

CLAUDIA GIUSTOLISI*

NO-DEAL BREXIT

DECREE LAW NO. 22 OF 25 MARCH 2019

ABSTRACT. The risks of a non-negotiated detachment of the United Kingdom (UK) from the European Union (EU) has prompted the Italian legislature to take actions aiming at protecting the markets, mitigating the perceived risks, and providing a clear roadmap of what lies ahead for banking, financial and insurance undertakings affected by Brexit.

Consequently, the Italian Government recently issued Decree Law no. 22/2019 addressing the scenario of a no-deal Brexit (the Decree), which was published in the Official Gazette on 25 March 2019; the Decree entered into force on 26 March 2019 and provides for a transition period of 18 months. The provisions of the Decree will apply both to UK entities providing regulated activities in Italy under the EU freedom of establishment or the freedom to provide services as well as to Italian entities operating in the UK.

CONTENT. 1. Introduction – 2. The measures laid down in Decree Law no. 22/2019 – 3. The protection of Italian depositors and investors

1. Introduction

Decree Law no. 22 of 25 March 2019 was published in the Italian Official Gazette no. 71 of 25 March 2019, was converted into Law no. 41 of 20 May 2019, and contains urgent measures to ensure the stability and integrity of financial markets, as well as the protection of Italian and UK investors in the event of the UK withdrawal from the European Union.

In particular, the Decree is intended to determine the legal framework applicable to banks, investment firms and other financial operators in the event that the United

* Post Doctoral Researcher, Università degli Studi di Siena.

Kingdom leaves the European Union without an agreement (“no-deal Brexit”).

The risks of a non-negotiated detachment of the UK from the European Union has prompted the Italian legislature to take actions aiming at protecting the markets, mitigating the perceived risks, and providing a clear roadmap of what lies ahead for banking, financial and insurance undertakings affected by Brexit.

The Decree, indeed, sets forth a transition period of 18 months (the “Transition Period”), which is the period of application of the provisions contained in the Decree.

In fact, in case of a no-deal Brexit, as of the leave date, domestic intermediaries will have to stop providing investment services and activities in the United Kingdom, given that they will no longer benefit from the European passport. Similarly, British intermediaries will no longer be able to provide their services in Italy using pre-existing authorizations.

Moreover, it establishes a number of transitional measures generally differentiated depending on the nature of the business exercised in Italy, on the relevant regime – whether under the freedom to provide services or the freedom of establishment – at the date of effectiveness of Hard Brexit, as well as, in certain cases, on the type of clients *vis-à-vis* whom the activity is carried out.

In particular, the regulatory measures prepared are intended to ensure continuity in the provision of investment services and activities by both Italian entities operating in the United Kingdom and British entities operating in Italy, as well as to regulate the orderly exit from the domestic market of British operators obliged to discontinue activities in Italy by the leave date.

The application of said transitional measures requires in certain cases a prior notice to be served to the competent Italian supervisory Authority (Bank of Italy for the banks – Consob for the investment firms), no later than three days before Hard Brexit becomes effective.

The Bank of Italy and Consob published the instructions to follow for UK financial institutions and for Italian investors under Decree Law no. 22 of 25 March 2019.

2. The measures laid down in Decree Law no. 22/2019

The Decree structures the relevant applicable provision depending on:

- the type of entity (*e.g.*, banks, insurance undertakings, investment firms);
- the way the entity provides services in Italy (*i.e.*, under the freedom to provide services or the freedom of establishment);
- the categories of clients the reserved activities are provided to (this aspect is taken into account with respect to investment services);
- the services provided (for banks, a distinction with regard to financing and collection of savings is set forth).

Intermediaries that intend to avail themselves of the transitional regime shall make a notification to the relevant Italian competent Authority no later than three business days before the Date of withdrawal, in accordance with the procedures established by the competent authorities (the Notification).

In particular, the Decree Law sets out different transitional provisions for:

- *UK banks and branching electronic money institutions that intend to cease operations, and UK payment institutions, non-branching electronic money institutions and asset management companies that are required to cease operations.*

In this case, no later than 15 days from its entry into force, UK banks and branching electronic money institutions that intend to cease operations in Italy after the date of withdrawal shall notify the Bank of Italy of the way they plan to ensure the orderly termination of their activities. The intention to cease operations must also be communicated to the relevant UK supervisory authorities. The orderly termination of activities in Italy shall also be disclosed to the Italian customers and to the relevant business counterparties of the financial institution (Article 4 of Decree Law 22/2019).

