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THE ACCESS TO THE EU FINANCIAL MARKET FOR THE COMPANIES FROM NON-MEMBER STATES¹

ABSTRACT

The provision of financial services in the EU is characterized by the increased integration of the internal market, as well as, globalisation of said services. On the one hand, companies in the Member States can use the passport for the financial services, which allows their provision throughout the EU without the need to acquire a permit in each country separately. On the other hand, the financial crisis has shown a strong interdependence among financial markets globally and the negative effects deficiency in one of them can have on the EU market. Consequently, the possibilities for companies from non-member states to provide their services are limited in scope. However, gradually several possible methods of access were developed. Among them are setting up an EU subsidiary, operating a branch in the EU, or seeking a national exemption. One of the methods is determining the equivalence of third-country regulations and supervision mechanisms with the EU regime. This approach is sometimes deemed as controversial because the decision on equivalence is in the sole discretion of the European Commission, which causes fears that the process could be influenced by the political and economic necessities. The mechanism is characterized by the fragmentary approach – it is not prescribed in all acts on financial services and it is tailored to the needs of each act separately – and is granting fewer rights than a passport for financial services. Despite the controversy, its significance is reflected in the incentives for regulatory convergence with the EU regime and closer co-operation among regulatory bodies. This issue is proving to be more and more important, especially having in mind the newest developments in the EU market, as Brexit or new regime for the financial markets.

Keywords: financial services, EU, third country, equivalence, passporting

1. INTRODUCTORY REMARKS

In the past decades, the levels of cross-border activity have significantly increased, mainly due to three factors – liberalization (i.e. the removal of barriers to investment and trade), the increase in collective investment and technological progress which allowed for the cross-border connectivity of counterparties and alleviated

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the business process.² Despite positive outcomes, the strong interconnectedness of financial markets worldwide has shown its negative side when the 2008 crisis emerged. Namely, interconnectedness and risk exposures from foreign jurisdictions have shaken the EU financial market foundations.³ This has called for a radical change in the EU regulatory landscape, which was previously rather liberal and characterized by self-governance and openness.⁴ The main objectives were securing global financial stability through major institutional reforms and, afterwards, introducing reforms aimed at market efficiency.⁵ During this process, the EU faced the dilemma between the need of restoring financial stability in its territory and maintaining the competitiveness of its financial industry.⁶

The debate on third-country access to the EU's financial services market has run parallel with the integration of markets in Europe and the process of globalisation of financial services.⁷ Considering that third-country participants in the internal market had their share in the crisis, the EU has set a goal of "expanding European regulatory clout over a range of market actors domiciled in third countries but operating in European markets".⁸ Since the financial crisis, the EU's regulatory approach to relations with third countries has been reshaped and extended.⁹ The financial crisis has significantly influenced third-countries position towards EU financial market – either there are restrictions on the ability of third-country firms to provide services to EU counterparties, or third-country firms or transactions are subjected to EU requirements.¹⁰

² Armour, J., Fleischer, H., Knapp, V., Winner, M., *Brexit and Corporate Citizenship*, [http://ssrn.com/abstract_id=2897419] Accessed 6 September 2017, p. 3

³ European Commission, *Commission staff working document EU equivalence decisions in financial services policy: an assessment*, SWD(2017) 102 final, Brussels, 2017, [https://ec.europa.eu/info/sites/info/files/eu-equivalence-decisions-assessment-27022017_en.pdf] Accessed 7 January 2018, p. 4

⁴ Moloney, N., *Brexit, the EU and its investment banker: rethinking 'equivalence' for the EU capital market*, [<https://ssrn.com/abstract=2929229>] Accessed 6 September 2017, pp. 29-30

⁵ Moloney, N., *EU securities and financial markets regulation*. OUP, Oxford, 2014, pp. 956-957

⁶ Quaglia, L., *The Politics of 'Third Country Equivalence' in Post-Crisis Financial Services Regulation in the European Union*, *West European Politics*, Vol. 38, Issue 1, 2015, p. 168

⁷ European Parliament, *Understanding equivalence and the single passport in financial services Third-country access to the single market*, [[http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599267/EPRS_BRI\(2017\)599267_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599267/EPRS_BRI(2017)599267_EN.pdf)] Accessed 7 January 2018, p. 2

