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LSE and Europe

Brexit and EU Financial Governance: Passporting, Equivalence, and Beyond

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#LSEBrexit

Brexit and EU Financial Governance: Passporting, Equivalence and Beyond

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EU Financial Governance + the Researcher

- ‘EU financial governance’
- Rule-making, supervision, and enforcement + institutions
- Why - ‘To Know the Causes of Things’
- Highly dynamic and sophisticated aspect of EU law
 - Constitutional; institutional; functional; political; international; market/household perspectives.....and more
 - Importance of the public interest + fiscal implications
 - Sits at intersection of major fault-lines in EU politics, finance, and law
- Legal specialist
 - *EU Securities and Financial Markets and Regulation* (Oxford University Press, 3 edition, 2014)
 - European Securities and Markets Authority Stakeholder Group (2011-2016); Special Adviser, UK House of Lords Inquiry into EU’s regulatory response to crisis (2015)

EU Financial Governance + the Researcher

- Array of forces which shape financial rules and institutions + outcomes
 - Balance of power between EU and its Member States
 - Choices about the EU financial market and its regulation: what kind of market; does law matter?
 - Institutional questions
 - Consumer finance questions: the ‘Cinderella’ topic....
- Current work: Brexit and EU financial governance
- Repeating patterns of disruptive shock, change, ripples + momentum effects; part of a wider pattern
 - Financial crisis → Single rulebook + European System of Financial Supervision + ripples
 - Euro area crisis → Banking Union + ripples
 - Brexit → ?

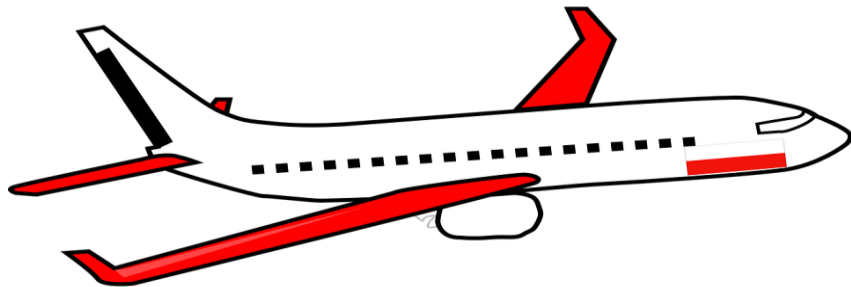
Nature of Brexit Effects

- Intersecting spheres + feedback loops: UK; EU; international



I Financial Governance: UK and EU

- The question: 'passporting', 'equivalence', or something else.....
- Political.....but also legal
- Passport rights + passport substitutes.....a matter of law or politics?



I Financial Governance: UK and EU

- ‘Passporting’
 - Key achievement of EU financial governance
 - Unlocks single market; a creation of EU law and within its structures
 - Legal device: allows highly regulated financial actors to operate across the EU on the basis of ‘home’ regulation (or passport)
 - Highly sophisticated legal and institutional technology in support
 - Question: interaction with EU financial law
 - Question: cause and effect - market relevance and the UK
 - Question: distinctiveness of Passport internationally
 - Question: losing the Passport
 - Embedded in the single market
 - ‘Acronym anxiety’: from a ‘UCITS’ to an ‘AIF’.....does it matter?
 - Legal strategies: subsidiaries.....? Regulatory reaction?

I Financial Governance: UK and EU

- ‘Equivalence’
 - Legal and procedural device for managing access by ‘third countries’ to the EU + how EU actors interact with ‘third countries’
 - A ‘hidden’ part of EU financial governance; how will it behave when unseen forces are applied?
 - Shining a light.....
 - Breadth of application + what is ‘equivalence’?
 - Patchwork of legislation; available in some sectors only
 - Procedural challenges
 - Legal certainty v. resilience challenges
 - Institutional challenges, incentives, and opportunities
 - Managing dynamism
 - Evidence
 - Powered by single market technology...
- No ‘equivalence’: legal outcomes in a regulated environment?

