



Brexit Week Two...

Webinar

14 January 2021

Today's agenda

- 1 The Trade Deal – 2 weeks in
 - 2 Contracts – key Brexit consequences
 - 3 Employment and Immigration
 - 4 Financial services – 2 weeks in
-

***Please send any questions to
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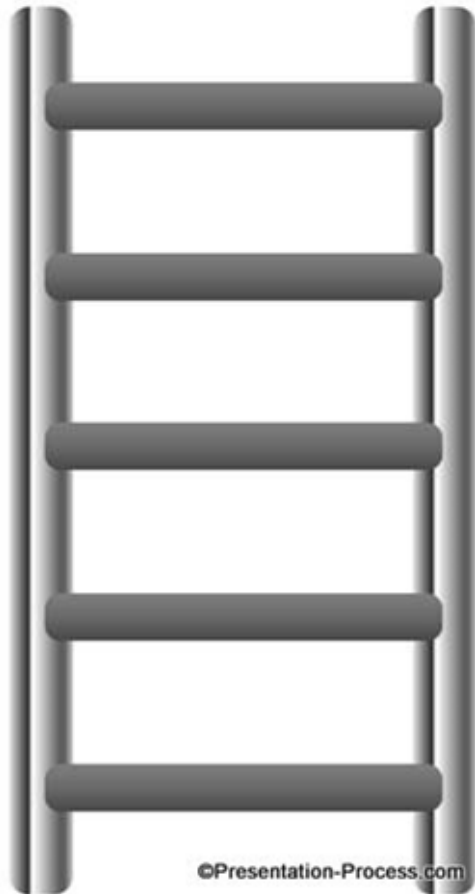


Explaining the Trade Deal

ROSS DENTON

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Brexit option: “The Ladder of Doom”



Single Market

Customs Union

Free Trade Area = TCA

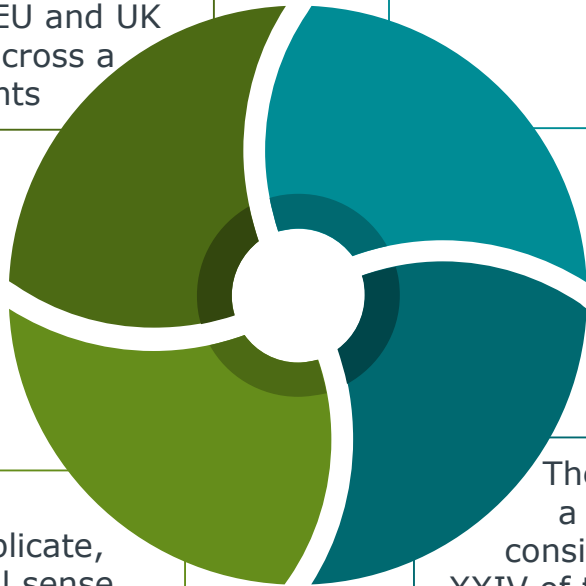
Bundle of agreements

WTO

What is the TCA?

It is an international agreement on how the EU and UK are going to trade in goods, plus a number of other provisions that will allow the EU and UK to cooperate across a number of fronts

It does not cover trade in services in the same way as goods, and so no FTA-type arrangements



It does not replicate, in any material sense, the relationship under the Single Market

The trade portion is a "free trade area" consistent with Article XXIV of the GATT – it is a "thin" trade agreement, but does cover all goods, including agricultural, which is unusual

Digital trade,
including data
protection

Movements of
capital

Intellectual
Property

Public
Procurement

Energy

Taxation

Competition,
including
subsidies

AML and
counter-
terrorism

Cyber security

Health security

Environment

Movement of
persons and
immigration

The impact of TCA

	The UK has now “unplugged” from the EU, and, specifically, the Single Market
	While the UK has been a “third country” since it left the EU, the UK is now a “third country” proper with similar rights and obligations as Japan or Canada
	All goods moving between the UK and EU will have to pay customs duties, unless the exporter can show that the goods “originated” in either the EU or UK – complex and onerous “rules of
	All movements of goods between the UK and EU will be subject to customs and regulatory checks on import
	Services and people, including their qualifications, are subject to new controls



