

Brexit Frequently Asked Questions

Provision of services

1. Could my ability to perform financial services on a cross-border basis be impacted now the transition period has ended?

Yes. The UK is now considered as a “third country” by the EU, and the EU is considered as a “third country” by the UK and each jurisdiction will be treated by the other accordingly. Whilst the UK and EU have now concluded an cooperation agreement, this does not include terms governing the reciprocal cross-border provision of financial services. These terms are expected to be agreed during the first quarter of 2021. Therefore firms’ ability to continue their usual trading activities and/or providing services to EEA clients could be impacted, depending on their location and the types of activities being undertaken.

2. How could this affect my ability to access the LME and what is the LME doing to help?

Before the end of the transition period, the LME was able to provide access to its systems in any EEA Member State as a result of provisions under MiFID II which mandate pan-European access for all regulated markets. These provisions no longer apply to the LME. Instead the LME’s ability to provide access to its systems within the EEA depends on the domestic rules of individual Member States.

Since the UK formally gave its notice to withdraw from the EU, the LME has worked with the relevant European Regulatory Authorities to ensure continuity of access to its trading services for EEA members. This has involved the LME receiving a licence under German law to provide trading services to German members and a dispensation under Dutch law to allow it to provide services to Dutch members. No additional licences or dispensations were required for other EEA jurisdictions in which current LME members are incorporated.

3. How could this affect my ability to access LME Clear and what is LME Clear doing to help?

Before the end of the transition period, LME Clear was able to provide access to its systems to Clearing Members in any EEA Member State as a result of provisions under the European Market Infrastructure Regulation (EMIR). EMIR provides pan-European access for all authorised central counterparties (CCPs) such as LME Clear. The provisions governing access under EMIR have been amended through new legislation known as “EMIR 2.2”. This revises the manner in which third country CCPs apply for, and receive, recognised status.

EMIR now no longer applies to LME Clear. Instead LME Clear’s ability to provide access to its systems within the EEA will depend on the relevant provisions under EMIR or EMIR 2.2 which relate to ‘third country’ (that is, a country outside of the EEA) CCPs.

EMIR states that CCPs established in a third country may only provide clearing services to EU Members if that CCP first obtains recognition from the European Securities and Markets Authority (ESMA). LME Clear obtained this recognition from ESMA allowing the clearing house to provide clearing services to EEA incorporated members until 30 June 2025.

Mandatory trading and clearing

4. Are EEA firms subject to any requirements concerning the types of trading venues on which they can trade metal derivatives?

No. Metal derivatives are not currently subject to the mandatory trading obligations under MiFID II. As such, there is no requirement for EEA regulated firms to trade these instruments on EEA (or equivalent) trading venues. If metal derivatives were to become subject to these requirements under EEA law, then EEA firms may no longer be permitted to trade on the LME. We are not aware of any proposals to impose such a requirement on metal derivatives.

5. I access LME Clear as a client of a Member, am I subject to any requirements concerning the types of clearing house through which I must clear metal derivatives?

No. Metal derivatives are not currently subject to the mandatory clearing obligations under EMIR. As such, there is no requirement for EEA regulated firms to clear these instruments through EEA (or equivalent third country) clearing houses.

Passporting and authorisation requirements for the LME and LME Clear

6. My firm is EEA regulated, can we continue to rely on our EEA passport now the transition period has ended?

Now that the transition period has ended, firms regulated in the EEA which undertake regulated activities in the UK are no longer able to rely on their MiFID II passporting rights. Whilst the UK and the EU have agreed a mutual cooperation agreement, this does not include terms governing the cross-border provision of financial services. Therefore, in order to ensure continuity of services provision, EEA firms must be able to benefit from transitional arrangements that the UK regulatory authorities unilaterally put in place, have separate FCA authorisation or be able to rely on an exemption.

7. I work at an FCA regulated, UK firm which has EEA clients, how will Brexit affect my ability to service them?

The passporting provisions under (EU) MiFID II no longer benefit UK authorised firms. Whilst the UK and the EU have agreed a mutual cooperation agreement, this does not include terms governing the cross-border provision of financial services. Therefore, in order to ensure continuity of services provision, UK-based firms with EEA clients should consider how they will continue accessing these clients. There are a number of potential options available and the most appropriate solution will depend on the firm's business model, the type of investment activity being provided and the size of their EEA client base. The relevant options include:

- (i) Considering the application of any temporary legislation introduced by the Member States to facilitate the continued provision of services by UK firms;
- (ii) Establishing a new entity in the EEA and applying for a licence from the relevant regulator. This entity could then benefit from a MiFID II passport and service clients throughout the EEA;
- (iii) Considering the relevance of “reverse solicitation” to its services.

