewed and revised.

It is likely that the revisions to the agreements will not result in fundamental changes to the obligations that the relevant prudential authorities have undertaken to date, not least as the Memoranda of Understanding consist principally in high-level principles intended to facilitate cooperation between CONSOB and the Bank of Italy and the various UK authorities consisting
primarily in (i) reciprocal provision of timely information and (ii) reciprocal assistance including inspections of regulated persons upon request of other prudential authorities and periodic meetings to discuss issues of mutual interest.

Moreover, the substance of the various Memoranda of Understanding reflects analogous agreements with third countries.

On the other hand, as regards the Multilateral Memorandum of Understanding between ESMA and the UK, the relevant agreements will have to be reviewed in the context of Brexit and will need to be renegotiated, as they were entered into by the UK in its capacity as a European Union member state.