

3 March 2020

## ESMA Consultation & Other Updates

### ESMA consults on the new MiFIR and MiFID II Regimes for Third-Country Firms

#### Background and Scope

European Securities and Markets Authority (“ESMA”) has launched a public consultation on [draft technical standards on the provision of investment services and activities in the Union by third-country firms under MiFID II and MiFIR](#) in order to seek input from investment firms with regards to the draft technical standards being proposed.

The new Investment Firms Regulation (EU) No 2019/2033 (IFR) and Directive (EU) 2019/2034 (IFD) introduced changes to MiFIR and MiFID II regimes for the provision of investment services and activities in the EU by third-country firms. ESMA is mandated to develop Draft Technical standards setting out the functioning of this new regime. The draft Technical Standards will be submitted to the European Commission for the adoption of the final legal text.

These changes include new reporting requirements from third-country firms to ESMA on an annual basis in accordance with Article 46 of MiFIR; and grant ESMA the power to ask third-country firms in the ESMA register 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.

This Consultation Paper explains the approach followed by ESMA when developing the regulatory technical standards and implementing technical standards under Articles 46(7) and (8) of MiFIR and Article 41(5) of MiFID II. The Consultation Paper indicates that the proposed changes will take the form of:

[i] Draft regulatory technical standards to specify the information that third-country firms must provide to ESMA for the registration in the ESMA register of third-country firms and for the information that third-country firms have to 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.

While branches of third-country firms authorised under Article 39 of MiFID II remain under the supervisory responsibility of the competent authorities of the Member State where they have been authorised, the IFD amends MiFID II to provide for further reporting obligations on such branches to the competent authorities of the Member State where they are established. In accordance with Article 41(5) of MiFID II, ESMA shall develop draft implementing technical standards to specify the format in which the new flow of information provided by MiFID II is to be reported to NCAs by branches of third-country firms.

## Target Audience

The Consultation Paper is addressed to investment firms and credit institutions providing investment services and activities, investment firms and credit institutions selling or advising clients in relation to structured deposits, UCITS management companies and external Alternative Investment Fund Managers (AIFMs) when providing investment services and activities in accordance with the UCITS Directive and the AIFMD. Furthermore, the Consultation Paper applies to these entities when providing investment services and activities in the Union either on a cross-border basis or through a branch.

## Responding to the Consultation Paper

ESMA invites comments on the paper and in particular on the specific questions summarised in Annex I. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by 31 March 2020.

All contributions should be submitted online by opening this [link](#). Kindly also send your contributions to the under-mentioned email addresses.

## Next steps

ESMA will consider the responses it receives in relation to the Consultation Paper in Q2 2020 and expects to publish the draft technical standards and send the final report to the European Commission for endorsement in Q3 2020.

## ESMA MiFID II / MiFIR Investor Protection & Intermediaries Q&As

ESMA has also published an updated version of its [Q&A](#) on the implementation of investor protection requirements under the Market in Financial Instruments Directive and Regulation (MiFID II/MiFIR). The Q&A provide new answers on MiFID practices for firms selling financial instruments subject to the BRRD resolution regime.

The new Q&As provides clarification on

- Sales of subordinated eligible liabilities and the assessment of suitability
- Whether Article 44a of BRRD 2 should be applied only if there is an active offering on the part of the firm
- Information to be collected from clients in order to comply with Article 44a(1) and 44a(2) of BRRD 2
- Calculation of 10% threshold referred to in Article 44a(2)(a) of BRRD 2
- What happens if a transaction relating to subordinated eligible liabilities is deemed unsuitable by the firm, but the retail client wishes to proceed anyway
- Monitoring of 10% threshold referred to in Article 44a(2)(a) of BRRD 2

### Target Audience

Furthermore, the content of the Q&A document is aimed at investment firms by providing clarity on the application of the MiFID II and MiFIR requirements.

### Next steps

ESMA will continue to develop the Q&A document on investor protection topics under MiFID II and MiFIR, both adding questions and answers to the topics already covered and introducing new sections for other MiFID II investor protection areas not yet addressed in this Q&A document.

## ESMA's Technical advice to the European Commission on the Effects of product intervention measures

In February 2020, the European Securities and Markets Authority ('ESMA') published the [technical advice to the European Commission on the effects of product intervention measures under MiFIR](#). The temporary product intervention measures were first introduced on 2nd July 2018 for Binary Options and on the 1st of August 2018 for Contracts for Differences ('CFD'). These measures, which were renewed three times, expired on the 1st of July 2019 and 31st July 2019.

In the technical advice, ESMA stated that almost all EU National Competent Authorities have adopted national product intervention measures in order to address the investor protection concerns arising from Binary Options and Contracts for Differences ('CFDs'). ESMA also clarified that unless the entity is authorised or registered in the European Union, third country firms are only allowed to offer services to clients established or situated in the European Union at the client's own initiative. ESMA has asked the European Commission to clarify the application of product intervention measures to firms acting on a cross-border basis when National Competent Authorities take overlapping product intervention measures.

Furthermore, in the technical advice, ESMA stated that National Competent Authority have reported an overall decrease in the number of CFD retail client accounts; trading volume; and total retail client equity when comparing the period following the introduction of the product intervention measures with the same period a year earlier, when the product intervention measures were not applicable. In relation to binary options, there were no new authorisations of firms offering binary options to retail clients.

### Contacts

Should you have any queries regarding the above, please do not hesitate to contact: [offsiteinv@mfsa.com.mt](mailto:offsiteinv@mfsa.com.mt).