⁸ Pagliari, S. *A Wall Around Europe? The European Regulatory Response to the Global Financial Crisis and the Turn in Transatlantic Relations*, *Journal of European Integration*, Vol. 35, Issue 4, 2013, p. 392

⁹ European Parliament, *op. cit.* note 7, p. 2

¹⁰ Ng, L. "Third country" issues in current EU financial services regulation, *Butterworths Journal of International Banking and Financial Law*, May 2012, p. 287

The renewed interest in EU third-country access framework is also a consequence of the newest developments in the EU. First of them is certainly Brexit. The exit of the UK from the EU membership has launched a series of discussions on how will the future relations between the two entities look like. Various scenarios are in play, one of them being the so-called “hard Brexit” where the UK severs all the ties with the EU and acquires the status of a third country. Though Brexit could impact the functioning of this regime in the future, possibly resulting in stricter conditions for the third-country access, some authors doubt that outcome. They point out that this probably won't happen, having in mind the interest of EU to remain open financial market, to promote and nourish G20 values and the fact that the participation of the ESA makes the access process less political.¹¹ The second significant development regarding the third-country status in the EU is a new legislative framework in force as of January 2018 that is aimed at establishing a more harmonized approach to the access rights of third-country entities to financial markets and that introduces new options so far unfamiliar in the EU legislation.

2. THE POSITION OF EU MEMBER STATES

The EU membership brings significant advantages for the market participants originating from one of the Member States, such as an unrestricted use of four market freedoms, no discrimination on basis of location or currency and standing before CJEU.¹²

However, one of the major benefits concerns the provision of financial services in the Single Market characterized by the possibility for EU firms to use the system of passporting. The logic of the mechanism is that the license to provide services doesn't have to be acquired in each Member State separately, but it is obtained in one of them and is used to provide services in other states – either via branch or offering cross-border services directly to clients.¹³ It seeks to minimize legal, regulatory and operational barriers to cross-border provision of financial services

¹¹ Ferran, E., *The UK as a third country actor in EU financial services regulation*, [https://ssrn.com/abstract=2845374] Accessed 23 September 2017, pp. 19-20

¹² *Ibid.*, p. 3

¹³ Armour, J., *Brexit and financial services*, [https://ssrn.com/abstract=2892679] Accessed 26 September 2017, p. 5; Nemeček, H., Pitz, S., *The Impact of Brexit on Cross-Border Business of UK Credit Institutions and Investment Firms with German Clients*, [https://ssrn.com/abstract=2948944] Accessed 23 September 2017, p. 3; Ringe, W. G., *The Irrelevance of Brexit for the European Financial Market*, [https://ssrn.com/abstract=2902715] Accessed 7 January 2018, pp. 4-5

in the EEA.¹⁴ The mechanism is based on mutual trust of supervisory authorities and is dependent on harmonization of legislation and coordinated supervision of financial subjects.¹⁵ This approach avoids the need for companies to satisfy regulatory demands in each country separately, thus providing a more efficient system and significant cost reductions.¹⁶

3. THE POSITION OF THIRD COUNTRIES

Unlike the firms from Member States and EEA countries, the position of companies from third countries¹⁷ is characterized by “a decentralised model of state-by-state authorisation”, meaning that said firms cannot avail themselves of fundamental market freedoms but have to obtain authorisation in each Member State where they wish to operate.¹⁸ The only exception is the right to free movement of capital, which is under Article 63 of TFEU extended to third countries.¹⁹ However, in the area of financial services, this is of minor importance, because the provision of financial services is covered by the freedom of establishment, which takes precedence over free movement of capital and doesn’t extend to third countries.²⁰ Also, third-country entities are not protected from discriminatory measures Member States can introduce.²¹

¹⁴ Peihani, M., *Brexit and Financial Services Navigating through the Complexity of Exit Scenarios*, [https://www.cigionline.org/sites/default/files/documents/Brexit%20Series%20Paper%20no.4.pdf] Accessed 25 March 2018, p. 3

¹⁵ Moloney, N., “*Financial services, the EU, and Brexit: an uncertain future for the city?*”, *German Law Journal*, 17, 2016, p. 77