It is also worth noting that the designation of the LME’s contracts as ETD or OTC (see question 10 below) could also be relevant to EEA clients as it could impact their regulatory capital obligations or their designation as NFC-/NFC+ for EMIR purposes.

8. The LME Rules include certain requirements concerning how my firm is regulated. What will loss of passporting rights mean for the LME Rules?

The LME Rules do not limit membership based on regulated status. However, they do impose some additional obligations for those firms which do not have a UK licence. Therefore an EEA-based firm which previously relied on a MiFID II passport, and which is not authorised by the FCA or reliant on any temporary permissions regime, may be required to provide the LME with a legal memorandum of advice explaining the basis on which it is able to trade on the LME without breaching the UK regulatory regime. Such a basis may include the reliance on an exemption under the UK’s Regulated Activities Order, for example the exemption applicable to entities that do not have a UK presence and which undertake regulated activities “with or through” a UK regulated firm.

9. What will loss of passporting rights mean in terms of the requirements imposed on Members by the LME Clear Rules?

The LME Clear Rules mandate that Members maintain all regulatory authorisations in all jurisdictions for which they are required.

Additional requirements apply in relation to General Clearing Members, who are required by the LME Clear Rules to be regulated (either in the EEA or in another country deemed acceptable) and not prohibited from being a General Clearing Member by the laws and regulations that apply to them. Generally, Clearing Members must be either:

- a credit institution or investment firm as defined in UK/EU legislation (or the equivalent in a non-EU/non-UK country), or;
- permitted to carry on regulated financial services activities in the UK under UK law. This could be either because they are authorised by the UK authorities, or because an exemption applies.

Members carrying on activities in the UK from the EEA will need to review the basis on which they do this. Members relying on passporting rights will need to ensure that they are able to lawfully continue their activities in the UK.

Exchange traded derivatives and OTC contracts

10. Will LME contracts continue to be viewed as Exchange Traded Derivatives (ETDs) for EEA counterparties?

Prior to the end of the transition period, the LME's contracts were seen as ETDs for the purpose of EU MiFID II and EU EMIR. As the LME has not been deemed to be an "equivalent" trading venue under EU law, any derivative contract executed on the LME from 1 January 2021 onwards, will be considered as OTC from an EU perspective. Any derivative contract executed on the LME before this date, will continue to be considered as ETD from an EU perspective.

The classification of LME contracts as OTC may introduce additional regulatory obligations for EEA counterparties and UK counterparties trading with EEA counterparties. These may include additional reporting obligations and could contribute to the mandatory clearing threshold for entities currently designated as NFC-.

From a UK law perspective, all LME contracts will continue to be classified as ETDs.

Regulatory Capital

11. My firm is an EEA regulated Clearing Member. How could our capital position be impacted?

The European Capital Requirements Regulation (CRR) imposes requirements on the level of capital that regulated firms must hold. The level of capital that a firm is required to hold depends on the level of risk exposure within its business. CRR stipulates how these risk levels should be calculated. Where firms that are subject to the CRR have exposures to a CCP, the risk weighting that it must apply to those exposures will depend upon the regulatory status of that CCP. In particular, a CCP that is authorised or recognised under EMIR is deemed to be a "qualifying CCP" (QCCP) under the CRR. The risk weighting that must be applied for exposures to a QCCP is significantly more favourable than the risk weighting for CCPs which are not QCCPs. This means that more capital must be held against exposures to a CCP that is not a QCCP. LME Clear is a QCCP for these purposes.

Further information

12. Who should we contact for further information?

For more information on the UK's withdrawal from the EU and its impact on your LME business please contact Brexit@lme.com.

13. Who should we contact for further information if we wish to change the legal entity which is a Member of LME Clear?

If you wish to apply for new LME or LME Clear membership, or you wish to change the legal entity within your group which is a Member of LME and LME Clear, you should contact your usual relationship manager or email LMERM@lme.com. Please be aware that any new Member entity must meet the eligibility criteria in order to become a Member in accordance with the LME Clear rules and procedures.

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