- *UK banks and branching electronic money institutions that intend to continue to operate in Italy.*

In this case, the subjects that intend to continue to operate in Italy after the date of withdrawal, in relation to all or part of the activities previously carried out, shall notify the Bank of Italy at least three business days prior to the date of withdrawal. Moreover, the intention to continue to operate shall also be communicated to the relevant UK supervisory authority (Article 3(6) of Decree Law 22/2019). No later than six months after the start of the transition period, the subjects that have notified their intention to

continue to operate in Italy may apply for a license to operate as third-country institutions if they intend to operate beyond the transition period of 18 months. Failure to submit such application shall trigger a run-off period of six months, by the end of which the financial institution will have ceased to operate in Italy.

– *UK investment firms that, at the date of withdrawal, provide investment services and activities in Italy.*

a) In the exercise of the right of establishment through branches, they may continue, during the transition period, to perform the same activities (Art. 3, paragraph 4 of the Decree).

b) Under the freedom to provide services:

b1) they may continue to perform the same activities only with regard to eligible counterparties and professional clients (until the adoption of a decision of the European Commission in accordance with Article 47, paragraph 1 of the EU Regulation 600/2014, and in any case not beyond the transition period (Art. 3(3) of the Decree).

The subjects referred to in points a) and b) may benefit from the transition period subject to forwarding a notification to Consob within 3 working days prior to the date of withdrawal.

The same firms, where they intend to operate in Italy beyond the transition period, shall submit to Consob – within a final deadline of six months from the date of the start of the said period – the application for authorization to practice their activities.

b2) In favor of retail clients and opt-up professional clients, they shall terminate activity by the date of withdrawal.

This institution shall inform clients, other entities with whom they have relations in the provision of services and CONSOB on the initiatives taken to ensure the orderly termination of activity (within fifteen days).

– *UK insurance companies operating in Italy.*

These subjects will be removed from the EU list of insurance companies held by IVASS. In order to guarantee the continuity of services for policyholders, insured persons and persons entitled to insurance benefits, the UK insurance companies shall continue to operate during the Transition Period with respect to the management of existing contracts and coverages in force at the date of withdrawal, without entering into new con-

tracts or renewing existing contracts. Furthermore, UK insurance companies are required to submit to IVASS a plan illustrating the relevant measures to be adopted in order to ensure the regular and proper execution of existing contracts and coverages within 90 (ninety) days from the date of entry into force of the Decree. In turn, policyholders may withdraw from existing contracts having a duration exceeding one year without any additional cost, by giving written notice to the company or by exercising other forms of termination of the contract (tacit renewal clauses lose their effect). The policyholder's withdrawal shall take effect from the expiry of the first policy year following the date of withdrawal from the relevant contract. UK insurance companies shall inform policyholders, insured persons and other persons entitled to insurance benefits with respect to the operating regime applicable, within 15 days from the date of entry into force of the Decree.

– *UK insurance and reinsurance intermediaries operating in Italy.*

These subjects will be removed from the relevant register held by IVASS. In order to avoid any detrimental impact for any contractual party, insured persons and persons entitled to insurance benefits, UK intermediaries will be allowed to carry out any activities required to orderly terminate existing relationships (and in any event within maximum 6 (six) months from Hard Brexit), without entering into new contracts or renewing existing contracts. UK intermediaries shall inform any contractual party, insured persons and persons entitled to insurance benefits regarding the operating regime applicable, within 15 (fifteen) days from the date of entry into force of the Decree.

3. The protection of Italian depositors and investors

Moreover, pursuant Article 8(1)(3) of Decree Law no. 22/2019, the banks referred to in Article 3(1) of the Decree (branches), after the date of withdrawal shall adhere by law to the Italian deposit guarantee (DGS) systems. Also on that date, UK banks that operate under the freedom to provide services shall adhere by law to the DGS unless they submit to it a statement from the UK DGS certifying that their depositors shall continue to be protected by the latter.

In the same way, after the date of withdrawal the branches of UK banks and investment firms operating in Italy shall adhere by law to the Italian investor compensation scheme (ICS). Also on that date, UK banks and investment firms that operate

under the freedom to provide services shall adhere by law to the ICS unless they submit to it a statement from the UK ICS certifying that their investors shall continue to be protected by the latter.

Within thirty days (three months for DGS) of the date of withdrawal both categories of UK intermediaries shall contact the Italian DGS and ICS to carry out the required operational and administrative formalities (including the obligation to pay contributions) shall complete the formalities required for adherence to the DGS or ICS.

As soon as possible and in any case within forty days, both categories of UK intermediaries shall inform their depositors and investors of the DGS and ICS in charge.

These provisions arise from the need to strengthen and protect Italian depositors and investors who have placed their trust in UK banks and investment firms.

For these reasons, the Italian Government has decided to implement a transitional regulation that extends the compensation and protection of these depositors and investors, providing for a coverage for claims arising from banks or investment firms' inability from Italian DGS (the coverage is € 100,000 for depositants) and from Italian ICS (the coverage is € 20,000 for investors), even after the United Kingdom's exit from the European Union.