¹⁶ International Regulatory Strategy Group, *The EU’s third country regimes and alternatives to passporting*, [https://www.thecityuk.com/assets/2017/Reports-PDF/The-EUs-Third-Country-Regimes-and-Alternatives-to-Passporting.pdf] Accessed 28 March 2018, p. 33; Kokkinis, A., *The impact of Brexit on the legal framework for cross-border corporate activity*, [http://wrap.warwick.ac.uk/83606] Accessed 31 August 2017, p. 25; Lehmann, M., Zetzsche, D. A., *Brexit and the consequences for commercial and financial relations between the EU and the UK*, [http://ssrn.com/abstract=2841333] Accessed 4 September 2017, p. 23

¹⁷ The qualification of a “third-country firm” applies to entities formed outside the Union. These include the entities formed in the non-EU jurisdictions that follow “incorporation” theory, and after the Brexit, the UK pre- or post-Brexit formed companies. It also refers to companies in non-EU jurisdictions that follow the “seat” theory. Böckli, P., *et al.*, *The consequences of Brexit for companies and company law*, [https://ssrn.com/abstract=2926489] Accessed 5 September 2017, p. 12

¹⁸ Armour, *op. cit.* note 13, p. 8; International Regulatory Strategy Group, *op. cit.* note 16, p. 39; Böckli *et al.*, *op. cit.* note 17, p. 12

¹⁹ Armour, *op. cit.* note 13, p. 8; International Regulatory Strategy Group, *op. cit.* note 16, p. 39

²⁰ Armour, *op. cit.* note 13, p. 8, fn. 11; International Regulatory Strategy Group, *op. cit.* note 16, 39

²¹ International Regulatory Strategy Group, *op. cit.* note 16, p. 40

This traditional model has been reconsidered after the onset of the financial crisis because it bore higher costs and made the control of systemic risk harder.²² Hence, the EU financial regulation has slowly evolved in the direction of allowing broader access to the third-country firms.²³ The opening of the Single Market for financial services toward third-country providers is based on two reasons. On the one hand, it enhances the competition by market expansion and providing more liquidity, innovation and differentiation of products.²⁴ On the other hand, it enables “achieving greater resilience against smaller crises by establishing a global infrastructure system”.²⁵

The treatment of third-country counterparties will directly influence the future (positive) development of cross-border financial activities.²⁶ In regulating the third-country position, the European legislator oscillated between two polar opposites – promoting stability through stricter regulation, or enhancing the competitiveness at the expense of the stability.²⁷ Namely, the EU recognizes the potential dangers for the internal market and market participants mirrored mainly through less strict supervision in third countries.²⁸ Nevertheless, an overly strict regime of third-country access can lead to excessive market entry barriers, leading to foreign providers avoiding European space and disappearance of innovation and competition.²⁹

The third-country access is conditional upon completion of various requirements. Even though there is no universally accepted framework of third-country access, some conditions can predominantly be found in the European legislation. They include equivalence, local authorisation and effective supervision and enforcement for the third-country firm and Cooperation agreements between the third country and the relevant bodies in the EU.³⁰ Sometimes additional requirements can apply, such as reciprocity or submission of disputes to local courts’ jurisdiction.³¹

²² Armour, *op. cit.* note 13, p. 10

²³ Ferran, *op. cit.* note 11, p. 4

²⁴ Sethe, R., *Das Drittstaatenregime von MiFIR und MiFID II*, Schweizerische zeitschrift für wirtschaftsrecht, Issue 6, 2014, p. 616

²⁵ Lehmann, M., Zetzsche, D. A., *How Does It Feel to Be a Third Country? The Consequences of Brexit for Financial Market Law*, [https://www.cigionline.org/sites/default/files/documents/Brexit%20Series%20Paper%20no.14_2.pdf] Accessed 25 March 2018, p. 6

²⁶ Ng, *op. cit.* Note 10, 289

²⁷ Quaglia, *op. cit.* note 6, p. 170

²⁸ Sethe, *op. cit.* note 24, p. 616

²⁹ *Ibid.*, p. 616

³⁰ International Regulatory Strategy Group, *op. cit.* note 16, p. 42

³¹ *Ibid.*, p. 45

Each of these conditions has its purpose. The requirement of equivalence protects investors and the financial system against risks created by insufficiently regulated or supervised market participants, reciprocity creates a level playing field, allowing EU firms the same market opportunities as counterparties from third countries. The requirement of cooperation in various areas protects important public interests, such as security.³²