Contracts and governing law

DAVID CAPPS

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Brexit update: Dispute Resolution

GOVERNING LAW

- Both Rome I Regulation (contractual obligations) and Rome II Regulation (non-contractual obligations) have been retained in UK law (with minor modifications)
- EU courts will also continue to apply Rome I and Rome II, so will continue to give effect to a choice of English law to the same extent as currently
- References to EU institutions and EU law: interpretation should be straightforward but careful drafting required going forward

Brexit update: Dispute Resolution

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Jurisdiction

Current jurisdiction provisions of the Recast Brussels Regulation (RBR) will continue to apply to legal proceedings instituted before 1 January 2021.

Recognition and enforcement

Current provisions of the RBR will continue to apply to recognition and enforcement of judgments given in legal proceedings instituted before 1 January 2021

Brexit update: Dispute Resolution

FROM 1 JANUARY 2021

The RBR has now ceased to apply, so look to:

1 “The Deal” - but the TCA of 24 December did not include any provisions in this area – any new deal unlikely?

2 Lugano Convention **BUT** requires EU consent before UK can accede in its own right

3 Hague Convention on Choice of Court 2005 **BUT:**

- applies to exclusive jurisdiction clauses only; &
- timing issue in the EU

4 each Member State’s national law

Brexit update: Dispute Resolution

RECOGNITION AND ENFORCEMENT

Recognition and enforcement of judgments stand or fall with jurisdiction provisions

If Hague Convention applies – recognition and enforcement of English judgment in the EU should be straightforward

If not (e.g. jurisdiction clause is non-exclusive), recognition and enforcement governed by the national rules of the EU Member State in which enforcement is sought.

Brexit update: Drafting your disputes clause **ashurst**

Exclusive

Currently offers the least problematic option for enforcement within the EU.

Non-exclusive

Avoids the enforcement issue but risk of parallel proceedings and Hague Convention will not apply.

Asymmetric

As long as the clause is considered valid in the relevant jurisdiction, and you are the contracting party that will benefit from the asymmetry, this could be an attractive alternative, but remember Hague will not apply.

Arbitration

Simplest solution if enforcement post-Brexit is a concern.

Brexit update: Service of legal proceedings

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Documents received for service by the receiving state prior to 31 December 2020

EU Service Regulation applies

Documents received from 1 Jan 2021

Hague Service Convention may apply



Employment & Immigration

CROWLEY WOODFORD & LIZ PARKIN

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New UK immigration system

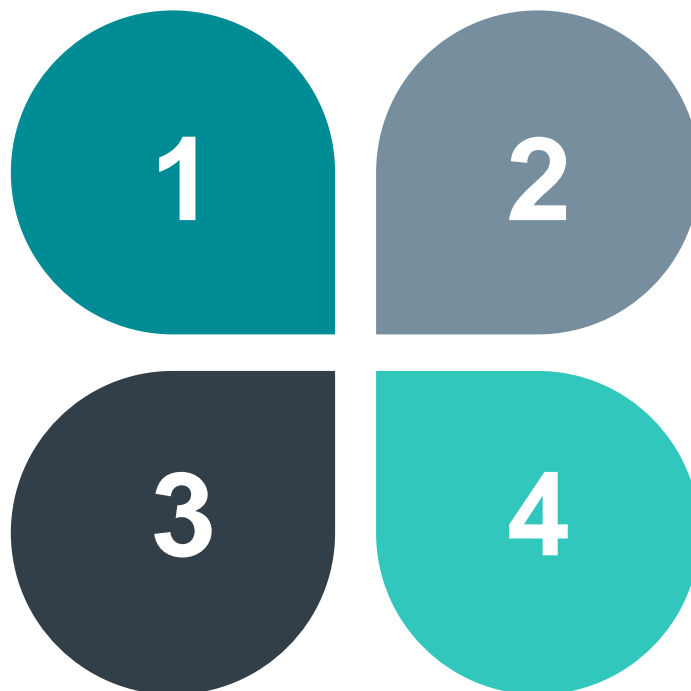
HOW WILL THINGS CHANGE FROM 1 JANUARY 2021?

