

ISDA Brexit Advice – Summary of Preliminary Analysis of Lifecycle and Other Events

Disclaimer: This page does not contain legal advice and merely is intended as an information resource to assist market participants in assessing the impact of the UK's referendum on membership of the European Union (EU) held on June 23 2016 (Brexit referendum) and in planning for the exit of the UK from the EU following the Brexit referendum and the official notification on March 29, 2017 of the UK's intention to withdraw from the EU, pursuant to Article 50 of the Lisbon Treaty.

We refer to the instructions given to counsel in the UK dated 30 July 2017 and the instructions given to counsel in all other jurisdictions set out below dated 27 July 2017 (in each case, as updated on 29 August 2017), in each case requesting the provision of advice regarding the regulatory treatment of certain lifecycle and other events with respect to OTC derivative transactions after the date on which the UK leaves the EU (the “**Exit Date**”).

Counsel was requested to advise as to whether, on or following the Exit Date, either counterparty to a transaction would be subject to any additional regulatory requirements (as compared with such requirements as at the date of counsel's response, being prior to the Exit Date) upon the occurrence of each of the events set out below under the laws of the relevant jurisdiction as currently in force, where:

- (1) the transaction was entered into before the Exit Date between (i) a UK investment firm, credit institution or branch thereof, and (ii) an investment firm or credit institution from the relevant jurisdiction, or branch thereof (or, with respect to the advice provided by UK counsel, an EU 27 investment firm, credit institution or branch thereof); and
- (2) the relevant event occurs on or after the Exit Date.

The below table summarises (and is subject to, and qualified in its entirety by, the more detailed analysis set out in) the advice from counsel in each jurisdiction in response to such instructions. References to paragraphs are to paragraphs in the applicable instructions.

As well as the assumptions set out in the applicable instructions, the summary below is given on the assumption that (i) the OTC derivative transaction is of a type which is caught by MiFID and (ii) there is no relevant MiFID exemption available.

A copy of this summary may be provided to ISDA members for the purpose of information only and only on the basis that it will not be relied upon by any such person and no such person may provide a copy of this summary to any other person.

	France	Germany	Italy	The Netherlands	Spain	United Kingdom
Payments and settlement (paragraph 3.3.1)	No additional regulatory requirements	No additional regulatory requirements	No additional regulatory requirements	No additional regulatory requirements	No additional regulatory requirements	No additional regulatory requirements <i>[Note: There may be a spectrum of views but, if this activity is regulated, the overseas persons exemption would likely be available to the EU counterparty]</i>
Exercise of an option (paragraph 3.3.2)	No additional regulatory requirements	No additional regulatory requirements (although less clear in the context of physically-settled options)	No additional regulatory requirements	No additional regulatory requirements (although this may be regulated where one party advises the other whether to exercise the option)	No additional regulatory requirements	Exercising an option by buying or selling certain types of asset (i.e. physical settlement) may be a regulated activity for which the EU counterparty requires a licence. EU counterparty is likely to be able to rely on an exemption except where acting through a UK branch
Rolling of an open position (paragraph 3.3.3)	Regulated activity for which the UK counterparty requires a licence	Regulated activity for which the UK counterparty requires a licence	Regulated activity for which the UK counterparty requires a licence	Regulated activity for which the UK counterparty requires a licence	Regulated activity for which the UK counterparty requires a licence	Regulated activity for which the EU counterparty requires a licence. EU counterparty is likely to be able to rely on an exemption except

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						where acting through a UK branch
Transfers (including substitution) of collateral under a CSA (or other title transfer collateral arrangement) (paragraph 3.3.4)	No additional regulatory requirements	No additional regulatory requirements	No additional regulatory requirements	No additional regulatory requirements	No additional regulatory requirements	Transfers of non-cash collateral may be a regulated activity for which the EU counterparty requires a licence (cash collateral would not be regulated). EU counterparty is likely to be able to rely on an exemption except where acting through a UK branch
Amendments (paragraph 3.3.5)	May be a regulated activity for which the UK counterparty requires a licence. Changes to notional amount should not be regulated, although this is particularly the case where the	May be a regulated activity for which the UK counterparty requires a licence where amendments relate to 'essential terms' (including an increase in notional	Regulated activity for which the UK counterparty requires a licence, except where (i) decrease in notional amount is in connection with decrease in principal amount of	May be a regulated activity for which the UK counterparty requires a licence where amendments are material (including changes to notional amount or any other 'core provisions')	May be a regulated activity for which the UK counterparty requires a licence where amendment is such that it could be considered a 'new transaction'. Whether changes to notional amount will be considered a new	May be a regulated activity for which the EU counterparty requires a licence where amendments are material (including changes to notional amount). EU counterparty is likely to be able to rely on an exemption except where acting through a UK branch