4. THIRD-COUNTRY ACCESS VIA THE PRINCIPLE OF EQUIVALENCE

Sometimes the access to the EU markets is possible provided the third country meets certain criteria specified in legislative acts. Among these conditions, the Commission's decision that the third-country legal and supervisory system is "equivalent" to the EU one, will often constitute the core prerequisite for obtaining EU markets' access.³³

The use of third-country equivalence rules in EU financial markets regulation is a relatively new phenomenon that gained significance after the global financial crisis.³⁴ These rules are seen as the cornerstone of the new regulatory approach of the EU towards third countries in finance.³⁵ Equivalence model has developed in the ambit of two contrasting approaches in the EU and has resulted in a compromise between the two types of EU economies. On the one hand, are "market shaping" economies (i.e. Germany and France) that were concerned over the possible negative influence of financial instability of third countries and that demanded the alignment of third-country rules with EU legislation and on the other hand are "market making" economies (i.e. UK) which emphasized the need to open the market to third countries and instigate the competitiveness of the EU financial sector.³⁶

The absence of equivalence determination causes that foreign firms doing business in the EU will be subject to the EU regulation in addition to their home country regulation.³⁷ The practical effects of equivalence clauses can be the encouragement

³² Lehmann, Zetzsche, *op. cit.* note 25, p. 6

³³ Wymeersch, E., *Brexit and the equivalence of regulation and supervision*, [<https://ssrn.com/abstract=3072187>] Accessed 7 January 2018, p. 2

³⁴ Quaglia, *op. cit.* note 6, p. 169

³⁵ *Ibid.*, p. 168

³⁶ *Ibid.*, pp. 168-172

³⁷ Howarth, D., Quaglia, L., *Brexit and the Single European Financial Market*, [<https://orbi.lu.uni/bitstream/10993/31955/1/Howarth%20and%20Quaglia%2C%20Brexit%20and%20the%20Single%20European%20Financial%20Market.pdf>] Accessed 25 March 2018, p. 5

of third countries to modify domestic rules making them equivalent to EU rules, or the increase of costs for third-country firms that provide services in the EU or to EU counterparts, subjecting those firms or transactions both to EU and home state regulations.³⁸

4.1. Characteristics of the equivalence

Several characteristics of the regime can be established:

- a) The notion of equivalence implies a limited opening of the EU markets to third-country operators on the basis that the third-country regime offers the same or comparable guarantees as enjoyed by EU investors and institutions.³⁹ This general notion is later calibrated to the scope and purpose of individual instruments of financial regulation that contain the “equivalence clause”.⁴⁰
- b) “Equivalent” does not mean “identical”.⁴¹
- c) The process is outcome-based, i.e. the third-country legislation doesn’t have to replicate EU legislation word-by-word, but has to achieve the same objectives.⁴² The determination of outcomes includes analyses of home country rules, levels of investor protection, the enforcement, oversight, international cooperation framework, membership in international organisations, etc.⁴³
- d) The timing of the process is open-ended and depends exclusively on the speed of competent authorities.⁴⁴

³⁸ Quaglia, *op. cit.* note 6, p. 167

³⁹ Wymeersch, *op. cit.* note 33, p. 36

⁴⁰ European Parliament – Directorate-general for International Policies., *Implications of Brexit on EU Financial Services.*,
[[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/602058/IPOL_STU\(2017\)602058_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/602058/IPOL_STU(2017)602058_EN.pdf)] Accessed 5 February 2018, p. 23

⁴¹ International Regulatory Strategy Group, *op. cit.* note 16, p. 43

⁴² Howarth, Quaglia, *op. cit.* note 37, p. 24; Eddy, p. 28. European Commission, *op. cit.* note 3, p. 4; some authors claim that two regulatory regimes that have different legal characteristics may nonetheless be “equivalent” if they produce the same economic effects (“market-based test for equivalence”). See Wei, T., *The Equivalence Approach to Securities Regulation*, Northwestern Journal of International Law & Business, Vol. 27, Issue 2, Winter 2007, p. 262