Freedom of movement

Freedom of movement no longer applies from 1 January 2021 – so what routes are there for living/working in the UK?

New UK immigration system

A new points-based immigration system applies to arrivals in the UK from 1 January 2021 (other than Irish nationals).



Settled status and Frontier Workers

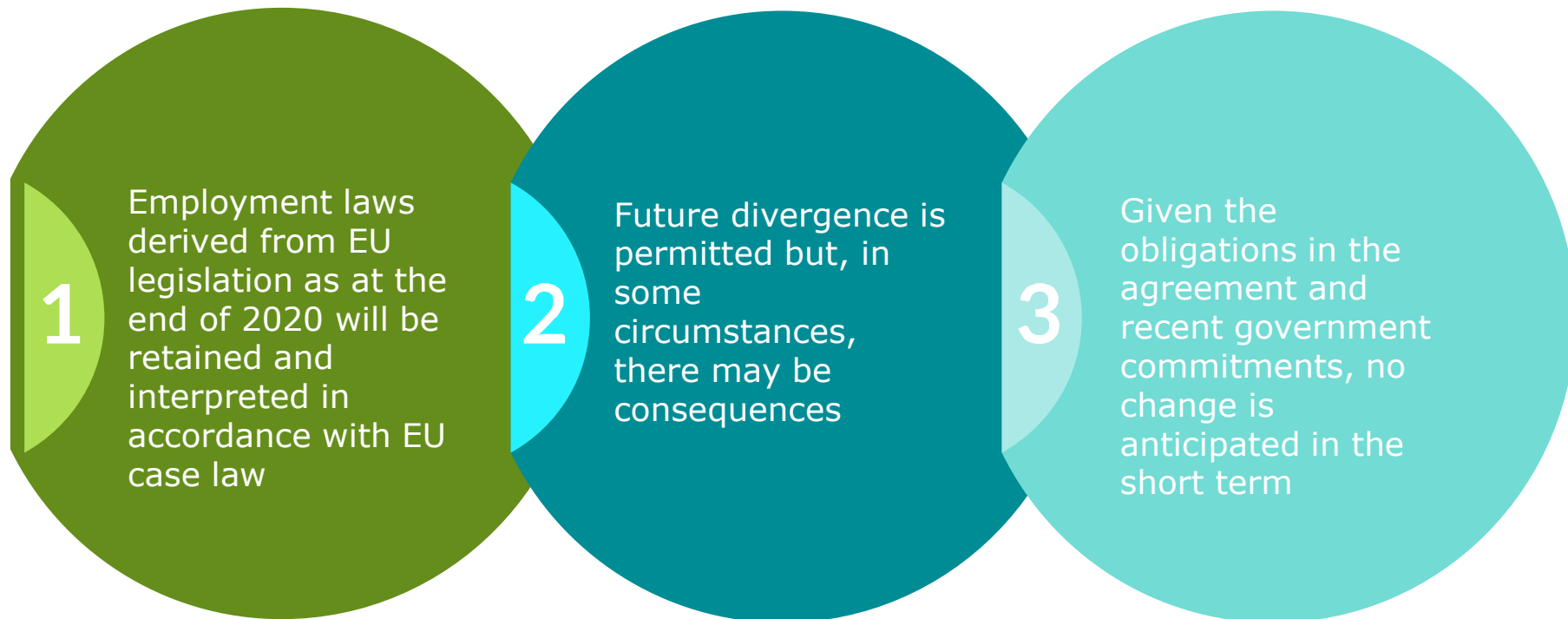
EEA nationals already living in the UK by 31 December 2020 can apply for settled or pre-settled status. For those not resident but commuting cross border then they may have frontier worker status.

