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MiFID II

Third country access

Key Points

- MiFID II will allow third country (i.e. non-EU) firms to provide cross-border services in relation to per se professional clients and eligible counterparties from outside the EU without setting up a branch
- A member state may require a non-EU firm to establish a branch in order to have access to retail clients and elective professional clients in its territory. This branch would be unable to provide services to retail or elective professional clients in the rest of the EU. However, the branch would be allowed to provide services to per se professional clients and eligible counterparties across the EU
- Subject to certain requirements, third country trading venues and central counterparties ("**CCPs**") will be permitted access to EU CCPs and trading venues, provided that foreign trading venues and CCPs have equivalent access in those third countries

2016

Third country access under MiFID II

Negotiations over the MiFID II regime for access by third country (i.e. non-EU) firms to the EU's markets have led to intensive lobbying and debate. At stake has been the issue of whether third country firms should be permitted in certain circumstances to operate on a basis similar to the current passporting regime for EEA firms. The resulting compromise is a mixture of harmonised requirements that will apply across the EU and other rules that may be applied at the discretion of the member states.[1]

Providing cross-border services into the EU

The MiFID II rules on third country firm access have been harmonised in relation to per se professional clients and eligible counterparties. In contrast, member states may apply national rules in relation to marketing to retail clients and elective professional clients.

However, MiFID II will provide a regime for retail clients and elective professional clients that member states may choose to apply.

Per se professional clients and eligible counterparties

Under the Markets in Financial Instruments Regulation ("**MiFIR**"), a non-EU firm will be able to provide cross-border services from outside the EU to per se professional clients and eligible counterparties established in the EU without establishing a branch, provided that:

- the EU deems the regulatory regime of the firm's home jurisdiction to be equivalent to the EU; and
- ESMA agrees to include the firm on its register of permitted firms.[2]

Retail clients and elective professional clients

There is no provision in MiFID II that allows non-EU firms a right to provide cross-border services to retail clients or retail clients who have elected to become professional clients. Consequently, where a non-EU firm wishes to provide services to these categories of clients, it might be necessary to create a branch in each member state in which the firm wishes to provide services.[3]

Establishing branches in the EU

Retail clients and elective professional clients

A member state may require a non-EU firm wishing to provide services to retail clients or to elective professional clients to establish an authorised branch in that member state. The member state must require any such branch to be authorised by that member state.[4]

Per se professional clients and eligible counterparties

If a non-EU firm has established a branch in a member state for the purposes of article 39 of the MiFID II Directive then, if that firm is established in an jurisdiction deemed to be equivalent to the EU, it can provide services to per se professional clients and eligible counterparties, without establishing new branches in each state, provided that it complies with the MiFID II information requirements that apply to the passporting of services.[5]

Access by third country CCPs and trading venues

A trading venue in a third country will be able to request access to EU CCPs, provided that the European Commission has adopted a decision stating that the legal and supervisory framework for trading venues in that third country is equivalent to the requirements for trading venues under MiFIR. Similarly, a CCP in a third country will be able to request access to a trading venue in the EU, provided the CCP is recognised under EMIR.[6]

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[1] For example, the UK government has announced that it intends to exercise its discretion not to implement the third country branch passporting provisions in article 39 of the MiFID II Directive: see HM Treasury, Transposition of the MiFID II Directive, March 2015.

[2] MiFIR, Recital (42) and article 46(1).

[3] MiFID II Directive, Recital (109).

[4] MiFID II Directive, article 39(1).

[5] MiFIR, article 47(3).

[6] MiFIR, article 38.

CCPs and trading venues in third countries will only be permitted to take advantage of their rights to non-discriminatory access to trading venues and CCPs inside the EU if the Commission has adopted a decision to the effect that the legal and supervisory framework of the relevant third country is considered to provide for an effective equivalent system for permitting CCPs and trading venues authorised under foreign regimes access to CCPs and trading venues established in that third country.[7]

Timescales for implementation

The MiFID II Directive and MiFIR came into force on 3 July 2014. Most of their provisions are currently stated to come into effect in member states from 3 January 2017, with Member states having until July 2016 to transpose the MiFID II Directive into national law.

However, following discussions between ESMA and the European institutions, it is now expected that the implementation of MiFID II will be delayed until January 2018.

[7] MiFIR, article 38.

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