

EBI – European Banking Institute

A right to an equivalence decision? - The special case of Brexit

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Agenda

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- 2. Market access through equivalence**
 - a) General concept
 - b) Equivalence decision
- 3. Right to a decision**
 - a) Political or technical decision
 - b) Basis for a right to a decision
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1. Brexit – The UK as a third-country

Timeline

- 23.6.2016 – Referendum
- 29.3.2017 – The UK's request for withdrawal
- 31.1.2020 – Exit from the EU = third-country
- 31.12.2020 – Transition period = treated as a Member State (Withdrawal Agreement)
- 1.1.2021 – Third country = treatment as a third-country

Current status

- WTO law
- EU-UK Trade and Cooperation Agreement

1. Brexit – The UK as a third-country



<https://www.publicdomainpictures.net/en/view-image.php?image=165944&picture=brexit>

- Inside EU = European passports
- Market access from outside the EU (as a third country)
 - Host state regulation
 - Branches
 - Purely cross-border services
 - Subsidiaries
 - Reverse solicitation
 - **Equivalence**

2. Market access through equivalence

a) General concept

- I. Scope of application
 - 40 equivalence mechanisms in various directives and regulations (“obligation-based approach”)
- II. Requirements
 - **Equivalence decision** by the Commission
 - Reciprocity, cooperation agreements, conformity with international standards, systemic importance, etc.
- III. Legal consequences
 - Exemption from single obligations
 - Market access to EU without ...
 - Having to obey EU supervisory law
 - Being supervised by EU supervisory authorities

2. Market access through equivalence

b) Equivalence decision

- I. Abstract meaning of “equivalence”
 - **Functional equivalence** (= regulatory goal of EU legislation; not regulatory technique)
 - **of regulatory outcomes** (= outcome on the market; not abstract rules)
 - **from a holistic perspective** (= legal system as a whole; not individual provisions)

- II. Main issue
 - Politicisation
COM SWD (2017) 102 final, p. 9: “factor[ing] in wider external policy priorities and concerns in particular with respect to the promotion of common values and shared regulatory objectives at international level”

3. Right to a decision

a) Political or technical decision

1. Equivalence provisions
 - Reference points are always of a technical nature
 - Level 2 regulation must be based on technical aspects
 - Historic development from bilateral negotiations to unilateral decision
2. European Treaties
 - Equivalence decision → implementing decision (Art. 291(2) TFEU) → administrative decision (COM as executive branch)
2. World trade law
 - Para 3(b) second sentence of Annex on Financial Service to GATS:
“Where a Member accords recognition autonomously, it shall afford **adequate opportunity** for any other Member to demonstrate that such circumstances exist.”

3. Right to a decision

b) Basis for a right to a decision

- For individual service providers → EU law
 - No consistent approach to when individual rights exist
 - No practical relevance
 - Generally, not very strict → any legitimate interest in a decision → market access/exemption from obligations → legal and economic interest → **right to a decision (+)**
- For third countries → world trade law
 - Para 3(b) “adequate opportunity” after autonomous recognition has been granted
 - **Right to a decision (+)**, if recognition has been granted vis-à-vis another member

3. Right to a decision

c) Limitations to the right to a decision

Discretionary act (“may”) → **two restrictions**

1. No right to a positive equivalence decision, **unless** the only possible lawful decision would be to determine equivalence
= Right to request a decision free of any errors of assessment
2. Limited resources of COM → right to prioritise on technical grounds
= Right to a lawful consideration of their request

3. Right to a decision

d) The special case of Brexit

- Closely interconnected financial markets → “high-impact country” → systemic importance
- European Union (Withdrawal) Act 2018, c. 16, § 2–3 → incorporation of EU law
- What follows from this?
 - If the UK does not deviate from EU law, its law is equivalent → equivalence decision is only possible lawful option → service providers and the UK itself may request a decision
 - If request is rejected
 - UK service providers: action for annulment or action for failure to act before the ECJ
 - UK: dispute settlement of world trade law

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