⁴³ Moloney, *op. cit.* note 4, p. 32

⁴⁴ International Regulatory Strategy Group, *op. cit.* note 16, p. 50

- e) The process is discretionary in character – the decision is based on the sole discretion of the competent authority, thus increasingly becoming political instrument aimed at protection of EU interests.⁴⁵
- f) The decision is unilateral and lies on the EU authorities. However, today, equivalence is slowly evolving and becoming more and more a bilateral determination, based on reciprocity (“equivalence-plus-reciprocity”).⁴⁶
- g) There is no single, unified mechanism, but each legislative act contains its own rules and requirements. Equivalence provisions are tailored to the needs of each specific act and their meaning varies from one legal text to another.⁴⁷

4.2. Equivalence vs. passporting

The place of equivalence as a market access tool can be further determined by comparing it to the mechanism that provides the widest access to the EU market. Even though sometimes when equivalence is described, the passporting is mentioned, the two concepts are not the same, i.e. equivalence is not a weaker form of passporting, but a considerably different technique.⁴⁸ Passporting is a right related to the EU membership; it is permanent and cannot be unilaterally varied or withdrawn by the EU.⁴⁹ Whereas, equivalence may be withdrawn unilaterally and represents a privilege, not a right.⁵⁰ Unlike passport, equivalence doesn't provide for “a single point of entry to the entirety of the single market”.⁵¹ Passporting rights are also in many instances wider in scope and depth.⁵² Equivalence is limited in scope – it doesn't cover all the areas of market access, sometimes it relates only to certain types of clients, and some areas are not regulated. In terms of decision making, equivalence is more complex, because it requires a Commission's decision, adopted after a thorough and lengthy investigation.⁵³ This limited scope and

⁴⁵ Wymeersch, *op. cit.* note 33, p. 37; Böckli *et al.*, *op. cit.* note 17, p. 15

⁴⁶ Wei, *op. cit.* note 42, p. 257. Similar Armour *et al.*, *op. cit.* note 2, p. 31

⁴⁷ Margerit, A., Magnus, M., Mesnard, B., *Third-country equivalence in EU banking legislation*, [[http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/587369/IPOL_BRI\(2016\)587369_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/587369/IPOL_BRI(2016)587369_EN.pdf)] Accessed 22 March 2018, p. 2

⁴⁸ Wymeersch, *op. cit.* note 33, p. 37

⁴⁹ International Regulatory Strategy Group, *op. cit.* note 16, p. 52; European Parliament, *op. cit.* note 7, p. 4

⁵⁰ Ringe, *op. cit.* note 13, p. 31

⁵¹ Ferran, *op. cit.* note 11, p. 4

⁵² European Parliament, *op. cit.* note 7, p. 4

⁵³ Wymeersch, *op. cit.* note 33, p. 37

legislation-specific nature make the equivalence regime less attractive option than an EEA-type passport.⁵⁴

4.3. Advantages and disadvantages of the regime

Having in mind the increased importance of the equivalence mechanism for the shaping of relations between EU and third countries, it is necessary to consider its positive and negative impact. It is recognised that this mechanism brings significant economic benefits reflected in reduced costs, improved legal certainty and limited regulatory arbitrage.⁵⁵ The introduction of equivalence serves as an incentive for third-country regulators to enhance supervisory co-operation and to seek closer regulatory convergence with the EU.⁵⁶ Its application avoids conflicting rules and exempts cross-border trading firms from double regulation and supervision.⁵⁷ The approach fosters product innovation and competition,⁵⁸ providing EU market participants with a wider range of services, instruments and investment choices originating from third countries.⁵⁹

Despite its advantages, the system has a certain amount of flaws that reduce its effectiveness. It is often being criticised as “being piece-meal, inconsistent, and subject to a range of different procedures and conditions”.⁶⁰ The process bears the risk of political exploitation⁶¹ because it affords the Commission very significant discretion.⁶² Also, EU’s equivalence only covers a narrow range of services and can be withdrawn at any time.⁶³ Lack of uniform formulation of criteria or procedure⁶⁴ and lack of transparency of the process⁶⁵ influence the desirability of this mechanism.

