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ESMA issues supervisory briefing on supervisory expectations in relation to firms using tied agents in the MiFID II framework

On 2 February 2022, the European Securities and Markets Authority (ESMA) issued a [supervisory briefing](#) on its expectations in relation to firms using tied agents in the MiFID II¹ framework.

The supervisory briefing is of particular relevance to UK investment firms. ESMA has been monitoring the behaviour of UK firms for compliance with the MiFID II legislative framework following the UK's departure from the EU on 31 December 2020 (**Brexit Date**).

Background

Under the MiFID II framework, investment firms may appoint and use tied agents to undertake investment and ancillary activities on behalf of the firm where that tied agent works solely on behalf of the investment firm. These tied agents avoid regulation under MiFID II. However, where the agent acts for more than one investment firm, it will not be considered a tied agent and will instead be considered an investment firm falling within the scope of MiFID II.

When appointing tied agents, investment firms must comply with the requirements under Article 29 of MiFID II, including that the firm “remains fully and unconditionally responsible for any action or omission on the part of the tied agent when acting on behalf of the firm and that firms shall monitor the activities of their tied agents so as to ensure that they continue to comply with MiFID II when acting through tied agents”.

The supervisory briefing outlines the expectations of ESMA and the national competent authorities (NCAs) in relation to the appointment and use of tied agents in the provision of investment services. ESMA places particular focus on firms assessing the appropriateness of tied agents prior to appointment and ensuring that the firm has sufficient oversight and monitoring of the tied agents' activities on an on-going basis.

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¹ Directive 2014/65/EU (Markets in Financial Instruments Directive)

The appointment of a tied agent

ESMA outlines the following expectations of firms when appointing tied agents:

- ▣ Firms should have a clear understanding of how the tied agent fits into the firm's strategy, including what types of clients the tied agent will be dealing with and how the firm will obtain and deal with these clients.
- ▣ Before appointing a tied agent, the firm should (i) conduct a proper and comprehensive assessment of the tied agent's suitability, organisational structure, reputation, reporting capability, etc. and (ii) put in place appropriate arrangements to monitor the tied agent's activities for compliance with MiFID II requirements. ESMA considers this is especially important where the tied agent may have close links to other entities, including non-EU entities, that could exercise inappropriate influence over the way in which the tied agent carries out the activities on behalf of the firm.
- ▣ If the tied agent is a legal person, the firm should assess its resources including the number of natural persons within the tied agent which are involved in the provision of services or activities on behalf of the firm, the locations of the employees or natural persons working under the control of the tied agent and how those persons or employees are monitored.
- ▣ If the tied agent is permitted to hold money and/or financial instruments of clients, the firm should assess the tied agent's financial situation and ensure the tied agent has appropriate arrangements in place to comply with MiFID II requirements on the safeguarding of clients' assets.
- ▣ Firms should clearly agree with the tied agent their respective rights and obligations to the satisfaction of the relevant NCA, including the firm's rights in respect of instruction and termination, rights of information, rights of inspection and access to books and premises of the tied agent.
- ▣ The firm is also expected to seek confirmation that the tied agent will not rely on third parties for the provision of services on behalf of the firm.
- ▣ The supervisory briefing includes a list of minimum requirements for inclusion in the agreement between the firm and the tied agent.

Close ties to other entities

ESMA expects NCAs to assess and consider the appropriateness of the firm's assessment of a tied agent and to carefully scrutinise a firm's business model where it mainly consists of appointing tied agents with close ties to other entities, including third-country entities, as such entities may exercise influence over the activities the tied agent carries out on behalf of the firm.

The use of a tied agent

ESMA reminds firms of their obligations to monitor the activities of their tied agents so as to ensure that they continue to comply with MiFID II and expects firms using tied agents to devote sufficient company resources to the oversight and monitoring of their tied agents' activities, especially where the tied agent has close links to other entities, including third-country entities.

ESMA restates the organisational requirements applicable to the firms and their relevant persons² (including tied agents) under Regulation 2017/565 (**MiFID II Delegated Regulation**), including appropriate monitoring of the relevant persons by the firm's compliance function and risk management framework, remuneration policies and procedures, and a conflicts of interest policy which must be consistent with the obligations under MiFID II to ensure the relevant persons act independently and in the best interests of the client. Firm should give particular attention to the conflicts of interest which may arise from the relationship between the appointed tied agent and other entities or third-country entities with which the tied agent has close links.

NCA's should be satisfied that firms have adequate organisational arrangements in place for monitoring their tied agents' activities; appropriate reporting mechanisms established with the tied agents; and appropriate mechanisms to assess the quality of services provided by the tied agent on behalf of the firm.

Firms are also expected to:

- ❑ monitor the financial situation of their tied agents on an on-going basis, especially where the tied agent holds client money and/or financial instruments on behalf of client;
- ❑ deal with any complaints relating to the activities the tied agent performs on its behalf; and
- ❑ have the ability to terminate the relationship with the tied agent, with immediate effect without detriment to the quality of services where this is in the best interests of the client.

Commentary

It is clear that ESMA is concerned about the independence of tied agents and their operational 'substance' in the EU, particularly for tied agents who have close links to UK or other third country entities.

ESMA is looking for firms to conduct enhanced oversight and monitoring of their tied agents to ensure that the tied agent (i) has adequate and appropriate staffing arrangements (ESMA

² A relevant person is defined in Article 2 of the MiFID II Delegated Regulation in relation to an investment firm as any of the following: (a) a director, partner or equivalent, manager or tied agent of the firm; (b) a director, partner or equivalent, or manager of any tied agent of the firm; (c) an employee of the firm or of a tied agent of the firm, as well as any other natural person whose services are placed at the disposal and under the control of the firm or a tied agent of the firm and who is involved in the provision by the firm of investment services and activities; (d) a natural person who is directly involved in the provision of services to the investment firm or to its tied agent under an outsourcing arrangement for the purpose of the provision by the firm of investment services and activities.

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references staff sharing and secondee arrangements as a concern) and (ii) is operating using their own resources and not mainly from the resources of a UK or other third-country entity.

This follows on from the [public statement](#) issued by ESMA in January 2021 reminding firms of the MiFID II rules on ‘reverse solicitation’, having observed what it considered “some questionable practices” by UK firms following the Brexit Date. In that statement, ESMA warned that where a third-country firm solicits clients or potential clients in the EU, or promotes or advertises investment services or activities in the EU, it should not be deemed a service provided at the exclusive initiative of the client *“regardless of any contractual clause or disclaimer purporting to state, for example, that the third country firm will be deemed to respond to the exclusive initiative of the client”*.

The supervisory briefing is non-binding, however, its objective is to encourage common supervisory approaches and practices throughout the EU and NCAs are expected to apply the supervisory briefing within a reasonable timeframe. We expect the Central Bank of Ireland to do so.

It is recommended that EU investment firms using tied agents conduct a review of their existing policies and practices related to the appointment and monitoring of their tied agents to ensure compliance with the MiFID II requirements and ESMA’s expectations. UK or other third-country entities, including firms with related entities operating out of the EU may also want to review their current activities.

If you have any questions or require assistance to ensure you are compliant with ESMA’s supervisory expectations, please contact the authors or your usual Dillon Eustace contact.

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