Business travel to/from the EEA

Business visitor rules will apply with limitations on the amount of time to be spent in any country (for both business and holidays cumulatively).

The future of UK employment laws

WILL THERE BE CHANGES?





Financial Services – 2 weeks in

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Financial services

AN UPDATE

1

- **European regulatory approaches (see next slides)**

2

- **Reverse solicitation**
 - Regulator's position
 - Client practices
 - EU clients position

3

- **Outsourcing**

ESMA's Public Statement on reverse solicitation

13 JANUARY 2021



*"With the end of the UK transition period on 31 December 2020, some **questionable practices by firms around reverse solicitation** have emerged. For example, some firms appear to be trying to circumvent MiFID II requirements by including general clauses in their Terms of Business or through the use of online pop-up "I agree" boxes whereby clients state that any transaction is executed on the exclusive initiative of the client."*

13 JANUARY 2021 PUBLIC STATEMENT BY ESMA

- ESMA reminds firms of the MiFID II and the guidance provided in the ESMA Q&As on the application of "own exclusive initiative".
- Every communication means used (press releases, internet ads, phone calls) should be considered to determine whether the client / potential client has been subject to solicitation in the EU.
- ESMA has highlighted that:
 1. the provision of investment services in the EU without proper authorisation risks administrative or criminal proceedings; and
 2. when using services of investment service providers which are not properly authorised under EU law, investors may lose EU protections granted to them.



Jurisdictional updates (Financial Services)

