

Preparation for a “no deal” Brexit - Steps to enable certain ECM mandates to continue seamlessly

Q&A for issuers

1 What is the purpose of this Q&A?

The purpose of this Q&A is to explain to issuers why investment banks and capital markets firms in the UK (referred to as “UK banks” in this Q&A) require additional flexibility to enable certain ECM mandates to continue without disruption after Brexit.

2 Which mandates does this Q&A cover?

This Q&A covers certain mandates entered into by a UK bank with an EEA domiciled issuer and/or selling shareholder(s) (together, an “**issuer**”) prior to a “no-deal” Brexit but which will continue after Brexit (“**in-flight mandates**”).

3 Why is additional flexibility required for in-flight mandates?

On a typical ECM transaction, a bank customarily enters into a mandate with an issuer, under which the bank agrees, on the issuer’s behalf, to source investors to subscribe for or purchase (“**place**”) shares and/or to purchase (“**underwrite**”) the shares. Placing and underwriting services are regulated activities in the UK and the EEA. In some jurisdictions, sourcing expressions of interest from investors during the book-building process may also be subject to regulatory requirements.

Pre-Brexit, UK banks can rely on a pan-European “passport” to provide underwriting and placing services to EEA issuers and interact with EEA investors during the bookbuilding process, without triggering a local licensing requirement in the EEA jurisdiction where the issuer/investor is located.

On a “no-deal” Brexit, the ability to “passport” will not be available to UK banks and therefore UK banks will no longer be able to undertake these activities/services to an EEA issuer/EEA investors unless they have a licence in each relevant jurisdiction (or an available exemption or Brexit transitional measure applies – see Question 4).

4 Why can’t banks use an exemption or transitional measure?

Some EEA jurisdictions have general exemptions or are intending to implement (or have implemented) Brexit transitional measures which will permit UK banks to continue to provide certain services to clients in that jurisdiction for a limited period following a no-deal Brexit. These general exemptions and/or measures may be helpful in certain instances but are unlikely to be comprehensive.

5 Can you give an example of what this means in practice?

If a UK bank enters into an underwriting agreement with a Spanish issuer before Brexit under which it agrees to place and/or underwrite shares on the issuer’s behalf, after Brexit the UK bank must have a licence covering this activity in Spain (in addition to its UK licence) unless an exemption or transitional measure applies.

6 What is the solution?

To enable an in-flight mandate to continue without interruption after Brexit, a UK bank may need to transfer the mandate to one or more of its affiliates and/or certain other parties. In addition, affected banks may need to use an affiliate and/or certain other parties in their interactions with EEA investors.

7 What measures are banks proposing to put in place?

Affected banks will include language (“**enabling language**”) in relevant legal agreements enabling them to transfer their rights and obligations under the mandate to affiliates and/or certain other parties.

8 Which agreements will be affected?

The enabling language may be included in an individual mandate letter, in the transaction agreement or in bank’s terms of business (all together, “**agreements**”).

9 What will the enabling language look like and how will it work?

Legally, the language will typically take the form of a novation clause (either automatic or triggered by the bank). On transfer, the affiliate/other party becomes the contractual counterparty to the issuer and will be the contractual and regulatory service provider.

10 Can I refuse the inclusion of the enabling language in the agreements?

We expect AFME members to require the enabling language in relevant agreements so that they are not exposed to regulatory risk.

11 Why are specific arrangements not already in place in time for “exit day”?

Most UK banks have contingency plans in place to allow them to carry on undertaking relevant services/activities with EEA issuers/investors after Brexit. However, as there is continuing significant uncertainty regarding the exact date on which the UK will exit the EU and the terms of the UK’s exit, it has not been possible for banks to set a date to implement these plans in advance of a “no deal” Brexit. A measure (such as the enabling language) is therefore required for in-flight mandates.

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