⁵⁴ Peihani, *op. cit.* note 14, p. 8

⁵⁵ Weber, R, Sethe R., *Äquivalenz als Regelungskriterium im Finanzmarktrecht*, Schweizerische Juristen-Zeitung, Vol. 110, Issue 22, 2014, p. 572

⁵⁶ European Commission, *op.cit.* note 3, p. 4

⁵⁷ Ferran, *op. cit.* note 11, p. 4; Lehmann, Zetzsche, *op. cit.* note 25, p. 5; European Commission, *op.cit.* note 3, p. 5

⁵⁸ Lehmann, Zetzsche, *op. cit.* note 25, p. 5

⁵⁹ European Commission, *op.cit.* note 3, p. 5

⁶⁰ Moloney, *op. cit.* note 4, p. 46

⁶¹ Ringe, *op. cit.* note 13, p. 32

⁶² Moloney, *op. cit.* note 4, p. 21

⁶³ Howarth, Quaglia, *op. cit.* note 37, p. 24

⁶⁴ Wymeersch, *op. cit.* note 33, p. 29

⁶⁵ Wei, *op. cit.* note 42, p. 294

5. “CLASSICAL” METHODS OF MARKET ACCESS

If the equivalence approach for whatever reason cannot apply (e.g. it is non-existent, reduced or retrieved)⁶⁶ companies themselves can take the initiative and reorganize their business in order to obtain market access.⁶⁷ For that purpose, several approaches can be used.

5.1. Subsidiaries and branches

A foreign entity that wishes to do business in the EU market can create a subsidiary in one of the EU Member States. A subsidiary is a separate legal entity and has to comply with the relevant conditions posed in the country of founding.⁶⁸ Its main advantage is the fact that it would be considered a European company and could avail itself of the freedom of establishment and the prohibition of discrimination.⁶⁹ It can also benefit from the passporting rights and can be used as an “EEA hub” for the provision of services throughout the EU without the need to establish a separate presence in each country.⁷⁰ However, the major disadvantages of the regime are the need to comply with the capital and staff requirements and expensive and time-consuming application process.⁷¹

Unlike subsidiaries, branches are not separate legal entities. Their main benefit is that third-country firm may be able to use capital which it holds in its home jurisdiction to satisfy local capital requirements.⁷² Branches are considered to be a less attractive option for third-country firms because they don't enjoy the passporting right and their activities are limited to the member state of establishment.⁷³ In case they want to provide services in other EU countries, the firms would have to set up branches in each country of interest.⁷⁴ The approval of the establishment of branches could be significantly influenced by bilateral political conflicts.⁷⁵ The need to comply with different national requirements affects the costs and the attractiveness of the market access.⁷⁶

⁶⁶ International Regulatory Strategy Group, *op. cit.* note 16, p. 114

⁶⁷ Ringe, *op. cit.* note 13, p. 4

⁶⁸ Wymeersch, *op. cit.* note 33, p. 15

⁶⁹ Böckli *et al.*, *op. cit.* note 17, p. 16

⁷⁰ Nemeček, Pitz, *op. cit.* note 13, pp. 18-19; Lehmann, Zetzsche, *op. cit.* note 25, p. 12

⁷¹ International Regulatory Strategy Group, *op. cit.* note 16, p. 120

⁷² *Ibid.*, p. 126

⁷³ Nemeček, Pitz, *op. cit.* note 13, p. 20; Wymeersch, *op. cit.* note 33, p. 15

⁷⁴ International Regulatory Strategy Group, *op. cit.* note 16, p. 127

⁷⁵ Lehmann, Zetzsche, *op. cit.* note 25, p. 14

⁷⁶ Lehmann, Zetzsche, *op. cit.* note 16, p. 23; Lehmann, Zetzsche, *op. cit.* note 25, p. 14

5.2. Passive use of the freedom to provide services (reversed solicitation)

Third-country firms can provide the services to EU clients on the basis of “reversed solicitation” where the client approaches the firm and requests its services.⁷⁷ In this case, the supervisory and private law of the company’s home country applies.⁷⁸ This procedure is considered to be “prudentially unobjectionable” since the customer chooses the level of protection of the third state on his own volition.⁷⁹ However, this model doesn’t seem to be viable for wider use, because it can only be applicable in certain specific situations and can pose risk for the third country if an adequate system of risk management is not established.⁸⁰