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SUMMARY OF MEASURES

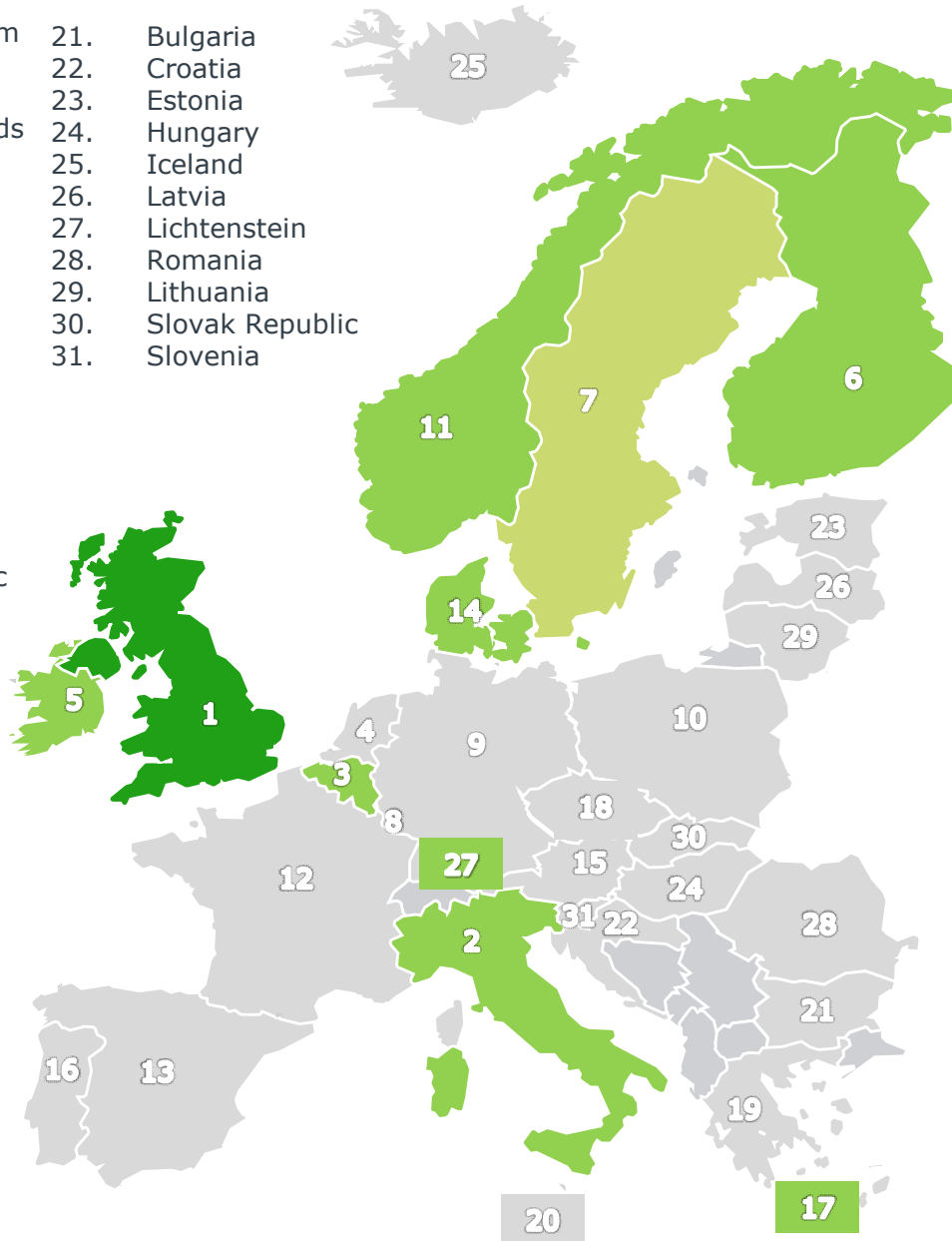


Not settled and
not legal advice

Local measures I – wholesale clients

MEASURES APPLICABLE TO PER-SE PROFESSIONAL AND ELIGIBLE COUNTERPARTY CLIENTS

1. United Kingdom
2. Italy
3. Belgium
4. The Netherlands
5. Ireland
6. Finland
7. Sweden
8. Luxembourg
9. Germany
10. Poland
11. Norway
12. France
13. Spain
14. Denmark
15. Austria
16. Portugal
17. Cyprus
18. Czech Republic
19. Greece
20. Malta
21. Bulgaria
22. Croatia
23. Estonia
24. Hungary
25. Iceland
26. Latvia
27. Lichtenstein
28. Romania
29. Lithuania
30. Slovak Republic
31. Slovenia



Jurisdiction	Measure
UK	Temporary passporting style measure for new and existing clients – cross border and branch. Application required.
Ireland and Norway	Local law exemption covering new and existing per se professional and ECP clients - cross border. Applies automatically. Norwegian measure expires on 31 December 2022, whereas Irish measure does not. Ireland – UK firms will be able to carry out portfolio management for existing Irish funds post 31.12.20 but will be required to notify the CBI. UK firms must obtain CBI clearance to manage new Irish funds.
Liechtenstein, Cyprus, Belgium and Denmark	Local measure covering new and existing per se professional and ECP clients - cross border. Update – Cypriot regulator released its measure on 22 December 2020. Liechtenstein and Danish measures expire on 31 December 2022 and 30 June 2022, respectively, whereas Belgian measure does not. Light touch applications required. The notification window for the Cypriot and Danish measures closed on 31 December 2020 and 15 October 2020 respectively. Despite this, firms are still submitting notifications.
Italy and Finland	Temporary local measure covering new and existing per se professional and ECP clients - cross border. Application required. Update – Consob confirmed 6 month transitional relief to UK firms that had filed for the local measure on or prior to 31.12.20, pending the review of their applications. This facilitates cross border services to existing per-se professional and ECP clients. Both regulators are taking an intensive approach to reviewing applications. The Finnish regulator is suggesting (previously unforeseen) on-going compliance obligations e.g. transaction reporting etc.
Luxembourg	(i) Local measure covering new and existing per se professional and ECP clients - cross border. Update – CSSF granted equivalence to the UK enabling UK firms to apply for the measure. (ii) 'Characteristic performance test'
Sweden	Temporary measure to allow the provision of services to existing clients (as at 29 March 2019) until 31 December 2021. No application or notification required. ³

