

BREXIT: The MiFID passport

An overview

A significant part of the UK's financial services industry relies on the passport under the Markets in Financial Instruments Directive (**MiFID**)¹ to provide its services in other Member States of the European Economic Area (**EEA**). The loss of the passport would therefore have a profound effect on financial institutions based in the UK.

Unless the UK becomes a member of the EEA along the lines of Norway or otherwise retains access to the single market, post-Brexit financial services firms operating out of the UK will find themselves in a similar position to non-EEA based financial institutions.² MiFID II does however, contemplate granting financial institutions in non-EEA states the right to use a modified version of the MiFID passport to offer their services in the EEA provided that their home jurisdiction is deemed MiFID equivalent. Depending on the final timing and terms of Brexit, financial institutions in the UK may therefore ultimately find themselves able to use the MiFID passport.

<p>What is the MiFID passport?</p>	<p>The MiFID passport, along with its equivalents under EU banking, insurance and investment funds laws (see our Brexit AIFMD Passport briefing here), allows investment firms authorised in one Member State (their “home” state) to offer investment services in other “host” Member States, without the need for local authorisation in the host state. Instead, passporting firms may establish a local branch in the host state, or to offer services remotely on a cross-border basis.</p>
<p>What changed on 24 June 2016?</p>	<p>Nothing – from a legal perspective! The UK is still a member of the EU and will, in the absence of a unilateral move by the UK to repeal the European Communities Act 1972, likely remain a member until at least 2018, if not somewhat longer. Until the UK leaves the EU, all of EU law, including MiFID, will continue to apply in full. As such, the MiFID passport will continue to be available to financial institutions in the UK for the time being (assuming the UK implements MiFID II as required – see).</p> <p>If the UK ultimately remains a member of the EEA (like Norway), it is likely that little would change. Under any other arrangement it is possible that the MiFID passport would no longer be available to financial institutions in the UK, although a modified form of passport may become available under MiFID II (see below).</p>
<p>MiFID II</p>	<p>In 2014, the EU agreed a package of reforms to MiFID, comprising a revised directive and a related regulation (together, MiFID II). MiFID II introduces a harmonized regime making the MiFID passport available to non-EEA based financial institutions provided their home state regulation is deemed MiFID equivalent.</p> <p>The current expectation is that the MiFID II directive will need to be transposed into UK law by 3 July 2017, before entering into force on 3 January 2018. Whether and how implementation ultimately goes ahead in the UK and what this means for UK-based investment firms will depend on the form and timing of Brexit negotiations.</p>
<p>MiFID passport for non-EEA financial institutions</p>	<p>While MiFID II will improve consistency in the EU approach to third country firms, the new framework remains far from straightforward. The position of third country firms under MiFID II will depend on whether they are seeking access to wholesale markets³ only, or also to offer services to retail or “elective” (i.e., less sophisticated) professional clients.⁴</p>

¹ Directive 2004/39/EC (MiFID), text available [here](#). MiFID, which was implemented in 2007, created a pan-European framework for the regulation of investment services and activities, including trading of securities and derivatives, investment advice and portfolio management.

² Also referred to as “third country firms”.

³ Article 46 of Regulation (EU) No 600/2014 (MiFIR), text available [here](#). Under the current MiFID rules, the position of “third country” firms from outside the EEA is dependent on local law rules at member state level. The UK permits third country firms (such as US brokers and investment advisers) to operate in the UK, provided that such firms either operate within the available exemptions for cross-border business, or establish a UK branch or subsidiary.

⁴ Article 39 of Directive 2014/65/EU (MiFID II), text available [here](#).

<p>Third country firms under MiFID II (Retail/elective professional)</p>	<p>Non-EEA based financial institutions may be able to offer MiFID services to retail (or elective professional) clients in the EEA Member States, although they may be required by such Member State to establish a branch as a condition of operating in their market. Alternatively, Member States may opt to preserve existing national rules for retail market access – which will likely continue to vary.</p> <p>In either case, third country firms offering services to retail clients in EEA Member States will need to comply with the MiFID II minimum conduct of business standards for retail business, some of which are potentially burdensome.</p>
<p>Third country firms under MiFID II (Professional/eligible counterparties)</p>	<p>MiFID II will introduce harmonised rules for third country firms seeking to offer wholesale investment services across the EEA. Such firms may be allowed access to the single market through a modified passporting system, provided that the regime in the firm’s home jurisdiction is assessed by the European Commission as equivalent to the EU regime. Reciprocal co-operation arrangements will also need to be in place between the EU and the third country and firms must register with the European Securities and Markets Authority.</p> <p>If the UK becomes a third country (i.e., it leaves the EEA), the potential for cross-border access to EEA wholesale markets may offer a sufficient incentive for the UK to implement the MiFID II regime notwithstanding Brexit. This outcome would, however, depend on the third country aspects of MiFID II being fully implemented at EU level, and on the willingness of EU authorities to certify the UK as equivalent and execute the necessary bilateral arrangements (which could be affected by political factors).</p> <p>If the UK were to fully implement MiFID II it is hard to see how the UK could be denied equivalence, although the lead times involved could mean a gap between Brexit taking effect and any equivalence decision being granted, during which time UK based investment firms would need to make alternative (likely EU-based) arrangements for market access.</p>
<p>Deposit taking</p>	<p>Deposit taking is generally outside the scope of MiFID, but currently benefits from a similar pan-EU regulatory framework and passport under the Capital Requirements Directive (CRD). Banks established in the UK are therefore currently able to take deposits and provide various ancillary services (such as lending, etc.) throughout the EEA, subject to compliance with local conduct of business rules.</p> <p>The CRD does not, however, create or contemplate any regime for harmonised third country access to the Single Market for banking services. In consequence, (unless the UK remains in the EEA) UK banks seeking to operate in other EEA jurisdictions may need to seek new banking licences in the relevant member state(s) and/or rely on EEA-based subsidiaries to passport business throughout the EEA. This has led to concerns from international banks that currently rely on the UK as a “hub” for EEA market access that they may need to relocate some activities and staff to EEA locations in order to avoid losing business as a result of Brexit.</p>
<p>A dual regime?</p>	<p>As with the AIFMD (see our Brexit AIFMD Passport briefing here) it is not wholly inconceivable that the UK could ultimately operate a dual regime: a regime that is MiFID II equivalent (intended for financial institutions who wish to use the modified MiFID passport) and a local “lighter-touch” regime (intended for financial institutions who do not wish to use the MiFID passport).</p>

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