

MiFID II

Exemption for incidental services

December 2016

Key Points

- Professionals providing investment services in an "incidental" manner are exempt from the scope of MiFID II.
- The Commission adopted a proposal for the MiFID II Delegated Regulation in April 2016.
- The Delegated Regulation states that, in order to be "incidental", an investment service must satisfy all of the following conditions:
 - a close and factual connection must exist between the professional activity and the investment service;
 - providing investment services should not be a systematic source of income; and
 - the investment services should not be marketed or otherwise promoted, except where these are disclosed as accessory to the main professional activity.

Exemption for incidental services

The MiFID I Directive includes a provision that exempts professionals from the scope of MiFID where they provide an investment service in a manner that is "incidental" to their professional activity. This exemption is contained in article 2(1)(c) of the MiFID I Directive, which states that the scope of MiFID shall not apply to:

"persons providing an investment service where that service is provided in an incidental manner in the course of a professional activity and that activity is regulated by legal or regulatory provisions or a code of ethics governing the profession which do not exclude the provision of that service."

This provision is repeated in identical wording in the MiFID II Directive.¹ The Commission is required by MiFID II to adopt delegated acts to clarify the exemption for investment services provided "in an incidental manner".² ESMA accordingly consulted and provided technical advice for the Commission on this issue.

ESMA noted that member states have developed their own interpretations, leading to a divergence between national regimes on this

issue. Consequently, ESMA recommended a common approach that will ensure greater harmonisation across the EU.

ESMA consultation

In its May 2014 consultation paper, ESMA proposed that an investment service should be regarded as "incidental" if there is such a close and factual connection between the professional activity and the provision of the investment service that the investment service should be regarded as accessory to one or more aspects of the main professional activity. In particular, ESMA noted that a service should not be interpreted as "incidental" purely on the basis of its frequency or duration.³

To illustrate its proposal, ESMA provided the example of a law firm that offers legal advice in relation to transportation and logistics. In the course of giving legal advice to a client on a commercial agreement, the firm may offer advice on risk hedging in relation to that agreement. According to ESMA, this would fall within the exemption for an investment service provided in an incidental manner. This should not be considered as investment advice. However, if the firm's lawyer offered advice in the course of business on a client's personal investments, then this would be regarded as advising on investments and would be within the scope of MiFID.⁴

The ESMA consultation closed for comments on 1 August 2014.

ESMA Technical Advice

ESMA subsequently published its Technical Advice on 19 December 2014.⁵ The Technical Advice set out three conditions, all of which a person must meet in order to provide an investment service in an "incidental manner" for the purposes of the exemption outlined above:

- There must be a close and factual connection, including in temporal terms, between the professional activity and the provision of the investment service to the client, such that the investment service is regarded as accessory to the main

¹ Article 2(1)(c), MiFID II Directive.

² Article 2(3), MiFID II Directive.

³ ESMA, Consultation Paper, 22 May 2014, Chapter 2.1.

⁴ ESMA, Consultation Paper, 22 May 2014, Chapter 2.1

⁵ ESMA, Final Report: Technical Advice to the Commission on MiFID II and MiFIR, 19 December 2014 (ESMA/2014/1569) (the "Technical Advice").

professional activity of the person concerned.

- The provision of investment service is not intended to provide a systematic source of income.
- The professional does not market or promote his or her availability to provide investment services, unless these are disclosed to clients as being accessory to the main professional activity.

In relation to marketing, ESMA has commented that it would be acceptable for a professional firm merely to inform its clients that it could provide accessory investment services if required. This would not bring the services within the scope of MiFID.⁶

The MiFID II Delegated Regulation

The European Commission published its draft MiFID II Delegated Regulation on 25 April 2014.⁷ Article 4 of the Delegated Regulation sets out the definition of when an investment service is deemed to be provided in an incidental manner in the course of a professional activity.

The Commission's draft closely followed the ESMA technical advice. It states that the investment service will be incidental if it satisfies all of the following conditions:

- a close and factual connection exists between the professional activity and the provision of the investment service to the same client, such that the investment service can be regarded as accessory to the main professional activity;
- the provision of investment services to the clients of the main professional activity does not aim to provide a systematic source of income to the person providing the professional activity; and
- the person providing the professional activity does not market or otherwise promote his ability to provide investment services, except where these are disclosed to

clients as being accessory to the main professional activity.

In addition, Recital 34 emphasises that this exemption will only apply if the investment service has an "intrinsic connection" and is subordinated to the main area of the firm's professional activity.

Timescales for implementation

Following the confirmation of a one-year delay to the MiFID II timetable, most of the provisions in the MiFID II legislative package will come into effect in Member States from 3 January 2018. Member states will have until July 2017 to transpose the MiFID II Directive into national law.

6 ESMA, Technical Advice, 19 December 2014, Chapter 2.1.

7 Commission Delegated Regulation (EU) .../... of 25.4.2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

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