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		amendment (i) was expressly provided for in the terms of the original transaction or (ii) the transaction hedges an asset or financial transaction and the amendment is solely designed to keep, with no other change to the terms, the notional amount of the hedge and asset / transaction aligned	amount). See 'unwinds' for treatment of decrease in notional amount	hedged asset or (ii) where debt enforcement proceedings have been initiated with respect to the original transaction, provided in each case the restructuring takes the form of an amendment to existing documentation (rather than a confirmation for a new transaction)		transaction will depend on whether this is the case pursuant to the governing law of the transaction	
Novation (paragraph 3.3.6)	Remaining Party: EU counterparty located in the applicable jurisdiction	On the assumption that no changes made to the transaction (other than the identity of the	Regulated activity for which the new UK counterparty (transferee) requires a	Regulated activity for which the new UK counterparty (transferee) requires a	Regulated activity for which the new UK counterparty (transferee) requires a licence. No additional	Regulated activity for which the new UK counterparty (transferee) requires a licence. No additional	Regulated activity for which the EU counterparty (remaining party) requires a licence. EU counterparty (remaining party) is likely to be able to rely on an

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Transferor: UK counterparty Transferee: New UK counterparty		parties), no additional regulatory requirements. Case-by-case analysis will, however, be required	licence. No additional regulatory requirements for UK counterparty exiting the transaction (transferor)	licence. No additional regulatory requirements for UK counterparty exiting the transaction (transferor)	regulatory requirements for UK counterparty exiting the transaction (transferor)	regulatory requirements for UK counterparty exiting the transaction (transferor)	exemption except where acting through a UK branch
Remaining Party: EU counterparty located in the applicable jurisdiction Transferor: UK counterparty Transferee: EU counterparty located outside the applicable jurisdiction OR (for UK advice) non-EU counterparty		On the assumption that no changes made to the transaction (other than the identity of the parties), no additional regulatory requirements. Case-by-case analysis will, however, be required	No additional regulatory requirements	No additional regulatory requirements	No additional regulatory requirements	No additional regulatory requirements	Where the agreement takes place in the UK, regulated activity for which the EU counterparty (remaining party) requires a licence. EU counterparty (remaining party) is likely to be able to rely on an exemption except where acting through a UK branch (provided the approach to the third party is 'legitimate')

		France	Germany	Italy	The Netherlands	Spain	United Kingdom
	(outside the UK)						
	<p>Remaining Party: EU counterparty located in the applicable jurisdiction</p> <p>Transferor: UK counterparty</p> <p>Transferee: New EU counterparty located in the applicable jurisdiction OR (for UK advice) any EU counterparty</p>	<p>On the assumption that no changes made to the transaction (other than the identity of the parties), no additional regulatory requirements. Case-by-case analysis will, however, be required</p>	No additional regulatory requirements	No additional regulatory requirements	No additional regulatory requirements	No additional regulatory requirements	Where the agreement takes place in the UK, regulated activity for which the EU counterparty (remaining party) and new EU counterparty (transferee) require a licence. EU counterparties (remaining party and transferee) are likely to be able to rely on an exemption except where acting through a UK branch
	<p>Remaining Party: UK counterparty</p> <p>Transferor: EU counterparty located in the</p>	<p>On the assumption that no changes made to the transaction (other than the identity of the parties), no</p>	No additional regulatory requirements	No additional regulatory requirements	Regulated activity for which the UK counterparty (remaining party) requires a licence (although may be treated differently by regulator if the	No additional regulatory requirements	Regulated activity for which the EU counterparty (transferor) requires a licence. EU counterparty (transferor) is likely to be able to rely on an exemption except