SUMMARY OF MEASURES

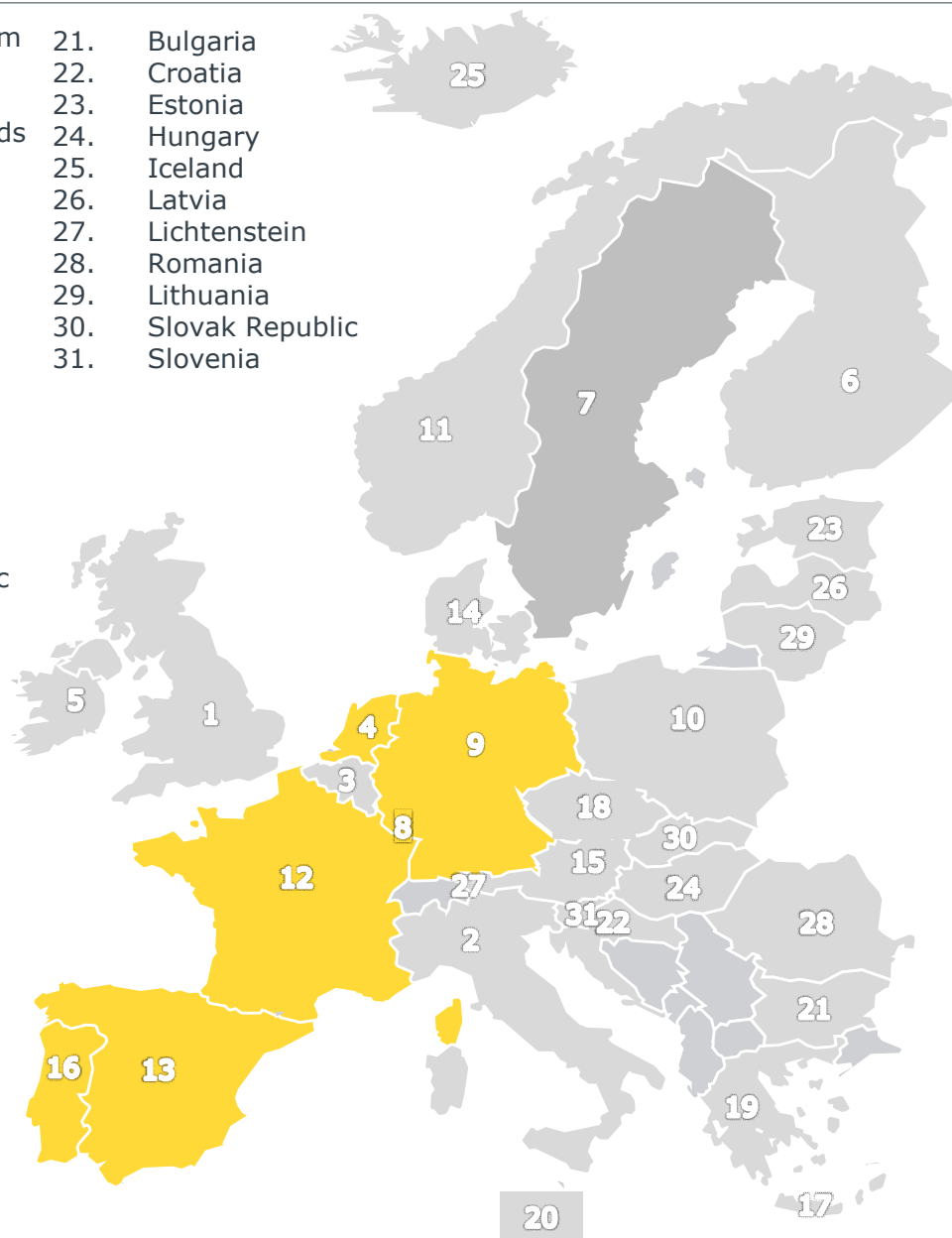


Not settled and
not legal advice

Local measures II – wholesale clients

MEASURES APPLICABLE TO PER-SE PROFESSIONAL AND ELIGIBLE COUNTERPARTY CLIENTS

- | | |
|--------------------|---------------------|
| 1. United Kingdom | 21. Bulgaria |
| 2. Italy | 22. Croatia |
| 3. Belgium | 23. Estonia |
| 4. The Netherlands | 24. Hungary |
| 5. Ireland | 25. Iceland |
| 6. Finland | 26. Latvia |
| 7. Sweden | 27. Lichtenstein |
| 8. Luxembourg | 28. Romania |
| 9. Germany | 29. Lithuania |
| 10. Poland | 30. Slovak Republic |
| 11. Norway | 31. Slovenia |
| 12. France | |
| 13. Spain | |
| 14. Denmark | |
| 15. Austria | |
| 16. Portugal | |
| 17. Cyprus | |
| 18. Czech Republic | |
| 19. Greece | |
| 20. Malta | |



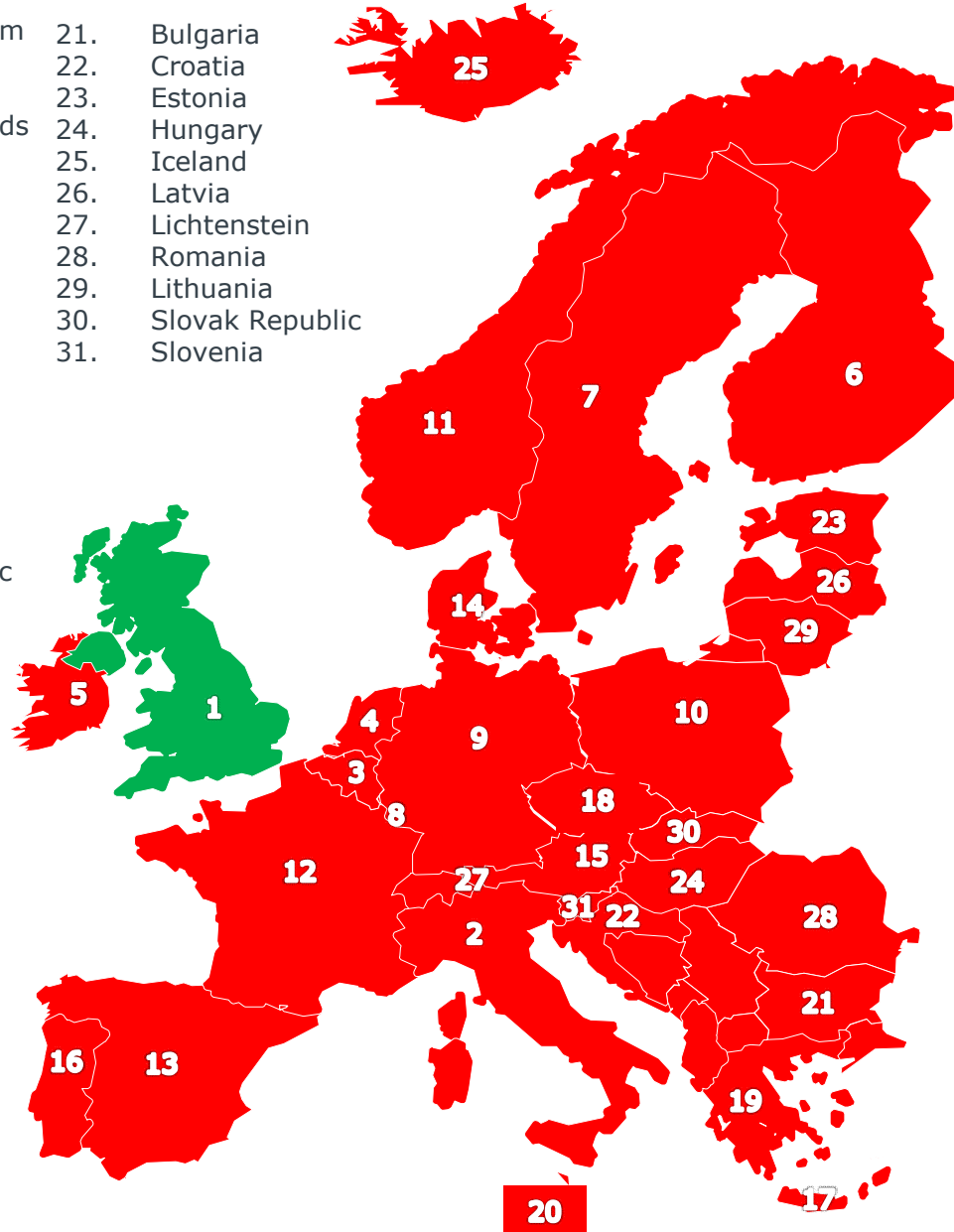
Jurisdiction	Measure
France	<p>Limited local “interdealer” exemption for proprietary trading between certain entity types.</p> <p>No application or notification required.</p>
Germany	<p>Limited exemption for on and off venue proprietary trading activity. The activity must not relate to underlying client trading services nor to market making.</p> <p>No application or notification for on venue trading required. Some regulatory uncertainty as to whether or not an application is required for off-venue proprietary trading - a risk decision should be made.</p>
The Netherlands	<p>Limited dealing on own account exemption.</p> <p>No application or notification required.</p> <p>The 2019 measure was contingent on a hard-Brexit and has therefore expired.</p> <p>Communications released by AFM confirming it will construe reverse solicitation narrowly.</p>
Spain and Portugal	<p>Contractual run-down measure for contracts entered into prior to 1 January 2021.</p> <p>Spanish measure expires on 30 June 2021.</p> <p>Update – Portuguese measure expires on 31 December 2021.</p> <p>No application or notification required.</p>



