

ESMA Issues New Guidance and Finalised Rules on EU Cross-Border Activities

In two separate papers, the European Securities and Markets Authority ("ESMA") has called for closer scrutiny by EU national competent authorities ("NCAs") and set out new rules on the activity of firms conducting cross-border investment services in the EU.

On 14 December 2022, ESMA issued a supervisory briefing¹ ("MiFID Supervisory Briefing") on cross-border activities of investment firms authorised under MiFID, focused on services provided to retail investors.

On 21 December 2022, ESMA issued a report² ("UCITS / AIFMD Report") with draft regulatory technical standards ("RTS") and implementing technical standards ("ITS") specifying the information to be provided. The report also included the templates to be used by fund managers when informing both home and host NCAs of the cross-border marketing and management of investment funds, and the cross-border provision of services by fund managers under the UCITS Directive and AIFMD.

MiFID Supervisory Briefing

This outlines questions that NCAs are expected to ask themselves, or regulated firms, when

¹ https://www.esma.europa.eu/sites/default/files/library/esma35-36-2780_mifid_ii_supervisory_briefing.pdf

² https://www.esma.europa.eu/sites/default/files/library/esma-34-45-1648_final_report_on_technical_standards_on_notification_letters.pdf

assessing the supervision of cross-border activities of MiFID investment firms to retail clients.

ESMA notes the significant increase in the number of retail investors seeking EU investment opportunities and highlights that "[e]ffective supervision of cross-border activities by NCAs is crucial to ensure retail clients benefit from the same level of protection regardless of where the firm providing those activities is based."

ESMA reports a need for NCAs to significantly improve their approach to the following key three areas in circumstances where MiFID investment firms are carrying out EU cross-border activities to retail clients:

- **New firm applications for authorisation** – Where NCAs should assess whether the applicant firms' organisational structure and arrangements are adequate considering the nature and extent of their cross-border plans;
- **Passport applications from existing firms** – Where NCAs should consider whether the planned cross-border activities may entail substantial changes to the firm and, if so, whether the firm is fit to operate accordingly; and
- **Ongoing supervisory engagements** – Where NCAs should use ongoing supervision tools to regularly check that firms' cross-border activities are carried out in compliance with applicable rules.

In light of this briefing, NCAs can be expected to closely assess new authorisation applications and passport applications for firms that offer services to retail clients cross-border. Such firms can also expect to be subject to closer ongoing regulatory supervision going forward.

UCITS / AIFMD Report

This issued following a public consultation on the RTS and ITS that closed on 9 September 2022. For more information please see our client update *ESMA Consultation on Notifications for Cross-Border Marketing and Management of Funds*³.

The draft RTS and ITS are contained in Annex III and IV of the report.

The draft RTS outlines the information that fund management companies should provide to NCAs when they pursue the activities for which they have been authorised on a cross-border basis, through a branch or under the freedom to provide services.

The aim is to establish uniform information requirements throughout the EU.

The RTS are prescriptive over what is to be provided to the NCAs, including a detailed programme of operations setting out the activities and services to be provided on a cross-border basis, and how the proposed branch will contribute to the strategy of the firm. The NCA must be informed of the proposed organisational structure, including reporting lines, a description of the risk management process, systems and controls put in place.

The draft ITS prescribe which letters and forms should be submitted to NCAs for notifications of the cross-border marketing and cross-border management of UCITS and AIFs and provides templates of these letters and forms.

³ <https://maples.com/en/knowledge-centre/2022/6/esma-consultation-on-notifications-for-cross-border-marketing-and-management-of-funds>

Implementation Timeframe

The MiFID Supervisory Briefing is effective immediately on its publication although it is non-binding.

The draft ITS and RTS in the UCITS / AIFMD Report have been submitted to the European Commission for adoption.

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January 2023
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