

# ESMA's consultation on draft technical standards on the provision of investment services and activities in the EU by non-EU firms under MiFID II and MiFIR

---

February 2020

Authors: [Julia Smithers Excell](#), [Laura Kitchen](#), [Kristen DiLemmo](#)

On 31 January 2020 - the very date of the UK's withdrawal from the EU - the European Securities and Markets Authority (ESMA) issued a consultation on draft technical standards underpinning the recently revised EU market access regimes for non-EU firms under the Markets in Financial Instruments Directive II and the Markets in Financial Instruments Regulation (MiFID II / MiFIR).

## What does this mean for market participants?

Non-EU firms wishing to provide investment services in the EU must comply with onerous reporting regimes under the new EU Investment Firms Regulation and Directive (IFR / IFD) which amend MiFID II / MiFIR. ESMA itself labels these requirements as "a new and significant reporting flow" and a requirement "to report granular information" in its consultation (in which the word "detailed" is used 21 times alone).

Across its 195 pages, ESMA's paper sets out in granular detail three sets of technical standards which, if implemented in final form, would require detailed reporting, including in machine-readable format, across myriad areas. These range from a non-EU firm's turnover, number of clients, services provided, management, complaints, marketing, investor protection and product governance, to conflicts of interest and details of the firm's control functions (compliance, risk, internal audit).

Non-EU firms are required to make these reports to ESMA every year - and ESMA is also empowered to require those firms listed in ESMA's register to provide data relating to all client and own account orders and transactions in the EU across a period of five years.

Market participants' feedback to ESMA's consultation may influence ESMA's final draft RTS and ITS which will be sent to the EU Commission in Q3 2020 for endorsement. The fact that this consultation was launched on the UK's exit day serves to underline how crucial it is for market participants to input their comments to ESMA either bilaterally or via their trade associations by ESMA's 31 March deadline.

## The (highly granular) detail

- **MiFIR regime for non-EU firms providing investment services in the EU to eligible counterparties and per se professional clients, without any EU branch:** Under MiFIR Article 46(7) and (8), ESMA is consulting on:

- 
- draft regulatory technical standards (RTS) listing across 102 pages the information non-EU firms must provide to ESMA in order to be registered in ESMA's register of non-EU firms, and also for their annual reports to ESMA; and
  - draft implementing technical standards (ITS) covering the submission format for the above across 50 pages of fields and sub-fields.

ESMA's stated aims in these RTS and ITS are to ensure:

- that it is able to monitor the scale and scope of the activities of non-EU firms in the EU
  - investor protection and integrity and stability of financial markets in the EU
  - certainty for the market and the uniform treatment of non-EU firms accessing the EU
  - a comparable level of protection for EU clients receiving services from non-EU firms
  - that the new MiFIR regime does not prevent investors and issuers from investing in or obtaining funding from non-EU firms.
- **MiFID II regime for non-EU firms providing investment services to EU retail clients and elective professional clients through an EU branch:** Under MiFID II Article 41(5), EU branches of non-EU firms authorised under Article 39, which remain under the supervision of the EU Member State regulator who authorised them, are required to comply with new reporting obligations to the EU Member State regulators where they are established. ESMA's third set of draft ITS specify the format for this additional new mandatory information.

Feedback is requested on the long lists of information required for registration in ESMA's register and for the annual reports to ESMA, the format for each field and sub-field for these data, the additional details required by ESMA on the activities carried out by EU branches of non-EU firms cross-border within the EU, and on ESMA's cost-benefit analysis.

## Unsurprising focus on outsourcing

Unsurprisingly in light of EU regulators' focus on outsourcing in the Brexit context over the past 3 years, many of the fields require detailed information on the non-EU firm's outsourcing arrangements relating to its EU operations. Firms must complete multiple sub-fields specifying every single "critical or important" operational function outsourced or intended to be outsourced, and all resources allocated to the control of outsourced functions must be described in full (including personnel, technical resources, and internal control systems and processes).