5.3. National exemption

Sometimes third-country firms can rely on existing rights of access under the local laws of EU Member States to provide cross-border services.⁸¹ This option presupposes they don’t need to be separately authorized in that jurisdiction. However, the regulatory regimes vary significantly and there is no general rule on this option.⁸² The firms have to obtain exemptions for each EEA country whose financial markets they intend to cover.⁸³ Germany, for example, allows the provision of services if the company is adequately supervised in the home country and cooperation between BaFin and home state supervisory authority is established. Nevertheless, this exemption is not available for retail client services and is limited to the provision of services only in Germany.⁸⁴

5.4. Bilateral agreements

One of the possible options is that third countries try to negotiate the access for their firms to the Single Market through the agreement which would “reduce overlaps and enhance regulatory and supervisory reliance”.⁸⁵ Nevertheless, this process often requires long negotiations and means combat over whose national interest shall prevail.⁸⁶ So far, the EU has concluded several types of bilateral agree-

⁷⁷ International Regulatory Strategy Group, *op. cit.* note 16, p. 120

⁷⁸ Lehmann, Zetzsche, *op. cit.* note 25, p. 15

⁷⁹ Sethe, *op. cit.* note 24, p. 617

⁸⁰ International Regulatory Strategy Group, *op. cit.* note 16, p. 121

⁸¹ *Ibid.*, p. 116

⁸² *Ibid.*, p. 118

⁸³ Nemeček, Pitz, *op. cit.* note 13, p. 21

⁸⁴ *Ibid.*, p. 21

⁸⁵ European Commission, *op.cit.* note 3, p. 6

⁸⁶ Lehmann, Zetzsche, *op. cit.* note 16, p. 24

ments with various countries. Their main feature is that they are mostly not comprehensive and include only certain areas, making wider market access rather expensive. The most comprehensive set is concluded with Switzerland, which opted out EU membership and chose to regulate its relations to the EU through sets of sector-specific agreements. In the area of financial services, however, there is only one agreement that regulates non-life insurance.⁸⁷ Another possible type of agreement is Deep and Comprehensive Free Trade Area (DCFTA) that is the part of the Association Agreement between the EU and Ukraine. This agreement regulates the field of financial services and provides the access to the Single Market on the condition that the continuous regulatory approximation is conducted. Parties to the treaty grant each other internal market treatment that implies the freedom of establishment and freedom to provide services.⁸⁸

6. MIFID II/MIFIR REGIME⁸⁹

While under MiFID regime⁹⁰ third-country access primarily was the function of national law, the newly established regime brings a radical change by achieving a greater centralization of the access process at the EU level.⁹¹ Namely, under MiFID regime, there was no harmonized third-country access, but it was solely determined by national laws.⁹² Said regime was partial, complex, and lacking in coherence.⁹³ MiFID II aimed at establishing a harmonized framework which gives third-country companies equal access to EU markets.⁹⁴ In regulating the subject matter, the new regime adopts a twin-track approach, dividing responsibility between the Member States and the Commission/ESMA based on the manner in which the firm operates (services or branch) and the clients to whom the services

⁸⁷ European Commission, *op.cit.* note 3, p. 6

⁸⁸ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014], OJ L 161/3, Annex XVII, Art. 4 (3)

⁸⁹ MiFIR is Regulation (EU) no. 600/2014 of the European parliament and of the Council of 15 May 2014 on markets in financial instruments and amending regulation (EU) no 648/2012 (Text with EEA relevance) [2014], OJ L 173/84 and MiFID II is Directive 2014/65/EU of the European parliament and of the Council of 15 May 2014 on markets in financial instruments and amending directive 2002/92/EC and directive 2011/61/EU (recast) [2014], OJ L 173/349

⁹⁰ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC [2004], OJ L 145/1

⁹¹ Moloney, *op. cit.* note 5, p. 403

⁹² Nemeček, Pitz, *op. cit.* note 13, p. 22

⁹³ Moloney, *op. cit.* note 4, p. 14

⁹⁴ Sethe, *op. cit.* note 24, p. 619

are provided (professional or retail).⁹⁵ The regime is closest to providing passport-like access to the EU market.⁹⁶

