

# MiFID II

**Third country access**

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## 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.

## Background

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.<sup>1</sup>

## 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.<sup>2</sup>

### *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.<sup>3</sup>

## Establishing branches in the EU

### *Retail clients and elective professional clients*

<sup>1</sup> 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.

<sup>2</sup> Recital 42 and Article 46(1), MiFIR.  
<sup>3</sup> Recital 109, MiFID II Directive.

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.<sup>4</sup>

### *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.<sup>5</sup>

### **Application for registration**

A regulatory technical standard ("**RTS**") published in July 2016 sets out the content and format of the information that firms must provide to ESMA in order to be registered formally as third country firms.<sup>6</sup> The third country firm must provide ESMA with:

- the full name of the firm;
- contact details of the firm;
- contact details of the person in charge of the application;
- website, where available;
- national identification number of the firm, where available;

- legal entity identifier (LEI) of the firm, where available;
- Business Identifier Code (BIC) of the firm, where available;
- name and address of the competent authority of the third country that is responsible for the supervision of the firm;
- where more than one authority is responsible for supervision, the details of the respective areas of competence ;
- the link to the register of each competent authority of the third country, where available;
- information on which investment services, activities, and ancillary services it is authorised to provide in the country where the firm is established; and
- the investment services to be provided and activities to be performed in the EU, together with any ancillary services.

### **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 the European Market Infrastructure Regulation ("**EMIR**").<sup>7</sup>

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

<sup>4</sup> Article 39(1), MiFID II Directive.

<sup>5</sup> Article 47(3), MiFIR.

<sup>6</sup> Commission Delegated Regulation (EU) 2016/2022 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards concerning the information for registration of third country firms and the format of information to be provided to the clients.

<sup>7</sup> Article 38, MiFIR.

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.<sup>8</sup>

### **Timescales for implementation**

The MiFID II Directive and MiFIR came into force on 3 July 2014, and most of their provisions will come into effect in member states from 3 January 2018. Member states have until 3 July 2017 to transpose the MiFID II Directive and the Delegated Directive into national law.

The RTS will become effective from 3 January 2018. RTS are EU Regulations having direct effect in EU law and so do not need to be transposed into the national law of member states.

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<sup>8</sup> Article 38, MiFIR.



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