

15 January 2021

## REMINDER to Firms of the MIFID II Rules on 'Reverse Solicitation' in the Context of the Recent End of the UK Transition Period

### Background

The European Securities and Markets Authority (ESMA) has issued a [statement](#) to remind firms of the MiFID II requirements on the provision of investment services to retail or professional clients by firms not established or situated in the European Union.

ESMA has already provided guidance to firms on the application of the MiFID II requirements on the provision of investment services and activities by third country firms, including how the notion of a client initiating "at its own exclusive initiative the provision of an investment service or activity by a third-country firm" included in Article 42 of MiFID II should be understood and applied. However, with the end of the UK transition period on 31 December 2020, some questionable practices by firms around reverse solicitation have emerged.

### Reverse Solicitation

According to Article 42 of MiFID II, where a retail client or professional client, within the meaning of Section II of Annex II, established or situated in the Union initiates at its own exclusive initiative the provision of an investment service or activity by a third-country firm, the third country firm is not subject to the requirements under Article 39 of MiFID II (Establishment of a branch).

ESMA reminds firms that as provided in recital 111 of MiFID II "where a third-country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union, it should not be deemed as a service provided at the own exclusive initiative of the client". This applies regardless of any contractual clause or disclaimer introduced by the firm purporting to state, for example, that the third country firm will be deemed to respond to the exclusive initiative of the client. Moreover, firms must refrain from adopting practices, for instance, by including general clauses in their Terms of Business or through the use of online pop-up "I agree" boxes whereby clients state that any transaction is executed on the exclusive initiative of the client.

As for the means of solicitations, ESMA reminds firms that every communication means used (including press releases, advertising on internet, brochures, phone calls or face-to-face meetings) should be considered to determine if the client or potential client has been subject to any solicitation, promotion or advertising activities by the firm on its investment services. Furthermore, such solicitation, promotion or advertising activities should be considered regardless of the person through whom it is issued (whether it is the third country firm itself, an entity acting on its behalf or having close links with such third country firm or any other person acting on behalf of such entity).

Moreover, ESMA would like to remind investment firms that:

- the provision of investment services in the EU without proper authorisation in accordance with EU legislation and the national law applicable in Member States exposes firms to the risk of administrative or criminal proceedings, for the application of relevant sanctions; and
- when using the services of investment firms which are not properly authorised in accordance with EU and Member States' law, investors may lose protections granted to them under relevant EU rules, including coverage under the investor compensation schemes in accordance with Directive 97/9/EC.

## Target Audience

The content of this document is aimed at investment firms to remind them of MiFID II rules on reverse solicitation.

## Contacts

Any queries or requests for clarifications on the contents of this Circular should be addressed to the Conduct Supervision on [offsiteinv@mfsa.mt](mailto:offsiteinv@mfsa.mt).