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 The Investment Association

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RE: Draft Technical Standards on the provision of investment services and activities in the Union by third-country firms under MiFID II and MiFIR

The Investment Association (the IA) welcomes the opportunity to respond to this consultation concerning the provision of investment services and activities in the Union by third-country firms under MiFID II and MiFIR ('the consultation').

The IA represents the interests of more than 250 investment management firms who are collectively responsible for over €8.5 trillion in assets under management across Europe. Our members play a key role in supporting the growth of the modern European economy financing businesses and projects in need of capital, and helping savers and investors to achieve their long-term financial goals.

In preparing our response, the IA has been guided by the needs of these savers and investors our members serve across Europe, as well as the operational implications on member firms of the UK becoming a third-country at the end of the Brexit transition period on 31 December 2020. Specifically, these include:

- The need to safeguard the ability to offer investment services cross-border under existing third-country regimes. This is necessary to avoid further fragmentation in European capital markets, and ensure savers and investors can continue to access investment expertise wherever they are located.
- The need to offer certainty over the process underpinning the use of the third-country regime under Articles 46 and 47 of MiFIR, and ongoing compliance. Firms need confidence about access arrangements, which requires the process to be stable and predictable, focuses on the delivery of regulatory outcomes, and is based on close supervisory cooperation.

For a third-country firm to be registered with ESMA, among other matters we note that the European Commission must first adopt an equivalence decision regarding the supervisory and regulatory regime of the third-country where the firm is established. So far, however, we

note that no MiFIR equivalence decisions have been made. Our response assumes such a decision will be in place ahead of the end of the Brexit transition period.



While the proposed requirements would apply to an investment firm from any equivalent jurisdiction, in the context of the Brexit transition period we welcome the intention to make the third-country regime available in a timely manner but wish to highlight a number of industry concerns for further consideration by ESMA.

Mandate and requirement for information on global activity

Firstly, the information sought by ESMA to either permit a third-country firm to enter the register, or which is required from a third-country firm on an annual basis to remain on the register, in certain instances appears to go beyond that which is mandated for under Article 46 of MiFIR. For example, we note that ESMA on an annual basis may seek information from third-country firms regarding the total number of clients and counterparties, and the total net turnover, on a global basis.

While we understand at the initial registration phase such information may help provide context regarding a firm's operations, information requirements should be limited to only those directly relevant to activity conducted within the Union. In our view, the consultation does not sufficiently explain how requiring information on a third-country firm's activities outside of the Union is relevant either to the oversight function of EMSA in operating the regime, or to understand a firm's ongoing ability to service clients within the Union beyond that information provided at the initial registration point.

The importance of supervisory deference and materiality

Secondly, we note a number of proposals could amount to a form of supervisory activity that should otherwise be the exclusive responsibility of a home-state authority. While we acknowledge ESMA should retain limited intervention powers where necessary for investor protection or financial stability reasons, ESMA should in our view have greater regard to the function and role of the home-state authority when determining what information it requires from third-country firms on an ongoing basis beyond 'material' changes.

We note that once registered, a third-country firm would be subject to ongoing oversight by ESMA, including the annual reporting requirements. This will lead to compliance and IT costs, both at registration and on an ongoing basis that may or may not be offset by the removal of the need for a firm to monitor the different requirements across the EU Member States, or that already provided to the relevant home-state authority. The offset is less likely where conditions attach to equivalence, or a limited equivalence is granted, meaning that firms will still need to monitor individual Member States' laws for those activities carried out under the national regimes.

Where a third-country firm had its authorisation revoked in a home-state, it is important to recognise that under Article 46 (2) (b) the third-country firm would no longer be eligible or be able to offer investment products and services within the Union. In addition, we understand ESMA will have the power to withdraw a firm's registration or to temporarily prohibit or restrict its activities if the firm fails to comply with the new annual reporting requirements. Consistent with the principle of 'supervisory deference' which underpins Article 46 (2) (b) of MiFIR, greater reliance on the function of the home-state authority, and introducing a 'materiality' test for annual updates, would improve the efficiency of the regime.

Making the regime work for firms of all sizes



Thirdly, while we understand that our larger members intend on using EU-based entities to provide investment products or services within the Union post-Brexit, either on the basis of an existing authorisation or newly secured authorisation, the same is not true of smaller firms without the resource or capacity to employ a similar strategy to continue servicing their clients within the Union. Arguably, it is smaller firms that stand to benefit the most from a harmonised regime across the EU, rather than individual Member State approaches, but these benefits risk being lost if the regime is not accessible to firms of all sizes.

Specifically, we note that the regime is far more onerous than any other EU equivalency regime in terms of both the initial application process and ongoing compliance requirements. This raises questions as to whether it will be a practical alternative for third-country firms, especially those without considerable in-house compliance and reporting teams. In contrast to the pre-existing MiFIR provisions that differentiate between the level of risk that firms may present, we understand ESMA is adopting a one-size-fits-all approach and instead urge the use 'proportionality' test when considering how smaller firms might be able to remain compliant with their ongoing annual reporting obligations.

I would be happy to discuss these matters directly and remain at your disposal

Kind regards

David McCarthy
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