Local measures III – retail clients

MEASURES APPLICABLE TO RETAIL CLIENTS

- | | |
|--------------------|---------------------|
| 1. United Kingdom | 21. Bulgaria |
| 2. Italy | 22. Croatia |
| 3. Belgium | 23. Estonia |
| 4. The Netherlands | 24. Hungary |
| 5. Ireland | 25. Iceland |
| 6. Finland | 26. Latvia |
| 7. Sweden | 27. Lichtenstein |
| 8. Luxembourg | 28. Romania |
| 9. Germany | 29. Lithuania |
| 10. Poland | 30. Slovak Republic |
| 11. Norway | 31. Slovenia |
| 12. France | |
| 13. Spain | |
| 14. Denmark | |
| 15. Austria | |
| 16. Portugal | |
| 17. Cyprus | |
| 18. Czech Republic | |
| 19. Greece | |
| 20. Malta | |



Post- transitional strategy

Other than the UK temporary permissions regime, there are no other jurisdictions with cross border measures that would facilitate the provision of services to MiFID retail clients at the end of the transitional period.

In the absence of local measures, we are aware of a number of UK firms intending to rely on passive servicing arrangements or reverse solicitation to retain pre-31 December 2020 client relationships.

Q&A

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Upcoming webinars

FinancialRegulatoryEvents@ashurst.com

Regulatory Breakfast Club

Thursday 21 January 2021

08:30 am GMT

<https://attendee.gotowebinar.com/register/2111387093366182669>

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