



## Brexit for UK MiFID firms

The worst case scenario for continuing free market access within the EEA would arise if the UK exits both the EU and the EEA. This would deprive UK firms of the benefits of the EU passporting regime for MiFID firms throughout the EEA.

### 1. The Irish experience on EU Referendums

There are potentially two relevant Irish experiences regarding the Irish relationship with the EU that might be useful to note in the context of contingency planning for Brexit.

In Ireland, ratification of EU treaties requires the passing of a referendum by the Irish people and on two occasions the Irish people voted against ratification of EU treaties. The first took place in 2001 in relation to the ratification of the Nice Treaty and a second in relation to ratification of the Lisbon Treaty. On both occasions the Irish Government was in favour of ratification and refused to accept the outcome of a no vote and proceeded with a second referendum, which turned out in favour of ratification in both cases.

Given the UK Government's position on allowing a free vote, it would seem unlikely that the UK Government would proceed with a second referendum in the face of a no vote.

### 2. Exit from the EEA

There are two basic scenarios facing the UK following a no vote in the forthcoming Brexit referendum, either exit from the EU or exit from the EU and the EEA.

Clearly the worst case scenario would be for the UK to exit the EU and the EEA. However, it is likely that the UK would also suffer a flight of internationally traded services even in the case of a no vote, following which, the UK leave the EU but decided to stay within the EEA.

Assuming that the UK leaves the EEA, it would no longer be able to avail of freedom of services within the EEA under the MiFID Directive, either by way of cross-border services or by way of establishment through branches, and individual MiFID firms would have to decide to re-establish within the EEA in order to obtain such free trade access within the EEA.

### 3. Re-establishment within the EEA on agency basis

The big question would seem to be how much of the existing infrastructure of UK MiFID firms would have to change to re-establish on an agency basis within the EEA. One possibility would be for a UK MiFID firm to establish a subsidiary in an EEA jurisdiction to carry out business for the UK parent as agent or arranger.

Certain EEA jurisdictions, including Ireland, would permit authorisation of a MiFID firm to provide services on an arrangement or agency basis. However, there are several EEA jurisdictions that do not, including Germany, Italy, Portugal and other major jurisdictions.

There would be reasonable concern that such jurisdictions would not recognise the provision of cross-border services of an EEA subsidiary of a UK firm where such services were provided on an agency or arrangement basis on behalf of the UK parent. To manage this possibility, the EEA subsidiary would likely have to operate on a back to back principal basis and collateralise its counterparty positions, with considerable additional capital implications.

### 4. Re-establishment within the EEA as principal

The big question in this scenario would be how much of the existing infrastructure of a UK MiFID firm would have to move in order to re-establish on a principal basis, e.g. would it require the relocation of the front, middle and back office of a UK MiFID firm and over what time frame? Clearly, Brexit from the EEA will present an extraordinary context and it is likely that the authorities in the UK, including the Bank of England and the Financial Conduct Authority, will be mindful of the overall stability mandate. It would be expected that they would act to facilitate the re-establishment of UK MiFID firms elsewhere within the EEA, e.g. by entering into memorandums of understanding with other regulators such as the ECB and national competent authorities within the EEA.

**5. Establishment of MiFID firms in Ireland**

At its most basic, an application would require a programme of operations addressing the various business lines, a detailed statement of resources and a business plan in compliance with the minimum capital requirements under CRD IV and CRR, and an organisation plan, including the proposed IT infrastructure.

From experience, the Central Bank of Ireland requires assurances at the outset of an authorised business on sufficiency of capital, resources and risk assessment.

Typically, the Central Bank of Ireland does not permit outsourcing of core functions and tasks within the initial years of establishment. In addition, outsourcing of permitted functions e.g. data processing, would be required to be made on the basis of service level agreements, as approved by the Central Bank of Ireland.

**6. How would MiFID applications from UK firms be received in Ireland?**

It is likely that the Central Bank of Ireland would take a selective approach to applications, having regard to the limits of its resources to effectively supervise regulated activities in Ireland. It is likely that the Central Bank of Ireland would be in a position to justify authorisation of firms with the best regulatory reputations only.

**7. Time scales**

The generally contemplated time frame for authorisation of MiFID firms in Ireland is between 6 months and 1 year. However, Brexit from the EEA would present an extraordinary context and, for reasons of the primacy of financial stability, it is likely that much would be done by regulators in the UK and elsewhere in the EEA to facilitate timely migration of UK firms into other EEA jurisdictions. The time frame for a MiFID firm to be set up in Ireland is likely to be determined by the proposed programme of operations and a conservative assumption would be that a firm would have to migrate the front, middle and back office to Ireland.

**8. Products that could be traded**

The only limitation on the products that could be traded would be by virtue of the programme of operations and the adequacy of resources (human, capital, IT, accounting, audit, compliance) that would be required to effectively manage the proposed business activities to the satisfaction of the Central Bank of Ireland.

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Anthony Smyth has broad experience of tax law. Clients appreciate him as 'great at interpreting our needs, and amazing at understanding international and Irish tax systems.' **Chambers & Partners Europe, 2016**

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