

Passporting is dead. Long live ‘passporting’?

Blog post by Partner Stephen Adams, 13 January 2017

There was some comment this week about the fact that the UK’s largest financial services advocacy body TheCityUK has self-consciously ceased to advocate the retention of passporting rights for UK-based financial services businesses after the UK has left the EU. This was presented as a concession of ambition, but it is also a form of tactical retreat.

Passporting is the basic framework established by EU financial services regulation that makes it possible for firms appropriately authorised in one EEA state to trade directly or via branches into all other EU markets on a ‘national treatment’ basis with minimal additional authorisation. It is the basic underpinning of the EU single market for financial services, to the extent that such a thing exists. It is also one of the pillars of London’s hub status in that market, as it enables business to be done with London from anywhere in the EU, among other things.

Suggestions from some in the UK that the passporting system could be retained for a UK outside of the regulatory perimeter of the EU have met with the rhetorical equivalent of a blank stare in Brussels and Frankfurt. In fact, in an EU that has largely stuck to the principle of ‘no negotiation without notification [under Article 50]’, this is a topic that has drawn some of the small number of definitive statements made by EU authorities, including Jens Weidman and Mario Draghi.

They see this suggestion as a massive non-sequitur, because they rightly see the passporting system as a function of the rights embedded in the EU treaties and the regulatory convergence created by the frameworks of the EU single market. The smart advocacy position from a UK point of view has always been to declare “passporting” lost the moment the UK stepped outside the single market. This concedes the basic point that the passporting system is based on things that the UK will almost certainly choose to give up.

As TheCityUK positioning implies, the best the UK can hope for is to put in place after Brexit a set of customised cross border market access rights and operational freedoms in the EU based on recognition of UK prudential, conduct and investor protection standards. These would look a bit like passporting, but on a different basis. This basis could include the EU’s current various systems of equivalence - on which my colleague Tom White has had interesting things to say), which cover some - but far from most or all - of the relevant areas. It could be a more bespoke system of regulatory convergence and prudential burden sharing embedded in a new treaty.

It probably wouldn’t cover areas that passporting does, such as cross border trade (inside the EU) in retail services, which are prudentially and politically sensitive. But it might extend to areas of mutual interest like access to capital markets or wholesale services, if the two sides can get comfortable with the prudential issues this raises. We simply don’t know until the two sides put their cards on the table. What we do know, is that whatever it is, it won’t be called passporting.