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	<p>applicable jurisdiction</p> <p>Transferee: New UK counterparty</p>	<p>additional regulatory requirements. Case-by-case analysis will, however, be required</p>			<p>sole purpose of the novation is to deal with Brexit implications)</p>		<p>where acting through a UK branch</p>
	<p>Remaining Party: UK counterparty</p> <p>Transferor: EU counterparty located in the applicable jurisdiction</p> <p>Transferee: New EU counterparty located outside the applicable jurisdiction OR (for UK advice) non-EU counterparty</p>	<p>On the assumption that no changes made to the transaction (other than the identity of the parties), no additional regulatory requirements. Case-by-case analysis will, however, be required</p>	<p>No additional regulatory requirements</p>	<p>No additional regulatory requirements</p>	<p>Regulated activity for which the UK counterparty (remaining party) requires a licence (although may be treated differently by regulator if the sole purpose of the novation is to deal with Brexit implications)</p>	<p>No additional regulatory requirements</p>	<p>Regulated activity for which the EU counterparty (transferor) requires a licence. EU counterparty (transferor) is likely to be able to rely on an exemption except where acting through a UK branch (provided the approach to the third party is 'legitimate')</p>

		France	Germany	Italy	The Netherlands	Spain	United Kingdom
	(outside the UK)						
	<p>Remaining Party: UK counterparty</p> <p>Transferor: EU counterparty located in the applicable jurisdiction</p> <p>Transferee: New EU counterparty located in the applicable jurisdiction OR (for UK advice) any EU counterparty</p>	Regulated activity for which the UK counterparty (remaining party) requires a licence. Case-by-case analysis will, however, be required	Regulated activity for which the UK counterparty (remaining party) requires a licence	Regulated activity for which the UK counterparty (remaining party) requires a licence	Regulated activity for which the UK counterparty (remaining party) requires a licence	Regulated activity for which the UK counterparty (remaining party) requires a licence	Regulated activity for which the EU counterparty (transferor) and new EU counterparty (transferee) require a licence. EU counterparties (transferor and transferee) are likely to be able to rely on an exemption except where acting through a UK branch
Unwinds (paragraph 3.3.7)	Method (i): terminating all/part of the existing transaction	No additional regulatory requirements	No additional regulatory requirements	No additional regulatory requirements	No additional regulatory requirements	No additional regulatory requirements	Regulated activity for which the EU counterparty requires a licence. EU counterparty is likely to be able to rely on an exemption except where acting through a UK branch

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	Method (ii): entering into an offsetting transaction	Regulated activity for which the UK counterparty requires a licence (although parties would have strong arguments that no investment service had been rendered)	Regulated activity for which the UK counterparty requires a licence	Regulated activity for which the UK counterparty requires a licence	No additional regulatory requirements	Regulated activity for which the UK counterparty requires a licence	Regulated activity for which the EU counterparty requires a licence. EU counterparty is likely to be able to rely on an exemption except where acting through a UK branch
Portfolio compression (paragraph 3.3.8)	Method (i): Partially/wholly terminating trades submitted for portfolio compression, with no replacement trade	No additional regulatory requirements	No additional regulatory requirements	No additional regulatory requirements	No additional regulatory requirements	No additional regulatory requirements	Regulated activity for which the EU counterparty requires a licence. EU counterparty is likely to be able to rely on an exemption except where acting through a UK branch

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	Method (ii) terminating the trades submitted for portfolio compression and entering into one or more replacement trades	Regulated activity for which the UK counterparty requires a licence (although parties would have strong arguments that no investment service had been rendered)	Technically a regulated activity for which the UK counterparty requires a licence (although one should note that portfolio compression is expressly encouraged by MiFIR)	Technically a regulated activity for which the UK counterparty requires a licence (although one should note that portfolio compression is expressly encouraged by MiFIR)	No additional regulatory requirements	Regulated activity for which the UK counterparty requires a licence	Regulated activity for which the EU counterparty requires a licence. EU counterparty is likely to be able to rely on an exemption except where acting through a UK branch