Under MiFID II/MiFIR regime, market access by third-country firms depends on the type of clients firm intends to provide services. If the client is a professional client or an eligible counterparty,⁹⁷ the rules established under MiFIR apply. In this case the firm doesn't have to establish a branch in a Member State. However, this mode of access is conditional upon the determination of equivalence, existence of cooperation agreements between supervisory authorities and granting of reciprocity. Only after these conditions have been met, the firm can apply for registration with ESMA. Apart from successful registration, the firm has to notify the clients that it provides services only to professional clients and that is supervised outside the EU. The most controversial precondition is an obligation to accept the jurisdiction of the Member State's court.⁹⁸ Though the main purpose of this norm was to protect investors from litigations outside of the EU, it can have far wider consequences, leading to MiFID II/MiFIR being applied as a mandatory European law.⁹⁹ After the process is completed, Member States cannot place additional requirements on third-country firms. Otherwise, this would contravene the purpose of the established framework, which is to harmonize current fragmented regulatory regimes of Member States for cross-border provision of services by third-country firms.¹⁰⁰ In case the equivalence condition is not met, each Member State can decide whether to allow access to its market. In case equivalence is determined and third-country firm has an established branch in one of the Member States, it can provide services to professional clients in other Member States without the need to establish any new branches. This phenomenon is being referred to as "European passport light"¹⁰¹ or "third-country passport".¹⁰² However, the use of this option remains dubious, as it doesn't grant any regulatory advantages comparing to direct provision of cross-border services.¹⁰³ In case the prospective clients are retail clients or "opt in" professional clients,¹⁰⁴ the third-country firms acquire access through establishing a branch upon the request of Member State. Unlike with professional clients, this regime doesn't grant passporting rights.

⁹⁵ Moloney, *op. cit.* note 5, 403-404

⁹⁶ International Regulatory Strategy Group, *op. cit.* note 16, p. 46

⁹⁷ See MiFID II Annex II

⁹⁸ Armour, *op. cit.* note 13, p. 17

⁹⁹ Lehmann, Zetzsche, *op. cit.* note 16, p. 26

¹⁰⁰ Nemeček, Pitz, *op. cit.* note 13, p. 30

¹⁰¹ *Ibid.*, p. 33

¹⁰² Lehmann, Zetzsche, *op. cit.* note 16, p. 24

¹⁰³ Nemeček, Pitz, *op. cit.* note 13, p. 33

¹⁰⁴ See MiFID II Annex II

7. CONCLUDING REMARKS

In the past decade, the EU has faced many challenges that threatened the stability of the financial market such as the financial crisis and nowadays Brexit. Each incidence has reinforced the efforts of the European legislators and policymakers in finding adequate responses to mitigate possible negative consequences. Learning from the crisis, the current regime lays great value on the convergence of laws and cooperation of supervisory authorities in order to prevent or soften the systemic risks. Having in mind globalization tendencies and interconnectedness of the financial markets worldwide, the position of firms from non-member states that wish to enter the European market has shown to be one of the decisive factors when creating future policies. Through the scope of the market access granted to the third-country firms, EU reacts to the global developments and implicitly expresses its political stances.

Several methods of access have been recognized so far. Some of them exist long(er) and can be characterized as “classical”. These include creating subsidiaries or branches in the Member State, use of reversed solicitation option, applying for national exemption (if possible) or concluding a bilateral agreement that regulates the specific areas of EU-third country relations. Each model of access has its own qualities, but neither of them provides for the full access to the EU market, as the passporting rights do for the Member States. The newest method of regulating the third-country access is determining the equivalence of third-country regulations and supervision mechanisms with the EU regime. This mechanism is the result of two opposing needs of the EU – guarding financial stability, on the one hand, and opening the market for the competition, on the other hand. It promotes greater convergence of legislation and closer co-operation of supervisory bodies. However, it is often criticized on grounds that it lies in the discretion of the competent authority and can be used to achieve political or economic goals.

The current regime of third-country firm access to the financial market takes advantage of equivalence clause, allowing wider Single Market-access, but in return imposes stricter conditions for access.

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