esma Securities and Markets Stakeholder Group

Date: 28 April 2020
ESMA22-106-2365

Advice to ESMA

SMSG response to the Consultation Paper on Draft technical standards on the provision of investment services and activities in the Union by Third-county firms under MIFID II and MIFIR

Introduction

1. *Regulation (EU) 2019/2033, of the European Parliament and the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) 1093/2010, (EU) 575/2013, (EU) 600/2014 and (EU) 806/2014 (**IFR**) and the Directive (EU) 2019/2034, of the European Parliament and the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/62/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU (**IFD**) have established a new regime for third country entities intending to provide investment services and activities in the EU by amending the relevant provisions contained in Regulation 600/2014 (MIFIR) and Directive 2014/65 (MIFID II).*

2. *According to this new regulatory regime, entities that intend to provide services to eligible counterparties and per se professional clients without being established in the EU, and after the EC had adopted a decision according to article 47 (1) of MIFIR, must submit information to ESMA in order to be registered in ESMA's register.*

3. *These entities must also submit information to ESMA on an annual basis, so that ESMA is aware of their activities within the EU.*

4. *Additionally, ESMA may request specific information from these entities and carry out - in agreement with the competent authority of the third country - on-site inspections of these entities.*

5. *When a third country entity intends to open a branch in a Member State, it must obtain prior authorization from that Member State authorities and submit annually certain information to the relevant NCA. Information shall be sent then by each NCA to ESMA.*

6. *The new wording of article 47 (7) of MIFIR, introduced by the IFR, requires ESMA, in consultation with EBA, to develop draft regulatory technical standards to specify the*

information that the applicant third-country firm is to provide in the application for registration with ESMA.

7. *The new wording of article 47 (8) of MIFIR, introduced by the IFR, requires ESMA to develop draft implementing technical standards to specify the format in which the application for registration with ESMA is to be submitted, and the format for the submission of the information the third country entity must submit annually to ESMA.*

8. *The new wording of article 41(6) of MIFID II, introduced by the IFD, requires ESMA to develop draft implementing technical standards to specify the format for the information to be submitted by a branch to an NCA on an annual basis and the information submitted by that NCA to ESMA is to be reported.*

9. *The ESMA Consultation Paper explains the approach followed by ESMA when developing the RTS and the ITS under articles 46(7) and (8) of MIFIR and article 41 (6) of MIFID II.*

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General comments

10. The new EU rules governing information that third country entities must provide to ESMA (where there is no branch and services are addressed at eligible counterparties and *per se* professional clients) and to the NCA (in the case of branches) are clearly designed to deal with the provision of investment services by a potentially significant number of third country entities (to a large extent from the UK) in the EU, which is not the case today.

11. ESMA will very probably be receiving a great deal of information and the SMSG is of the opinion that ESMA should be provided with the necessary operational capacities, for properly receiving, reviewing and assessing this information.

12. The SMSG is aware that the CP is focused on the content and format of information the third country entities must provide to EU authorities, be it ESMA or the relevant NCA. However, the SMSG believes that the RTS and ITS should be aligned and support the principles that should govern the regulatory regime for third country entities providing investment services and activities in the EU.

13. The SMSG is of the opinion that these principles should include the following:

- A level playing field between third country entities and EU entities should be guaranteed within the EU, so that potential incentives for the EU industry to move to a third country be avoided, limiting the risk of an EU industry relocation, and promoting EU industry development.

- EU markets must remain open to third country entities to operate and provide liquidity and volume, avoiding unnecessary regulatory restrictions.

14. The SMSG's general assessment of the RTS and the two ITSs is positive. Since they, however, require in general the necessary information on a quite exhaustive form, the SMSG makes a number of suggestions below to better align the RTS and ITSs to the extent possible with the above mentioned principles, and to increase ESMA and NCA capacities to discharge their respective functions. Information can prove to be a very valuable instrument for this.

Specific comments

15. The SMSG is of the opinion that ESMA and the NCAs should obtain all the necessary information to at least:

    i. Have a clear image of what the reality is as regards the provision of investment services to clients in the EU.
    ii. Identify potential risks.
    iii. Be able to identify any potential circumvention of EU law by third country entities. The use of the reverse solicitation option by third country entities beyond their regulatory borders is a major concern in this respect.

16. In addition, ESMA should have the necessary information to properly exercise its new powers, such as requiring additional information, conducting on-site inspections, or temporally prohibit or restrict the provision of investment services in the EU.

17. It should be very clear from the RTS and ITS that ESMA can ask for additional information from the third country entity at any moment when ESMA deems it appropriate, according to and within the limits of ESMA's powers. Consequently, the RTS and ITS should contain the obligation for third country entities to provide ESMA with any additional information ESMA could require from the entity.

18. It would be helpful if the RTS would require that each third country entity appoints a person for the ongoing relationship with ESMA and particularly for situations where a quick contact might be necessary. While the Annex is in line with this idea, an express reference in the RTS wording would be advisable.

19. The SMSG is of the opinion that the RTS should establish that third country entities must inform ESMA of any material change in their domestic regulations or specific regulatory or operational conditions affecting the entity, without waiting until the next annual information.

20. The SMSG acknowledges that the Annexes contain a certain level of granularity of data regarding different types of clients. This is very positive since it will be helpful that ESMA and the relevant NCA in the case of a branch, have sufficient information regarding specific types of clients in respect of each specific kind of services and each specific product.

21. When asking for the entity marketing strategies, additional information could be required as regards the level of reverse solicitation services provided to EU clients by the entity or any entity pertaining to the same group. Financial groups provide different kinds of

services to different kinds of clients from different entities within the group, or even from different departments or areas within the same entity. The SMSG therefore believes that requiring information on reverse solicitation could result in (i) ESMA receiving additional information that could be of interest, (ii) avoiding that with one registration a broader scope of services is covered, including the provision of services beyond the reverse solicitation rules, and (iii) EU rules giving a clear message that reverse solicitation will be followed and paid attention to.

22. It would be very useful if ESMA received detailed information as to the nature and content of the complaints directed by EU clients to the third county entity. This can give a clear image of the potential problems a particular entity might be creating within the Union. Annexes to the RTS already foresee that some information be provided on this.

23. ESMA, or the relevant NCA, have no prudential supervision capacities over a third country entity. The SMSG considers that it would, nevertheless, be advisable that third country entities provide ESMA, or the relevant NCA, with the last report the entity had made public as regards prudential and capital adequacy information. This information could be of help in specific cases for ESMA or the NCA to assess the risk a particular entity might pose to clients in the EU.

24. It is not clear what the consequences are for a third country entity providing poor or incorrect data to ESMA or the relevant NCA. This should be clarified.

25. The SMSG acknowledges that ESG factors and how they are implemented and integrated within entities' organizations and in the relationship with clients, is a priority.

    The SMSG therefore recommends that the RTS and ITS require that as part of the information delivered by third country entities, whether to ESMA or to the NCA, information regarding the implementation and integration of ESG factors should be included.

    Thus, ESMA and the relevant NCA should receive information from third country entities regarding how they integrate ESG factors within their organization as well as in their activities within the EU and in their relationship with EU investors.

    The SMSG does not propose that ESMA conducts any kind of reconciliation between third country and EU ESG regulatory regimes, but that ESMA and the relevant NCA, receive this information in order to be able to make a proper assessment of the activities third country entities develop in the EU to better discharge ESMA and NCA functions.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's web-site.

Adopted on 10 April 2020.

[signed]

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Chair
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