II Financial Governance: the EU

- The grit in the oyster.....and the pearl



II Financial Governance: the EU

- The UK and single market + euro area relations in financial governance
 - Constructive tensions and ambiguities....
 - Complex ecosystem
 - Banking Union and the euro area
 - New structures; new ways of thinking (risk sharing); new demands on EU law
 - European System of Financial Supervision and the single market
 - Pressure on single market structures (European Supervisory Authorities)
 - A delicate minuet being played out + new institutional games learned
 - David Cameron's 'New Settlement' and protecting multi-currency financial integration
 - → What will be impact of the Brexit environmental shock on this ecosystem?

II Financial Governance: the EU

- Regulatory governance
 - Change to the ‘single rulebook,’ which glues the euro area and single market together
 - Inflection point; Substance; Tolerance of local discretion
 - Frictions to change
 - Question - EU: consumer financial protection
 - Question - UK: equivalence + ‘location’ requirements
- Institutional governance
 - Lessons from history
 - Momentum matters; law matters
 - The euro area: Banking Union, Capital Markets Union, Financial Union?
 - The role of law in institutional change
 - The single market: change to the single market arrangements
 - Disruption to current institutional incentives
 - Changing the three European Supervisory Authorities: a ‘twin peaks’ arrangement + the role of law

III Financial Governance: the International Sphere

- Shifting patterns.....



III Financial Governance: the International Sphere

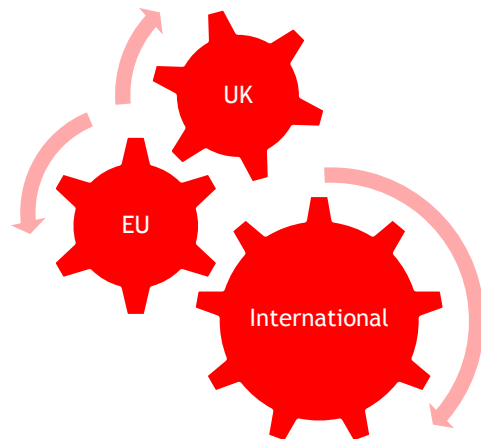
- ‘International finance governance’
 - The ‘great powers’ + those with capacity to influence (regulators)
 - International standard-setting bodies (Basel Committee; Financial Stability Board)
 - Crisis era and G20
 - Standards (Basel III; IFRS 9)
 - ‘Bedding in’ and growing regulatory influence
 - Conduct (beyond stability); supervision; enforcement
- The EU
 - Growing presence (alongside Member States)
 - Basel III and the EU
 - ‘First mover’ effects’; EU using equivalence to ‘export’ its approach; shape standards

III Financial Governance: the International Sphere

- Brexit effects
 - UK/EU coalitions: changing dynamics - influence
 - Change to patterns of influence across EU institutions
 - Growing importance of European Supervisory Authorities (equivalence effects)
 - Shaped by Brexit
- Geopolitical effects
 - Is the crisis-era consensus on standards shifting?
 - Fragmentation of regulation? Regulatory competition? Local specialization?
 - Skirmishes
 - How might the EU respond - and without the UK..

Intersecting Spheres

- Back to the intersecting spheres



- Example: UK equivalence outcome shaped by (and shapes) EU institutions whose posture may in turn be shaped by international effects

Thank you

Based on:

- N Moloney, “EU Financial Governance and Brexit: Institutional Change or Business as Usual?” forthcoming (2017) *European Law Review*
- N Moloney, “International Financial Governance, the EU, and Brexit: the ‘Agencification’ of EU Financial Governance and the Implications” (2016) (17) *European Business Organization Law Review* pp451-480
- N Moloney, “The EU, Brexit, and Financial Services - an Uncertain Future for the City?” 17 *German Law Journal* (2016) pp75-82