



## October 2020

### MiFID II: ESMA Publishes Final Report on Third-Country Firm Regime

On September 28, the European Securities and Markets Authority (**ESMA**) published its final report (**Final Report**), accompanied by final draft regulatory and implementing technical standards (**RTS** and **ITS**) on the provision of investment services and activities in the European Union (**EU**) by third-country firms (**TCFs**) under the Markets in Financial Instruments Directive (2014/65/EU) (**MiFID II**) and the Markets in Financial Instruments Regulation (600/2014/EU) (**MiFIR**).

#### Summary of the Final Report

On 31 January 2020, ESMA published a Consultation Paper containing the proposed technical standards (see our previous article [here](#)). Having considered the responses to the consultation paper ESMA has now published the Final Report and the draft ITS and RTS.

The draft RTS and ITS give further effect to changes made to MiFID II and MiFIR in respect of the provision of investment services and activities in the EU by TCFs, brought about by the Investment Firms Regulation (EU) 2019/2033 (**IFR**) and the Investment Firms Directive (EU) 2019/2034 (**IFD**).

#### Investment services provided in the EU on a cross-border basis

Changes introduced by IFR which amend the MiFIR regime for TCFs that intend to provide investment services and activities to eligible counterparties and per se professional clients on a cross border basis (within the meaning of Annex II of the MiFID II) include:

- a) the introduction of a reporting flow from TCFs to ESMA, on an annual basis;

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- b) the requirement to report granular information on services and activities to ESMA, on an annual basis, and to provide ESMA with access to relevant data; and
- c) new powers for ESMA to conduct on-site inspections and to temporarily prohibit or restrict the provision of investment services or activities in the EU by a TCF under Article 46 of MiFIR.

ESMA was mandated to prepare draft technical standards in relation to the revised third-country regime under MiFIR. To this end the following final draft RTS are appended to the Final Report:

- a) RTS to specify the information that TCFs must provide to ESMA for registration of the firm in the ESMA register of TCFs (Article 46(4) of MiFIR); and
- b) RTS to specify the information that TCFs are required to report annually to ESMA (Article 46(6a) of MiFIR with effect from 26 June 2021).

#### **Branches of Non-EU Investment Firms**

The IFD introduced changes to the provision of investment services and activities by TCFs to retail clients and professional clients (within the meaning of Section II of Annex II of MiFID II) through branches under MiFID II, including:

- a) a requirement on ESMA to publish annually a list of branches of TCFs active in the EU, based on information collected from national competent authorities (**NCAs**); and
- b) the introduction of reporting obligations on the branch of a TCF to report to the competent authority of the Member State where the branch is established.

ESMA was mandated to develop an ITS to specify the format in which the information required to be provided by a TCF branch under Article 41(3) of MiFID II is to be reported. In fulfilment of this mandate a draft ITS is appended to the Final Report specifying the format in which the required new flow of information is to be reported to Member State competent authorities by branches of TCFs.

#### **Next Steps**

The draft RTS and ITS have been submitted to the European Commission (**Commission**) for adoption. The Commission has three months to decide whether to adopt the technical standards and it is expected that they will be approved and published in the Official Journal of the EU before the end of this year before entering into force on 21 June 2021.

Given that the UK looks set to become a 'third country' for the purposes of EU law with effect from 1 January 2021, the new rules will have a significant impact on UK investment firms doing business in the EU and, potentially, their clients and counterparties.

A link to the Final Report can be found [here](#).

If you have any queries about the information contained in this article, please contact Keith Waine

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