## Proposed requirement for additional details on the activities of EU branches of non-EU firms cross-border within the EU to eligible counterparties and per se professional clients

ESMA is highly conscious that MiFIR Article 47(3) allows non-EU firms from "equivalent" jurisdictions with a branch authorised under MiFID II Article 39 in an EU Member State a passport to provide investment services to eligible counterparties and per se professional clients across the EU from that single branch - and without a requirement to register in the ESMA register. This means that they do not have to give ESMA all the annual and point-of-registration data which ESMA is now requiring from other non-EU firms under MiFIR Article 46. So ESMA is proposing to add to the Article 41(5) MiFID II ITS a new requirement for information on the branch's activities within the EU, to facilitate supervision by the EU branch Member State regulator of that branch's pan-EU activities. Market participants are expressly asked to sign off on this.

## Exceeding ESMA's mandate?

ESMA flags that MiFIR Article 46 is not specific regarding the list of information required from a non-EU firm applying to ESMA for registration - and recognises "that ESMA's powers at the registration point appear relatively limited". However ESMA feels that its increased responsibilities under the new MiFIR regime, and its need to calibrate and plan its oversight of each non-EU firm, plus the annual list of information required from

---

non-EU firms under MiFIR Article 46(6a), drive - and in effect empower - it to require more information from applicants than currently, and to try to align data provided at registration with those provided annually.

### **Mitigation by harmonisation: ESMA's cost-benefit analysis**

- MiFIR regime for non-EU firms providing investment services throughout the EU to eligible counterparties and per se professional clients (without any establishment in the EU)
  - ESMA notes that because no equivalence decision has been taken under the MiFIR third-country regime thus far, non-EU firms have been relying on specific national regimes in each EU jurisdiction in which they are providing investment services. Once the EU Commission starts making equivalence decisions, non-EU firms in equivalent jurisdictions can continue relying on national EU regimes for 3 more years while transitioning to the harmonised regime granting them access to the EU by applying for registration in the ESMA register.
  - ESMA views the costs of this transition, registration and annual reporting to ESMA under MiFIR Article 46 as being mitigated by the harmonised regime granting access to eligible counterparties and per se professional clients across the whole EU.
- *Changes to the MiFID II regime for non-EU firms providing investment services to retail clients and elective professional clients through an EU branch*
  - EU branches of non-EU firms authorised under MiFID II Article 39 remain under the exclusive supervisory responsibility of the EU Member State regulator which authorised them. The IFD amends MiFID II to impose further reporting obligations on these branches to the relevant regulator.
  - ESMA notes that MiFIR Article 47(3) permits non-EU firms in “equivalent” non-EU jurisdictions with EU branches to provide investment services to eligible counterparties and per se professional clients across the EU without establishing new branches and without having to register in the ESMA register.
  - This means they are not subject to the information requirements (at the point of registration and after that, annually) of MiFIR Article 46. So ESMA proposes to include in the draft implementing technical standards under MiFID II Article 41(5) additional information on the activities the EU branch is carrying out on a cross-border basis in the EU under MiFIR Article 47(3) to facilitate supervision by the branch's EU host Member State of its activities in other EU Member States.
  - ESMA views the costs of this additional reporting as being “largely” mitigated by the introduction of a harmonised annual reporting regime for those non-EU firms which have multiple EU branches. But it is not clear if ESMA's cost-benefit analysis included an assessment of the proportion of non-EU firms with multiple EU branches vis-à-vis those with a single EU branch.

### **Challenges for non-EU firms wanting EU market access**

The widening of ESMA's powers in this area follows on from some EU Member States expressing anxiety about non-EU firms receiving preferential treatment when accessing the EU market. While this concern was not necessarily unfounded, ESMA's response runs the risk of over-correction: a number of the proposed fields for annual reporting go well beyond what an authorised EU investment firm would need to report to its own regulator. This will present a significant ongoing compliance burden for non-EU firms, having to prepare different reporting returns for their home regulators and for ESMA.

Another challenge lies in business uncertainty. As originally drafted, the MiFID II / MiFIR regime for third-country access empowered ESMA to withdraw the registration of a non-EU firm under what ESMA calls “limited” circumstances (for example, where ESMA believes the firm is acting in a manner which is clearly prejudicial to the interests of EU investors or the orderly functioning of the markets). Under the new regime, ESMA's powers to withdraw registration are expanded to include a non-EU firm's failure to comply with the new annual reporting obligations. Given how extensive these obligations are, this could create considerable uncertainty for non-EU firms doing business in the EU.

---

White & Case LLP  
5 Old Broad Street  
London EC2N 1DW  
United Kingdom

**T** +44 20 7532 1000

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.

© 2020 White & Case LLP