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Non-EU Investment Firms - ESMA consults on technical standards

On 31 January 2020, the European Securities and Markets Authority (“**ESMA**”) issued a consultation paper entitled “Draft technical standards on the provision of investment services and activities in the Union by third-country firms under MiFID II and MiFIR” (“**Consultation Paper**”).

By way of background, ESMA is mandated by the Investment Firms Regulations (EU) 2019/2033 (“**IFR**”) and the Investment Firms Directive (EU) 2019/2034 (“**IFD**”) to develop draft technical standards setting out the functioning of the new regime for third-country investment firms (i.e. firms established in jurisdictions outside the EU) and to embed the changes brought about by both the IFD and the IFR.

The rules relating to the provision of investment services and activities by third-country firms are found in both the MiFID II Directive 2014/65/EU (“**MiFID II Directive**”) and Regulation 600/2014/EU (“**MiFIR**”). Broadly speaking the MiFID II Directive addresses the provision of investment services through a branch established in an EU Member State, whereas MiFIR allows for the provision of investment services on a cross-border basis (i.e. without a branch being established in the EU).

Providing investment services in the EU on a cross-border basis

The IFR introduced changes, most of which will come into effect in June 2021, to the existing MiFIR regime for third country firms that intend to provide investment services to eligible counterparties and

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per se professional clients (within the meaning of Annex II of the MiFID II Directive). These changes include:

- A requirement to report granular information on investment services and activities to ESMA on an annual basis, and to provide ESMA with access to the relevant data;
- ESMA will have the power to require firms included on the ESMA register of third country firms to provide data relating to all orders and all transactions in the EU, whether on own account or on behalf of a client, for a period of five years;
- A requirement that ESMA share information, upon request, with the competent authorities of the Member States where a third country firm is providing investment services and performing activities;
- ESMA will have the power to conduct on-site inspections; and
- ESMA will have the power to temporarily prohibit or restrict the provision of investment services or the performance of activities in the EU, in certain instances, including where a third country firm has failed to comply with product intervention measures taken by ESMA or the European Banking Authority or the competent authorities of a Member State pursuant to MiFIR.

Branches of Non-EU Investment Firms

The IFD introduces changes of relevance to third country firms providing or intending to provide investment services to retail clients and elective professional clients by establishing a branch in a Member State pursuant to the MiFID II Directive. These changes include:

- ESMA will be mandated to publish annually a list of branches of third country firms active in the EU, based on information collected from national competent authorities; and
- Further reporting obligations will be placed on the branch of a third country firm and the competent authorities of the Member State where the branch is established.

Proposed Technical Standards

ESMA seeks submissions on the following proposed measures:

- (i) Draft regulatory technical standards specifying the information that third-country firms must provide to ESMA upon registration in the register of third-country firms and the information that third-country firms must report annually to ESMA;
- (ii) Draft implementing technical standards to specify the format in which the information for the registration of the firm and for the annual report to ESMA should be submitted; and
- (iii) Draft implementing technical standards to specify the format in which the new flow of information provided under the MiFID II Directive is to be reported to Member State competent authorities by branches of third-country firms.

Next Steps

The deadline for feedback on the Consultation Paper is 31 March 2020. ESMA has stated that it expects to publish the draft technical standards and send its final report to the European Commission for endorsement in Q3 2020.

A link to the Consultation Paper can be found [here](#).

If you have any queries about the information contained in this article, please contact Keith Waine or Enda McGeever or your usual Dillon Eustace contact.

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